THE

PUBLIC

COMPETITION

ENFORCEMENT

REVIEW

Eleventh Edition

Editor
Aidan Synnott

© 2019 Law Business Research Ltd
ACKNOWLEDGEMENTS

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

ADVOKATFIRMAET GRETTE AS
ALLEN & OVERY LLP
ANJIE LAW FIRM
ASSEGAF HAMZAH AND PARTNERS
BAKER & MCKENZIE (GAIKOKUHO JOINT ENTERPRISE)
BAYKANIDEA LAW OFFICES
BREDIN PRAT
CLEARY GOTTLIEB STEEN & HAMILTON LLP
CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ
DRYLLERAKIS & ASSOCIATES
GOODMANS LLP
HANNES SNEILLMAN ATTORNEYS LTD
KHAITAN & CO
L PAPAPHILIPPOU & CO LLC
LAGA (DELOITTE LEGAL)
LEE AND LI, ATTORNEYS-AT-LAW
LEGA ABOGADOS
LINKLETERS C WIŚNIEWSKI I WSPÓLNICY SP K
LLOREDA CAMACHO & CO
MARVAL, O’FARRELL & MAIRAL
NORTON ROSE FULBRIGHT SOUTH AFRICA INC
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
RCAA
Acknowledgements

URÍA MENÉNDEZ PROENÇA DE CARVALHO
VEIRANO ADVOGADOS
WHITE & CASE LLP
WILMER CUTLER PICKERING HALE AND DORR LLP (WILMERHALE)
# CONTENTS

PREFACE ........................................................................................................................................................ vii  
_Aidan Synnott_

Chapter 1  EU OVERVIEW ......................................................................................................................... 1  
_Frédéric Louis and Anne Vallery_

Chapter 2  ARGENTINA .................................................................................................................................. 8  
_Miguel del Pino and Santiago del Rio_

Chapter 3  BELGIUM ...................................................................................................................................... 20  
_Hendrik Viaene_

Chapter 4  BRAZIL ......................................................................................................................................... 30  
_Mariana Villela, Leonardo Maniglia Duarte, Gabriela Reis Paiva Monteiro and Vinicius da Silva Cardoso_

Chapter 5  CANADA ........................................................................................................................................ 43  
_Michael Koch, David Rosner and Justine Johnston_

Chapter 6  CHINA .......................................................................................................................................... 54  
_Michael Gu_

Chapter 7  COLOMBIA ................................................................................................................................. 68  
_Enrique Álvarez and Darío Cadena_

Chapter 8  CYPRUS ....................................................................................................................................... 83  
_Stephanos Mavrokefalos_

Chapter 9  FINLAND ....................................................................................................................................... 90  
_Tapani Manninen, Anette Laulajainen and Meri Vanhanen_

Chapter 10 FRANCE ................................................................................................................................. 102  
_Olivier Billard_

© 2019 Law Business Research Ltd
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
<td>GERMANY</td>
<td>Evelyn Niitväli and Marc Reynen</td>
</tr>
<tr>
<td>12</td>
<td>GREECE</td>
<td>Emmanuel Dryllerakis and Cleomenis Yannikas</td>
</tr>
<tr>
<td>13</td>
<td>INDIA</td>
<td>Sagardeep Rathi, Anisha Chand and Ebaad Nawaz Khan</td>
</tr>
<tr>
<td>14</td>
<td>INDONESIA</td>
<td>Farid Fauzi Nasution, Anastasia Pritahayu RD and Berla Walby Pratama</td>
</tr>
<tr>
<td>15</td>
<td>ITALY</td>
<td>Giuseppe Scassellati-Sforzolini, Marco D’Ostuni, Luciana Bellia, Fabio Chiovini and Michael Tagliavini</td>
</tr>
<tr>
<td>16</td>
<td>JAPAN</td>
<td>Junya Ae, Michio Suzuki and Ryo Yamaguchi</td>
</tr>
<tr>
<td>17</td>
<td>MEXICO</td>
<td>Luis Gerardo Garcia Santos Coy, Carlos Mena-Labarthe and Sara Gutiérrez Ruiz de Chávez</td>
</tr>
<tr>
<td>18</td>
<td>NETHERLANDS</td>
<td>Iradj Nazaryar and Tjarda van der Vijver</td>
</tr>
<tr>
<td>19</td>
<td>NORWAY</td>
<td>Odd Stemsrud</td>
</tr>
<tr>
<td>20</td>
<td>POLAND</td>
<td>Anna Laszczyk and Wojciech Podlasin</td>
</tr>
<tr>
<td>21</td>
<td>PORTUGAL</td>
<td>Joaquim Caimoto Duarte and Tânia Luísa Faria</td>
</tr>
<tr>
<td>22</td>
<td>SOUTH AFRICA</td>
<td>Candice Upfold</td>
</tr>
<tr>
<td>23</td>
<td>SWEDEN</td>
<td>Peter Forsberg, Johan Holmquist and David Olander</td>
</tr>
</tbody>
</table>
In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries’ competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following ‘many years of effort by practitioners and authorities.’ The authors note that this new law introduces ‘significant changes to antitrust enforcement in Argentina.’ Notably, in this edition we welcome for the first time in the Review a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied ‘its largest ever overall fine in a cartel case’. This case involved automotive companies’ captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were ‘relatively low compared with . . . previous years,’ it also points to a ‘significant increase in the number of cartel cases’. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick ‘could be explained by the increasing number of small and medium-sized companies applying for leniency’. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the ‘digital economy’ more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into ‘big data’ and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the Autorité de la Concurrence and the Bundeskartellamt concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny
by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the AT&T/Time Warner case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government’s request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the Bayer/Monsanto deal. China conditionally cleared the Essilor/Luxottica deal in the eyeglasses industry, while Italy cleared a different Luxottica deal with conditions. The United Technologies/Rockwell Collins deal is discussed in the China and United States chapters; and the Praxair/Linde deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA’s workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2019
Chapter 1

EU OVERVIEW

Frédéric Louis and Anne Vallery

I  THE YEAR IN REVIEW – A BUSY YEAR WITH A SPECIAL EMPHASIS ON ABUSE OF DOMINANCE DEVELOPMENTS

As usual, it would be impossible to cover all the significant developments, touching upon all aspects of European Commission (EC) enforcement of the TFEU antitrust rules, under the supervision of the EU courts in Luxembourg, that took place over the past year. The period saw a decline in the number and importance of new EC cartel decisions, yet a flurry of abuse of dominance cases, with a new monster fine on Google shattering the previous record fine imposed on the company the year before. In addition, and as expected, we saw a renewed EC drive against vertical restraints aiming to limit price competition in retail distribution markets.

i  Adoption of ECN+ Directive

The EU legislature formally adopted the ECN+ Directive in December 2018. 2 The aim of this legislation is to create a competition enforcement level playing field across the EU, by harmonising the basic powers of national competition authorities (NCAs) and bring them closer to the EC’s own powers. In addition, the Directive seeks to strengthen the independence of the NCAs vis-à-vis the Executive in their respective countries.

The Directive does not significantly improve upon the need for would-be immunity applicants to embark upon a tour of European NCAs, if they wish to be guaranteed immunity protection in the event the EC decides not to assert jurisdiction over their case. The Directive allows NCAs to accept leniency applications and markers in another official EU language than their own, but subjects this possibility to the agreement of the NCA concerned in each concrete case.

In an unfortunate failure to understand that legal certainty is the key condition for successful leniency programmes, the Directive does not manage to guarantee full immunity from criminal prosecution to current and former directors, managers and staff of the immunity applicant. Instead, ‘[i]n order to ensure conformity with the existing basic principles of their
legal system,”3 Member States whose criminal law provides for sanctions on cartelists may opt for a system whereby individuals linked to the immunity applicant may only be entitled to a reduced criminal sanction, and this only if their contribution to the immunity application outweighs the interest in prosecuting or sanctioning them.

ii Liability of private equity structures for cartel infringements

The EU General Court approved the EC’s fine on Goldman Sachs for its investment in a company having participated in the Power Cables cartel.4 During part of the cartel, Goldman Sachs had administered funds owning 84 to 91 per cent of the cartelist’s shares. Normally, such shareholding would not have sufficed in itself to trigger the presumption of parental liability existing under the Court of Justice’s (CJEU) case law but the GC held that the presumption could still apply as Goldman Sachs held 100 per cent of the voting rights in the cartelist during that time. The GC also found that, during the period after Goldman Sachs’ shareholding fell to 31.69 per cent, although the EC could not rely on the presumption, Goldman Sachs was in fact able to exercise decisive influence so as to trigger parental liability. Goldman Sachs’ defence that its investment was a purely financial one was rejected. According to the GC, a pure financial investor must have no involvement in the management or control of a company (i.e., must be unable to exercise decisive influence). This case and the outcome of the pending appeal to the CJEU are important for most private equity investment-management structures.

iii Review of fining methodology and cartel fining calculations

The EU courts continue to subject EC cartel fining calculations to intense scrutiny.

In the Smartchips cartel, the CJEU disagreed with the GC, holding that the GC should have considered whether the amount of the fine on Infineon was proportionate to the infringement. In particular, the GC should have examined Infineon’s claim that the limited amount of anticompetitive contacts it had with competitors bore on the gravity of the infringement.5 The issue is complex as the fine on this cartel was based on a gravity factor of 16 per cent, at the low end of the penalty scale for cartels, which starts at 15 per cent. Indeed, with a few exceptions, gravity factors tend to hover around 15 to 18 per cent, leaving little room for manoeuvre to take into account precise gravity factors, which is compounded by the fact that the EC chooses to work with one single gravity factor per cartel, using mitigation reductions to account for certain cartelists’ more limited involvement. The case is now back to the GC for reconsideration and a further reduction in the fine is not a foregone conclusion.

In the North Sea Shrimps cartel, the EC was censured for having failed to properly reason the different percentages of fine reductions it had granted to participants on the basis of them being so-called mono-product companies, a characterisation that only properly fitted one of the four participants.6

3 Idem, Article 23(3), p. 27.
4 Case T/419/14, The Goldman Sachs Company v. Commission, judgment of 12 July 2018. Appeal pending, case C-595/18P. Parental and successor liability gave rise to another interesting judgment during the period, whose facts are too complex to be described in this contribution, see case T-640/16, GEA Group AG v. Commission, judgment of 18 October 2018.
6 Case T-58/14, Stührk Delikatessen Import v. Commission, judgment of 13 July 2018. The Commission re-adopted its decision in the Envelopes cartel, after the GC had annulled the decision for failure to reason
iv  **Reasonable time for judicial adjudication**

The Court of Justice prevailed on its appeals to itself on the GC’s award of damages to compensate for bank guarantee costs supported for the period exceeding the reasonable time it should have taken the GC to rule on cartel appeals.\(^7\) The Court of Justice found an absence of causal link, as the applicants should have terminated the bank guarantee (and pay the fine plus interest) as soon they saw that the GC had exceeded the reasonable time to adjudicate on their appeals.

v  **Selective distribution and online marketplaces**

Bans on online selling within selective distribution systems have been frowned upon for some time by the EC. One lingering question that arose in Germany was whether suppliers having set up a selective distribution system could prevent their selected distributors from selling on online marketplaces such as Amazon or eBay. The concern voiced notably by the German Bundeskartellamt was that small retailers would find it hard to drive significant business to their own webshops due to lack of name recognition beyond the traditional area around their brick-and-mortar shop. On a preliminary question from a German court, the CJEU found that such restrictions were justified.\(^8\) The implications of the ruling are still hotly debated. Despite the ruling having originated from a question from a German court, the Bundeskartellamt appears keen to limit its scope in Germany.

vi  **Sanctions for resale price maintenance following e-commerce sector inquiry**

Following the completion of the EC’s sector inquiry into online distribution, the Commission adopted four fining decisions for resale price maintenance against Asus (€63.3 million), Philips (€298 million), Pioneer (€101 million) and Denon & Marantz (€63 million).\(^9\) Additional investigations on other restrictive vertical restraints uncovered during the sector inquiry are pending.

vii  **Spreading misleading information to prevent off-label drug prescriptions is an infringement by object**

The CJEU held that for the holder of a marketing authorisation for a given drug and the distributor of a rival drug to agree to limit off-label competition from the former with the latter by spreading misleading information about safety concerns associated with off-label use of the former drug constituted an infringement by object of Article 101 TFEU.\(^10\)

---


\(^8\) Case C-230/16, Coty Germany, judgment of 6 December 2017.

\(^9\) Respectively case AT.40465, AT.40181, AT.40182 and AT.40469.

\(^{10}\) Case C-179/16, F. Hoffmann-La Roche Ltd and Others v. Autorita Garante della Concorrenza e del Mercato, judgment of 23 February 2018.
viii Clarification on the conditions for a finding of abusive discrimination

In *MEO*, the CJEU clarified further the conditions for differentiated tariffs set by a dominant supplier to be deemed abusive.\(^ {11} \) Under existing case law, price discrimination by a dominant player only falls foul of the prohibition of abuse of a dominant position if it is capable of leading to a distortion of competition between competing customers (or suppliers) of the dominant player. The Court held that this means that the differentiated pricing must place one or more of these companies at a competitive disadvantage compared to the others. In reviewing the facts of the case, the Court noted that where the effect of the tariff differentiation on the costs of the profitability of the disadvantaged player is not significant, then it can be concluded that the differentiation is not capable of leading to a competitive distortion.

This is a key ruling for dominant companies facing multiple requests for ‘better deals’ in individual customer negotiations. The Court has formally confirmed that non-discrimination does not require absolute equality of terms.

ix Qualcomm payments for exclusive supply relationship

The EC ordered Qualcomm to pay a significant fine of nearly €1 billion (4.9 per cent of Qualcomm’s 2017 worldwide turnover) for having made payments to Apple in return for a commitment by Apple to procure all its requirements of LTE chips from Qualcomm, over a five-and-a-half-year period.\(^ {12} \) Following in the footsteps of the CJEU’s *Intel* ruling, the appeal by Qualcomm is likely to hinge on the EC’s handling of the economic evidence used by Qualcomm in defence of its position, in particular a critical margin analysis submitted to show that the exclusivity payments were incapable of having exclusionary effects.

x Google Android

On 18 July 2018, the EC continued its crusade against Google, shattering the previous record by imposing a mammoth fine of €4.34 billion for restrictions imposed on Android mobile device makers and mobile network operators.\(^ {13} \) Google was held to have abused its dominant position for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system.

The market definition for mobile devices’ operating systems is particularly contentious as the EC’s choice to include licensability in the definition automatically excludes Apple’s iOS. However, the EC investigated whether downstream competition for end users between Apple and Android devices could constrain Google’s market power for the licensing of Android. It found such constraint to be insufficient, on the basis of four factors:

> End users make their purchasing decisions on the basis of multiple factors independent from the mobile operating system. It is not clear whether the EC is contending that the operating system is irrelevant to end users or that it plays no significant role in their decisions – a surprising proposition in either case.

---


\(^ {12} \) Case AT.40220, *Qualcomm (Exclusivity Payments)*. Only a two-page summary of the decision is publicly available at this stage.

\(^ {13} \) Case AT.40099. Only the EC’s press release is available at this stage.
Apple devices are typically priced higher than Android devices and may not be accessible to a large part of the Android user base. Despite the price range of Apple devices having significantly broadened in the past years, that proposition appears correct.

Android device users face switching costs when switching to Apple devices. Again, this proposition appears generally correct.

Even if Android users were to switch to Apple devices, this would have a limited impact on Google’s core business as Google Search is the default search engine on Apple devices. It is unclear how this factor is relevant to the question of Google’s dominance on the putative market for licensable smart mobile operating systems.

As for the market for app stores for the Android mobile operating system, the EC unsurprisingly found dominance there, based on its previous analysis that the possibility to switch to Apple devices does not place a sufficient constraint on Google, thereby excluding competition from Apple’s own App Store.

Turning to the practices the EC deems abusive, these relate to tying of Google’s search and browser apps with the Play Store app, payments conditional on exclusive pre-installation of Google Search, and obstruction to the development and distribution of competing Android operating systems (‘Android forks’).

As to tying, the EC found that Google’s Play Store was a must-have for device makers. Therefore, the requirement to take this app as a bundle with other Google apps such as the Google Search app and the Google Chrome browser guaranteed that these would be pre-installed on practically all Android devices. This created a ‘status quo bias’, evidence showing that a large majority of users favour the search apps pre-installed on their devices. Google’s tying practice therefore reduced the incentives for device makers to pre-install competing apps as well as for users to download such apps. The EC dismissed Google’s defence that such tying was necessary to monetise its investment in Android. In a rare foray into what constitutes adequate remuneration for significant innovation, the EC considered that Google would still enjoy other significant revenue streams from the use of Android devices.

Google made payments to device makers and mobile operators conditional on these pre-installing Google Search on all their Android devices on an exclusive basis. The EC found that rival search engines were unable to compensate device makers or mobile operators for the loss of the conditional payments as these applied across all the Android devices made by or for these players. It is unclear from the press release how and whether the EC applied the as efficient competitor test in considering the exclusionary effect of the payments. All the press release tells us is that, to conform its analysis to the CJEU’s Intel ruling, the EC ‘considered, amongst other factors, the conditions under which the incentives were granted, their amount, the share of the market covered by these agreements and their duration.’

---

14 It appears from the summary of the grounds of appeal that the EC would have carried out an as efficient competitor analysis, see action brought on 9 October 2018, case T-604/18, Google and Alphabet v. Commission (available on http://curia.europa.eu/juris/document/document.jsf?text=&docid=208802&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3546950). From the summary of the fifth plea, it would appear that this analysis may have been conducted in extremis, as it was communicated to Google in a letter of facts, after the administrative hearing.
EC was unconvinced by Google’s defence that these payments, which were discontinued in 2013–2014, had been necessary to convince device makers and mobile operators to develop and market smart devices running the Android operating system.

As regards the obstruction of Android forks, the EC found that, in order to be allowed to pre-install Google's proprietary apps, device makers had to commit not to develop or sell ‘even a single device running on an Android fork’. This in particular would have affected Amazon's Android fork ‘Fire OS’. The EC rejected Google's defence that this was necessary to protect the Android ecosystem from fragmentation.

For the EC, these three practices are part of an overall strategy to cement Google’s dominance in general internet search.

Like the EC’s previous decision concerning Google Shopping, the Android decision is under appeal. A key question will be whether the EU courts will agree with the EC's sidestepping of the Android-iOS competition issue. The Android operating system was offered for free, enabling a quick spread of the thus far only workable competitor to Apple's iOS and the rapid spread of smartphone technology among all categories of users. Big companies that the EC once thought unassailable, such as Microsoft or Nokia, proved incapable of putting forward valid alternatives. In the ongoing debate as to how antitrust can best protect innovation, the EC’s forceful attack on the business model that made Android possible is bound to be discussed for years to come.

The EC adopted a decision imposing legally binding obligations upon Gazprom to put an end to practices that had been subject to a statement of objections issued three years earlier in April 2015.\(^\text{15}\)

The EC's preliminary views were that Gazprom had abused its dominant position on the markets for upstream wholesale supply of natural gas in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia in an overall strategy of fragmenting and isolating these gas markets, restricting the free flow of gas across these national markets and therefore leading to higher pricing policies. The alleged abusive practices related to territorial restrictions in Gazprom’s supply agreements (e.g., explicit contractual export ban and destination clauses), tying gas supplies to unrelated infrastructure advantages (thus leveraging Gazprom’s alleged dominant position on the wholesale gas supply market in Bulgaria), and excessive pricing practices (in comparison with the competitive European price benchmark).

Gazprom offered two sets of commitments in March 2017 and in March 2018, after the first offer triggered negative reactions. Most of the final obligations imposed on Gazprom were already offered in March 2017 but were significantly complemented and strengthened in March 2018. First, Gazprom has been forced to remove all direct and indirect contractual territorial restrictions in the contracts with its customers. Second, Gazprom has to actively promote and contribute to the integration of the gas markets between the Baltic States and Bulgaria. Third, Gazprom should offer its customers an effective price tool and pricing revision mechanism which would guarantee competitive prices. Fourth, Gazprom committed for 15 years not to seek any damages from its Bulgarian partners following the termination of the South Stream pipeline project.

\(^{15}\) Case At.39816 – Upstream gas supplies in central and eastern Europe.
While Gazprom escaped the imposition of a substantial fine, one cannot help wondering whether some of the obligations imposed on Gazprom do not relate more to market integration concerns than to competition policy, which recalls early EC Article 101 decisions on cooperation between France Telecom and Deutsche Telekom that, through the guise of a competition investigation, imposed concessions in the telecommunications sector whose true goal was to liberalise the French and German markets. Commissioner Vestager defended the EC’s decision by stating that the ‘case is not about the flag of the company – it is about achieving the outcome that best serves European consumers and businesses’. The Commissioner’s protestations notwithstanding, the EC’s focus on fixing the issue without seeking to sanction the conduct, while certainly helpful for diplomatic reasons, may also have enabled further-reaching concessions from Gazprom.
Last year was a significant one for antitrust in Argentina. After many years of effort by practitioners and authorities, on 24 May 2018 the National Congress enacted the new Antitrust Law No. 27,442 (the Antitrust Law), bringing significant changes to antitrust enforcement in Argentina.

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

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

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

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

---

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

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

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

During 2018, the Antitrust Commission focused its analysis on abuse of dominance and conduct investigations.

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

**Enforcement agenda**

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

- The appointment of the members of the National Competition Authority, which is expected to occur during the first quarter of 2020. At the time of writing, a new decree has been issued regarding the selection procedure for the appointment of the members of the National Competition Authority, which is expected to take place during the year.
- A greater interest in the detecting and prosecuting of anticompetitive conducts. In that regard, as will be analysed below, the Antitrust Commission has continued several market investigations and initiated some others with the intent of determining whether there are any anticompetitive actions taking place in such markets. Furthermore, anticompetitive conduct investigations are expected to be triggered by the leniency programme introduced by the new Antitrust Law.
- The intervention on the *Notebook* case, a recent corruption scandal that was unveiled in 2018 entailing an organised corruption scheme, which included the delivery of bribes to several people and locations, including politicians and many business people who benefited from large public contracts between 2005 and 2015. This proceeding is being carried out through a criminal investigation, but the Antitrust Commission is likely to initiate an investigation on bid-rigging allegations that have arisen in the depositions.
- The elimination of the cumbersome merger control review methods that had taken place prior to 2016 by using a more practical approach regarding transactions under analysis, especially with regard to non-material cases. Pursuant to the statements of the Antitrust Commission, it has reduced the delay in the review from an average of 3.2 years to approximately six to 12 months.
- The Antitrust Commission has initiated a more open approach with other authorities and supra-national entities in order to carry out joint exercises and training programmes with authorities such as the Federal Trade Commission and the European Union.
The Antitrust Commission has published a draft version of the Guidelines for Analysis of Cases of Abuse of Dominance for public consultation and is currently working on a draft version for Guidelines for the Leniency Programme. These are expected to be released during the course of 2019.

II CARTELS

i Significant cases

Cartel cases in Argentina have generally involved the following:

a the arrangement of prices or production quotas;
b the distribution of market shares;
c agreements between different bidding parties in public bids; or

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

According to the Antitrust Law, in the event that an infringement is proved, the cessation of the infringing conduct will be ordered and a fine could be imposed on the perpetrators that can be of: (1) up to 30 per cent of the volume of business related to the products or services involved in the unlawful conduct committed, during the last fiscal year, multiplied by the number of years that the conduct has lasted, which may not exceed the national consolidated volume of business registered by the economic group of the parties during the last fiscal year; or (2) up to twice the economic benefit produced by the unlawful conduct committed. In the event both of them are applicable, the highest amount will be imposed. On the contrary, if none of them is applicable, the fine could be of up to 200,000,000 Adjustable Units, as will be analysed below.

Between 2000 and 2005, the Antitrust Commission showed an interest in prosecuting cartels and heavy sanctions were imposed (most notably in the Cement\(^2\) and Liquid Oxygen\(^3\) cases), but from thereon until recently, no major collusion cases have been fined in Argentina.

Credit Cards case\(^4\)

In September 2016, the Antitrust Commission served notice to Prisma Medios de Pago SA (Prisma), the holder of the Argentine licence of VISA, and its 14 shareholder banks, of an investigation in which it set out three main types of anticompetitive conduct.

The first alleged conduct entailed the setting by Prisma of high interchange and discount rates, and Prisma deliberately keeping them at the upper levels of the allowed percentages, namely 3 per cent for credit cards and 1.5 per cent for debit cards. The second alleged conduct entailed a centralisation of promotional activities regarding the VISA brand, by means of which banks would not compete against each other, but rather had financing decisions centralised on a Prisma level. The third allegation consisted in downstream discriminations and refusal to supply by Prisma to its competitors in the offline interface market, gateway

---

\(^3\) Opinion No. 510 of the Antitrust Commission dated 8 July 2005.
\(^4\) Resolution No. 463 of the Secretary of Trade, dated 26 September 2017. Resolution No. 20 of the Secretary of Trade, dated 31 October 2018.
and payment facilitator channels, through its position in the acquisition market, which its
downstream competitors must go through. In September 2017, the Antitrust Commission
accepted the divestment commitment submitted by Prisma.

During 2018, the Antitrust Commission continued to monitor Prisma’s compliance
with said commitment. In order to comply with the commitment, Prisma tried to sell its
shares but faced several setbacks. Finally, in January 2019, the proposed divestment reached
an end and Advent acquired 51 per cent of Prisma’s shares.

ii Trends, developments and strategies

Per se anticompetitive practices

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

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

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

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

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

Leniency programme

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

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

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

- they must collaborate until the end of the investigation; and

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

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

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

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

iii  Outlook

The renewed interest in pursuing collusive conducts, in addition to the greater tools granted to the regulator in the Antitrust Law, show that it is quite likely that cartel enforcement will be a top priority for the Antitrust Commission in the years to come. It remains to be seen how the leniency system will be effectively implemented and what its results will be, but the legislative push towards its approval shows that cartel prosecution is once again a priority in Argentina. Especially taking into consideration the above-mentioned Notebook case in which the criminal investigation is still ongoing, but the Antitrust Commission is likely to start an investigation on bid-rigging allegations ex officio, either if such investigation is ordered by the criminal court handling the case or it triggered by a leniency application.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

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

Section 6 establishes three relevant factors to determine the existence of a dominant position: the degree of substitution for a product or service; the existence of regulatory barriers; and the extent to which a company can unilaterally set prices or restrict output.
Despite not being expressly indicated in the Antitrust Law, the Antitrust Commission also considers market share to be an important factor in determining whether there is a dominant position.

Section 1 of the Antitrust Law prohibits the abuse of a dominant position. Section 3, on the other hand, describes some vertical and exclusionary practices that could violate Section 1 as they are likely to cause harm to the general economic interest.

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

### Significant cases

**Argentine Society of Music Authors and Composers case\(^5\)**

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

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

### Trends, developments and strategies

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

The Civil and Commercial Code includes a provision regarding the prohibition of abuse of dominant position, but does not provide a definition of what should be understood by ‘abuse of dominant position’. Thus, a judge would have to resort to Section 5 of the Antitrust Law in order to accurately define whether the conduct under consideration is, in fact, an abuse of dominant position.

The inclusion of the concept of abuse of dominant position could also help the prosecution of those types of cases by courts without the intervention of the Antitrust.

---

5 Resolution No. 371 of the Secretary of Trade, dated 26 June 2018.
Commission. Under this new scenario, courts would be able to prosecute these cases without the intervention of said regulator. At the time of writing, we are not aware of any case on these terms.

Furthermore, the Antitrust Commission has published a draft version of Guidelines for the Analysis of Cases of Abuse of Dominance that are expected to be issued during this year. As a novelty, these guidelines include a detailed description of the anticompetitive conduct of abusive pricing.

### Outlook

During 2018, the Antitrust Commission has shown an increasing interest with regard to cases involving dominance. In this regard, and as mentioned above, it is relevant to highlight that the Antitrust Commission has published for public consultation a draft version of the Guidelines for the Analysis of Cases of Abuse of Dominance that are expected to be issued in 2019.

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

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

Additionally, Section 17 of the Antitrust Law is a specific rule that applies to mergers in regulated sectors. Said rule states that the Antitrust Commission must require an opinion from the relevant regulator on a transaction concerning its impact on competition or its compliance with the applicable regulatory framework.

### Significant cases

In the past, market investigations have not led to major cartel or dominance cases, since in most cases no final decisions or opinions were issued. As a reference, over the course of 2014, four major investigations were initiated against over 250 companies on a wide range of markets, yet only one cartel investigation arose (in the pharmaceutical industry), of which results are yet to be seen.

When the new Administration entered office, it announced several investigations would be initiated in the following markets:

- aluminium;
- steel;
- petrochemical products;
- mobile communications;
- credit cards and electronic payment;
- edible oil;
- milk;
- meat;
- detergent;
- local bus transportation;
- air transportation;
supermarkets; and
construction products.

**ii  Trends, developments and strategies**
As a result of these investigations, the *Credit Cards* case was initiated. There have been other market investigations that have finished without further follow up activity. In that regard, the milk investigation issued a series of guidelines regarding interactions with competitors, the edible oil investigation showed that there was competition in such market, and the results of the aluminium and petrochemical investigations are expected to be released shortly. In 2018, a major investigation regarding the country’s largest non-ferrous steel company was initiated for allegedly committing anticompetitive conducts and for abuse of dominant position.

**iii  Outlook**
The fact that one of the market investigations initiated in 2016 has led to a cartel investigation shows a departure from past practice in which no effective results were obtained through this avenue of investigation. It remains to be seen whether further conduct investigations will be generated by means of this method.

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

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

These economic concentrations require approval if the aggregate volume of business of the companies involved in the transaction exceeds 100 million Adjustable Units in Argentina. Please note that all the amounts set out by the new Antitrust Law will now be fixed in Adjustable Units, which will be adjusted on an annual basis. The initial value has been set at 1 Adjustable Unit = 20 Argentine pesos. At the time of writing, the relevant authority has not yet updated this unit. The volume of business is defined as the combined gross sales of products or services of the target and the buyer during the preceding fiscal year arising from their ordinary businesses, net of discount sales, value added tax and other taxes directly related to the volume of business.

Economic concentrations that fall within this definition must be mandatorily notified to the Antitrust Commission for clearance. The new Antitrust Law sets out a suspensive system according to which companies will not be able to close a transaction without the prior authorisation of the Antitrust Commission. However, this system will enter into force one year after the creation of the new Antitrust Authority. Therefore, it is expected that the suspensive system will enter into force during the first quarter of 2020 on a best-case scenario.
In the interim period, the post-closing notification is applicable, according to which the mandatory notice must be delivered prior to or within seven calendar days after the closing of the transaction or the publication of any cash tender or exchange offer.

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

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

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

The following transactions are exempt from the notification requirement:

- **a** the acquisition of companies in which the purchaser already holds more than 50 per cent of the shares (understood as already holding exclusive control);
- **b** the acquisition of bonds, debentures, non-voting shares or debt securities;
- **c** the acquisition of only one company by only one foreign company that has no assets or shares of other companies in Argentina;
- **d** the acquisition of wound-up and liquidated companies (which performed no activities in Argentina during the preceding calendar year); and
- **e** the acquisition of companies if the total local assets of the acquired company and the local amount of the transaction each do not exceed 20 million Adjustable Units, provided, however, that the exemption would not apply if any of the involved companies were involved in economic concentrations in the same relevant market for an aggregate of 20 million Adjustable Units in the past 12 months or 60 million Adjustable Units in the past 36 months.

If the parties do not comply with this requirement, they will be subject to fines of up to 0.1 per cent of the national consolidated volume of business for each day they fail to comply. If this method of calculation of the fine is not feasible, then the fine shall be up to 750,000 Adjustable Units, which represents 15 million Argentine pesos per day of delay.

Section 9 of the Antitrust Law states that any transaction subject to control by the Antitrust Commission does not bring about any effects in relation to the involved parties or any third party until it is approved by the Antitrust Commission, either expressly or tacitly.
i Significant cases
During 2018, the Antitrust Commission has continued to improve its merger analysis.

**Bayer/Monsanto**

The transaction entailed the acquisition of exclusive control over Monsanto on behalf of Bayer. These companies operate globally and their activities include solutions for agricultural production, agrochemical products and biotechnological developments.

The companies were close competitors regarding non-selective herbicides, vegetable seeds and extensive crop seeds. They also vertically overlapped since the investigation stage and the development of active ingredients and biotechnological events up to the stage of commercialisation of the products. Given the potential anticompetitive effects of the transaction, Bayer had to globally divest certain assets and businesses in favour of BASF in order to obtain clearance on behalf of the European Commission, the American DoJ and other competition authorities. Owing to the application of this ‘fix-it-first’ remedy, the Antitrust Commission considered that the transaction would not raise any concerns to the general economic interest in Argentina and therefore decided to unconditionally clear the transaction.

**Telecom/Cablevisión**

The transaction entailed a significant merger between two major undertakings in the telecommunications sector. The parties’ activities overlapped in the supply of residential access to internet, mobile telecommunication services, access to the wholesale internet network and local links or relays (capacity) in Argentina. Furthermore, some vertical relations had been identified in the upstream markets.

The Antitrust Commission’s competition concerns were finally settled through the application of a fix-it-first remedy and the transaction was cleared. This case reflects the Antitrust Commission’s recent inclination towards the application of the up-front buyer and fix-it-first remedies, following international standards, mainly from the European Commission.

**SAB Miller/AB InBev**

The transaction entailed the global acquisition of SAB Miller by its main competitor, AB InBev. The parties are the two main breweries at a global level. Therefore, in order to remedy the potential anticompetitive effects of the proposed acquisition, AB InBev was ordered to divest seven of its brands in Argentina to the Chilean brewery CCU. In exchange, the latter had to assign rights of the Budweiser brand in Argentina to AB InBev.

The transaction was conditioned on the fulfilment of the divestment and brand swap. This was a very relevant case as it was the first time that this type of ‘swap’ solution had been used in the interplay between a merger and a conduct investigation.

---

7 Resolution No. 374 of the Secretary of Trade, dated 28 June 2018.
8 Resolution No. 136 of the Secretary of Trade, dated 14 March 2018.
Trends, developments and strategies

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

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

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

The Antitrust Law also sets up a suspensive regime in which the parties will not be able to close the transaction prior to its approval. This is the most relevant departure from the former Antitrust Law as regards the notification system, in which parties could close the transaction and file for notification up to one week afterwards. The Antitrust Law now sets out fines for gun-jumping, which had hitherto never existed in Argentine merger control proceedings. However, it must be noted that the suspensive regime will become effective one year after the enactment of the law, so as to provide sufficient time for the Antitrust Authority to clear its abundant workload on merger control cases. This is expected to occur during the first quarter of 2020.

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

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

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

Merger Control Guidelines

In addition to the news introduced by the Antitrust Law, the Antitrust Commission has issued an updated version of its Merger Control Guidelines (which had not been updated since 2001). The new Guidelines provide a much-needed reference for practitioners in their day-to-day interactions with the Antitrust Commission, of which the following matters can be highlighted.
The Guidelines clearly set out that transactions with a combined market share of 20 per cent or less will be considered to be non-problematic, which triggers the application of the fast-track procedure. Unlike past practice, this indicates that these transactions will be cleared in rapidly and will not be subject to intensive review by the Commission.

This approach is further complemented with clear rules on the usage of the Herfindahl–Hirschman Index (HHI), which used to referred to, but with no specific rules. Pursuant to the Guidelines, those transactions that have a post-transaction HHI below 2,000 will be considered as non-relevant. Transactions that surpass such amount, but where the delta between the prior and post-transaction scenarios is below 150 points, will also be considered non-problematic. Furthermore, if the post-transaction market shares are lower than 30 per cent and if the post-transaction HHI is less than 3,000 or has a delta of less than 250 points, then the transaction will also be deemed as non-relevant.

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

The Guidelines also provide a commentary on the possible review of ancillary restraints, following the current practice by the new Administration of not setting out specific terms for their duration, but rather to analyse them on a case-by-case basis.

In short, the Guidelines provide clearer rules for parties interested in carrying out a merger control notification in Argentina, which allows them to fully assess the type of review that they will be subject to as well as have a better estimate regarding the proposed timeline.

### Outlook

Owing to the issuance of the new Antitrust Law, the complete overhaul of the merger control system helped the regulator steer away from the slow and cumbersome review process it has had for more than a decade, significantly improving the results during the course of 2018.

### CONCLUSIONS

#### i Pending cases and legislation

The new Antitrust Law addresses several of the most relevant shortcomings in antitrust enforcement in Argentina. However, some important modifications are yet to be implemented. During 2019, we expect to see effective progress towards the setting up of the National Competition Authority, in addition to the issuance of the final document of the Abuse of Dominant Position and Leniency Guidelines and the expected update of the Adjustable Unit.

#### ii Analysis

It yet remains to be seen how corruption cases will be handled together with the predominant role of the application of the leniency programme, which should definitely mark an increase in anticompetitive investigations.
Chapter 3

BELGIUM

Hendrik Viaene

I OVERVIEW

Prioritisation and resource allocation of the enforcement authorities

The current competition regime in Belgium is based on two acts, adopted by the Belgian Parliament on 3 April 2013, which inserted a new Chapter IV entitled ‘Protection of Competition’ and a new Chapter V entitled ‘Competition and Price Evolution’ into the Belgian Code of Economic Law (BCEL). On 6 September 2013, the BCEL entered into force.

Following the entry into force of the BCEL, the Belgian Competition Authority (BCA) consists of four distinct components:

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

The Prosecution Body must play the role of an ‘independent filter’ in order to refuse the opening of instructions and to dismiss cases in view of the priority policy and of the available means, or because a complaint is unfounded or time-barred. The Prosecution Body has been granted the power to dismiss a case by adopting a reasoned decision.\(^2\) Such a decision is open to appeal before the President of the BCA.

The BCEL also reiterates the possibility for the Competition College to declare, in a reasoned decision, that according to the elements in its possession, there are no grounds for acting in a case submitted to it by the Prosecution Body.\(^3\)

Another new feature under the BCEL is the introduction of a settlement procedure. A 10 per cent reduction in the antitrust fine will be offered to undertakings concluding such a settlement with the Prosecution Body. In such cases, the Prosecution Body will be competent to adopt a final decision, which is deemed equivalent to a decision of the Competition College, despite the fact that no appeal can be lodged against such a settlement.

---

1 Hendrik Viaene is a partner at Laga (Deloitte Legal).
2 According to Article IV.42, Section 2 BCEL.
3 According to Article IV.47 BCEL.
decision. On 22 June 2015, the Prosecution Body adopted its first settlement decision in the household, body care and hygiene products case. In the meantime, this procedure has grown in popularity, with the latest settlement decision taken on 24 January 2019.4

Another interesting development is the entry into force on 22 June 2017 of a law inserting the action for damages for infringements of the competition law in Title 3 of Book XVII of the BCEL, transposing into Belgian law Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. Based on the new provisions inserted in the BCEL, any natural or legal person having suffered harm caused by an infringement of the competition law has the right to obtain full compensation for such harm. These provisions apply to any infringements of Articles 101 and 102 TFEU or of their Belgian counterparts, or of both. If there is a decision by the BCA finding an infringement, such a finding is deemed irrefutably established for follow-on damage proceedings before national courts.

ii Enforcement agenda

On 27 April 2018, the BCA published a document explaining the strategic objectives that will guide its choice when selecting the cases it will focus on.5 In that regard, as in previous years, the BCA continues to take the following four factors into account when assessing its interest in starting an investigation into a given case:

a. the impact of the case on the functioning of markets in Belgium and on consumers;
b. the strategic importance of that case, notably in view of the economic sectors considered as having priority;
c. risks: the BCA is less inclined to invest resources in the investigation of a possible infringement if there is an important risk that such an investigation cannot succeed; and

d. resources: the BCA also takes into consideration the amount of resources necessary to start the investigation.

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

a. the liberalised sectors and network industries;
b. the wholesale distribution sector and relationships with its suppliers;
c. media and digital economy;
d. the public procurement sector;
e. the pharmaceutical sector;
f. the logistics sector; and

g. services.

---

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

iii Leniency Guidelines

On 22 March 2016, the new Leniency Guidelines entered into force.7 They apply to all leniency applications submitted after that date. The most important change introduced by the Guidelines consists of practical rules for leniency applications submitted by individuals. Clarification regarding how these rules are implemented was required, particularly since the option for individuals to obtain immunity for ‘whistle-blowing’ became part of the BCEL in 2013, and in light of potential sanctions against individuals for certain types of competition law infringements. Individuals are always granted full immunity, regardless of where they rank in the order of applications submitted, provided that they meet the other conditions set out in the Guidelines. In addition, the first undertaking can still enjoy full immunity even when an individual has already contacted the BCA. The Guidelines also clarify that individuals may apply for leniency alone or together with the undertaking or association of undertakings for whom they work or used to work.

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

a the confidentiality obligations of a leniency applicant;

b the language to be used in the application;

c how to contact the Auditor General to submit such an application or to obtain information about the availability of an immunity application for the first undertaking; and

d the possibility to obtain a marker.

The Guidelines are still limited to cartel cases, with the express exclusion of other types of horizontal agreements and vertical agreements. To the extent that a hub-and-spoke cartel can be qualified as a cartel, it will be covered.8

---

6 Available on the BCA website.
7 Available on the BCA website.
8 The BCA has already granted immunity and leniency in a hub-and-spoke cartel case in 2015; See decision No. ABC-2015-I/O-19-AUD of 22 June 2015, case CONC-I/O-06/0038, Hausses coordonnées des prix de vente de produits de parfumerie, d’hygiène et de droguerie, available on the BCA website.
iv Guide on information exchange

On 12 September 2018, the BCA published a draft guide on information exchange for public consultation. All interested parties were given until 15 November 2018 to comment. A final version of the guidance document is expected in the course of 2019.

II CARTELS

i Significant cases

In 2018,9 the Competition Council did not take any fully fledged decision on the basis of Article IV.1 BCEL, which prohibits ‘agreements between undertakings, all decisions by associations of undertakings and all concerted practices, the aim or consequence of which is to prevent, restrict or distort significantly competition in the Belgian market concerned or in a substantial part of that market’. A decision, however, is expected in the course of 2019 involving the Professional Body of Pharmacists (PBP). This case follows on from a preliminary measures decision taken in 2017 where it was found that prima facie the PBP had infringed Article IV.1 BCEL by engaging in different legal proceedings, defamatory practices, etc. directed against a new entrant, MediCare-Market.10 A report was filed by the Auditor on 31 October 2018.11

No settlement decisions were taken in 2018. On 24 January 2019, the Prosecution Body issued a settlement decision in the area of infrared cabins. It imposed a fine of €98,000 on HM Products Benelux for fixing the maximum discount levels its distributors could grant. HM Products Benelux imports and distributes infrared cabins of the brand Healthmate that are used to alleviate muscle and joint pains.

The BCA concluded that fixing maximum discount levels that distributors can grant amounts to resale price maintenance. Abiding by the maximum discount levels was a necessary precondition for being allowed into the distributor network. The system was accompanied by price monitoring and possible sanctions. The whole system was perceived as a single and continuous infringement spanning eight years and six months.

The investigation started following information received by the Investigation and Prosecution Service, and led to a dawn raid in October 2016. Following settlement discussions started in July 2018, the BCA adopted a settlement decision on 24 January 2019. The basic amount of the fine exceeded the 10 per cent Belgian turnover threshold. As a consequence, the amount of the fine was limited to the 10 per cent ceiling. As HM Products Benelux is not part of a large international group, the BCA agreed to further reduce the fine on proportionality grounds. Finally, the amount was reduced by an additional 10 per cent because HM Products Benelux agreed to settle.

ii Trends, developments and strategies

One of the major changes under the BCEL is the introduction of the possibility of imposing administrative penalties on individuals for direct involvement in hardcore antitrust infringements (with the exception of abuse of a dominant position). At the time of writing,

---

9 As it mainly relates to 2018, the present contribution takes into account developments that occurred up to 31 December 2018.
the BCA has not yet imposed administrative penalties on individuals on that basis. However, these sanctions have caused individuals to consider whether they would, separately or jointly with the undertaking that is their employer, file an application for immunity. This possibility has been used by individuals and it is expected that this will be a growing source of information for the BCA.

Another interesting development in 2018 was the judgment by the Belgian Supreme Court confirming the Brussels Court of Appeals 2015 ruling that the dawn raids carried out by a number of stevedores did not meet the constitutional requirements for carrying out such a raid. As a consequence, the BCA was prevented from using any documents collected during the dawn raids. This was ultimately one of the reasons why the BCA decided to close the investigation on 5 February 2019.

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

iii Outlook

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

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

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

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

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

---

12 Supreme Court, 26 April 2018, case c.15.0524.N.
Also, as discussed earlier, the Prosecution Body filed a report on 31 October 2018 in relation to the Professional Body of Pharmacists. A decision can be expected in 2019.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

Article IV.1 and Article IV.2 BCEL are the Belgian competition rules equivalent to Articles 101 and 102 TFEU. Article IV.1, Section 1, BCEL stipulates that ‘without the need of a prior decision to that effect, all agreements between undertakings, all decisions by associations of undertakings and all concerted practices, the aim or consequence of which is to prevent, restrict or distort significantly competition in the Belgian market concerned or in a substantial part of that market are prohibited’; whereas Article IV.2 BCEL states that ‘without the need for a prior decision to that effect, the abuse by one or more undertakings of a dominant position in the Belgian market concerned or in a substantial part of that market is prohibited.’

On 20 December 2018, the Prosecution Body closed an investigation into anticompetitive practices by the International Federation for Equestrian Sports (FEI) after the latter had given commitments. The investigation was launched following several complaints. Even though the complaints were withdrawn, the BCA continued the investigation. The complaints concerned (1) some provisions of the FEI General Regulations which stipulate that the participation of athletes, horses or officials in events that have not been approved by the FEI could be subject to a penalty of six months renewable; (2) the lack of transparency of the FEI approval process; and (3) the sanctions imposed on athletes, horses and officials participating in competitions not approved by the FEI. They were likely to foreclose competitors from the market for the organisation and commercial operation of five-star competitions. One of these complaints concerned a provision of the FEI General Regulations, which provides that the organisation of five-star competitions must be subject to an application for registration in the FEI calendar two years before the date of the first edition of the contest. The FEI offered commitments as regards the procedure for approval of new series, in the immediate establishment of a transparent procedure. Regarding the rules concerning the participation in events not recognised by the FEI and the conflict of dates, procedural and substantive changes were adopted by the board of the FEI on 20 November 2018. The board committed to support these changes at the next general assembly of the FEI.

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

No infringement decisions relating to an abuse of a dominant position were taken in 2018. However, in one case the BCA imposed interim measures on ABB Industrial Solutions...
BVBA in respect of its pricing policies for lids for electricity meter boxes. Following a tender organised by Eandis, ABB was selected as the exclusive supplier of lids for smart electricity meter boxes. Any supplier of a full smart electricity meter box, consequently, had to buy the lid from ABB, which also sold complete smart electricity meter boxes. The complainant claimed that ABB replied late to requests for quotations; that orders were confirmed late or sometimes even not at all; that delivery times were changed unilaterally and were invariably long; that it was giving priority to Eandis’ orders; that it charged substantially lower prices to Eandis, while the Eandis tender had specified that all installers should be able to obtain the lids at a market price; and, finally, that ABB was charging a price for the lids equivalent to 38 per cent of the total cost of a complete meter box and that ABB had dropped the price for a complete meter box, where it had not lowered its price for the lids. After an investigation, the BCA found that interim measures had to be imposed as ABB prima facie had abused its dominant position. In fact, it found that each of the earlier described practices constituted separate abuses. The interim measures imposed were that (1) ABB had to apply an April 2018 price reduction for Eandis also to other customers; (2) ABB must apply to the prices of the concerned lids the price reductions it would decide for electricity boxes or their components, regardless of the configuration in which they are ordered, and refrain from any not objectively justifiable price increase for these lids; and (3) ABB must commit to continue to process orders for lids according to the ‘first in, first out’ principle without distinguishing between the configurations in which they are ordered, including for lids that ABB uses itself for the production of electricity meter boxes.

ii Trends, developments and strategies
The BCA has shown its willingness to adopt settlement decisions. It remains to be seen whether this trend will continue in 2019. Another interesting evolution to watch will be how the entry into force of the 2016 Leniency Guidelines will have an influence on the activities of the BCA and whether more leniency applications will be introduced.

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

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
According to Article IV.44 BCEL, ‘the President may, on its own initiative or at the request of the minister or of the minister with responsibility according to the sector concerned, carry out or order general or sectoral investigations, if there is serious proof of harming the functioning of the market’. In that regard, he or she may request the assistance of the Prosecution Body. To date, the President of the BCA has not yet used his powers in this area.

That being said, the BCA has participated actively in the hotel sector monitoring working group led by the European Commission. For Belgium, 981 hotels were questioned about most favoured nation clauses or equivalent provisions. For the moment, no actions undertaken by the BCA in this area have been made public.

V STATE AID

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

VI MERGER REVIEW

i Significant cases

In 2018, about 36 merger decisions were adopted by the BCA, which cleared the majority of the examined concentrations under the simplified procedure.18 Only one of the decisions involved commitments. This decision will be briefly discussed.

In Volvo/Kant,19 the BCA allowed the acquisition of Kant, owner of several independent Volvo distributorships and service points. Following the investigation by the BCA, the Auditor found that the transaction would create a significant impediment to effective competition. Although this created the possibility for Volvo to offer commitments, none were offered and a hearing was held. Following the hearing, the president invited Volvo to offer commitments and such commitments (appointing a new independent distributor in the disputed area and closing another distributorship operated by Kant) were accepted by the BCA, thereby avoiding opening a second phase investigation.

In last year’s chapter, the BCA decision lifting certain conditions imposed on Kinepolis Group was discussed. These conditions were imposed following the merger of two independent movie theatre companies forming Kinepolis in 1997. They required prior approval for any acquisition of another movie theatre even when notification thresholds were not met. The commitments even required Kinepolis to obtain prior approval for internal growth, leading to a raft of closures of movie theatres in order to replace them by others in other commercially more interesting geographic areas and to avoid the prior authorisation process for internal growth. Finally, a number of commitments were also given relating to not concluding programming agreements with independent movie theatres, and not concluding exclusivity or priority deals between Kinepolis and its daughter, KFD, which is a movie distribution company. Following earlier attempts to lift the conditions between 2006 and 2010, Kinepolis filed a new request in 2017, resulting in a partial lifting of the conditions: as of 31 May 2019, Kinepolis will be allowed to grow internally without having to apply for prior approval. However, Kinepolis saw its potential to expand unchecked as of 31 May 2019 thwarted by two judgments rendered by the Brussels Market Court. First, on 28 February 2018,20 the 2018 BCA decision was annulled in as far as that decision lifted the requirement of prior approval by the BCA for Kinepolis’ internal growth. Following that judgment, the BCA adopted a new decision on 26 April 2018 reconfirming the lifting of

---

18 28 out of 36 cases in 2018. The simplified procedure can only be used if certain conditions are met, for instance if two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 25 per cent. The simplified procedure has the advantage that the prosecutor will render a decision within 15 working days. See the rules adopted by the General Assembly of the Competition Council on 8 June 2007, available on the BCA website.


the prior approval condition for internal growth as from 26 April 2020.\textsuperscript{21} That decision was again annulled by the Brussels Market Court because the BMA was composed of the identical group of individuals that took the 2017 BCA decision.\textsuperscript{22}

\textbf{ii Trends, developments and strategies}

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

A concentration must be notified when two of the undertakings involved in the transaction each have a turnover in Belgium amounting to €40 million. In addition, all the undertakings concerned must have jointly a €100 million turnover in Belgium.\textsuperscript{23} Of course, when a concentration meets the thresholds for a notification at the EU level, no notification at the national level is required. Exceptions to this rule are the referral provisions contained in Articles 4 and 9 of Regulation 139/2004 on the control of concentrations between undertakings. Article IV.11 BCEL clearly stipulates that in the case of the referral of a transaction to the Belgian level, a new notification must be filed with the Prosecution Body.

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

In May 2017, the BCA published an evaluation report regarding the notification thresholds for concentrations in Belgium. It concluded that these thresholds are already sufficiently high and should not be raised, and that there is also no need to lower them.\textsuperscript{24} The Prosecution Body nevertheless proposes that in the event that the notification thresholds would be lowered, this should happen only in relation to certain specific sectors, as this is the case in France, but not in general. In any event, the BCA indicates that a public consultation should be organised should a concrete proposal to modify the notification thresholds be discussed.

\textbf{VII CONCLUSIONS}

The volume of significant decisions rendered by the BCA is clearly increasing. 2018 saw the BCA involved in a number of demanding interim measures and merger control cases. In addition to that, it had to deal with cases coming back to it after the first decision was annulled by the Brussels Market Court, which always keeps the BCA in check. The bulk of the resources is still used in simplified merger cases.

As rightly indicated in the explanatory memorandum of the proposal for the BCEL, in view of the fact that the European Commission does not take more than eight decisions per year establishing an infringement, it cannot be expected that the Belgian authority conducts more than four investigations a year that result in the discovery of an infringement. Moreover, the BCA focuses on finding cartels, as does the Commission and many other national competition authorities. Part of the reasoning is that cartels are most damaging to consumer welfare. However, another, less encouraging, explanation is that the entire

\begin{itemize}
  \item \textsuperscript{21} BMA-2018-C/C-12, \textit{Kinepolis}.
  \item \textsuperscript{22} Brussels Market Court, 21 November 2018, 2018/MR/3.
  \item \textsuperscript{23} Article IV.7 BCEL.
  \item \textsuperscript{24} Available on the BCA website.
\end{itemize}
Belgium

detection system is directed towards cartels (leniency is available only for cartels), and that more difficult analyses (i.e., does an agreement infringe Article 101 TFEU or Article IV.1 BCEL?) are not undertaken because of the lack of resources (legal and economic) and the greater likelihood of the Competition Authority’s decision being overturned on appeal. Developments in 2017 and 2018, however, seem to indicate that the BCA has now shifted up gears in going after resale price maintenance, imposing interim measures in several sectors, adopting commitment and settlement decisions, and, occasionally, taking on an abuse of a dominant position case.
Chapter 4

BRAZIL

Mariana Villela, Leonardo Maniglia Duarte, Gabriela Reis Paiva Monteiro and Vinicius da Silva Cardoso

I OVERVIEW

In 2018, the Administrative Council for Economic Defence (CADE), the Brazilian competition agency, maintained the efficiency presented in previous years and tried to boost the authorities' institutional strength. After six years of enforcement under Law No. 12,529/2011 (the Brazilian Competition Act), which entered into force in May 2012 and introduced a new system that concentrated the roles of three competition bodies into one, both the pre-merger review system and the revised rules to create better incentives and provide more legal certainty to leniency agreements and cease-and-desist agreements (settlements or TCCs, to use its acronym in Portuguese) have enabled CADE to function at a higher level of efficiency and improve the quality in its investigations and decisions.

Under the previous system, the existence of three competition agencies, with overlapping responsibilities, used to cause delays in the processing of investigations for anticompetitive conduct and in the review and approval of mergers. Under the current institutional design, CADE is responsible for enforcing competition law issues at the administrative level, which is organised into three divisions or units: the Office of the Superintendent General (SG), the Administrative Tribunal (with seven commissioners) and the Department of Economic Studies (DEE).

The current Competition Act also introduced a pre-merger review system, replacing the previous post-merger review system. The new merger control model has exceeded expectations as to timing and efficiency, and CADE has been able to review and clear merger filings at a fast pace. In this regard, CADE continues to impress with its fast review of merger notifications, with an average review time for cases eligible for the fast-track procedure of 13.5 days in 2018. Transactions reviewed under the regular procedure are cleared within an average of 96.3 days.

1 Mariana Villela and Leonardo Maniglia Duarte are partners, Gabriela Reis Paiva Monteiro is an associate and Vinicius da Silva Cardoso is a junior lawyer at Veirano Advogados.
2 The new Brazilian Competition Act (Law No. 12,529/2011).
3 Broadly, the SG is in charge of investigating anticompetitive conduct and approving merger cases that do not raise competition concerns; the Administrative Tribunal is responsible for rendering decisions on all investigations of anticompetitive conduct and for deciding merger cases that may present competition concerns; and the Department of Economic Studies is responsible for issuing non-binding economic opinions and for carrying out economic studies in general.
According to CADE’s estimates, 404 concentration acts were analysed in 2018, of which one case was rejected and six cases were approved with restrictions. CADE’s Administrative Tribunal analysed 17 mergers in 2018 – six of them were appealed or called up after a decision by the SG. The SG declined to review a total of nine transactions, concluding that they did not require a merger filing because either they did not meet the legal turnover thresholds or they did not qualify as a concentration act as per the wording of the Brazilian Competition Act.6

CADE’s Administrative Tribunal continued last year’s trend, subjecting mergers to substantial scrutiny and opposition, and even effectively blocking high-profile mergers. In 2018, CADE blocked the acquisition of Liquigás by Ultragaz, and imposed heavy conditions to approve other notable mergers such as Monsanto/Bayer and Arcelor Mittal/Votorantim Siderurgia. In addition, Nadir Figueiredo also dropped the acquisition of Owens-Illinois after the SG recommended the blocking of the merger. This may be interpreted as an indication that CADE is continuously raising the bar of its approach to merger control in complex transactions. The competition analysis in merger control cases has become more complex and sophisticated as a result of CADE’s accumulated experience and knowledge and of increasing challenges and contributions by third parties. CADE also issued a new guideline on remedies, indicating the authority’s new approach will not diminish its historical efforts of increasing the transparency and quality of its decisions.

On the investigations front, 2018 was busier than 2017. The Administrative Tribunal tried 25 administrative proceedings, convicting the defendants (fully or partially) in 12 of them. CADE also executed 12 leniency agreements and 60 cease-and-desist agreements.7 These agreements originated several new investigations, especially related to alleged cartels in public bids. In addition, CADE published a new ordinance on third parties’ access to investigation documents.8

CADE was very active in terms of institutional progress and cooperation with foreign authorities throughout 2018. The authority took steps to improve international cooperation with other enforcers worldwide, executing memorandums of understanding with other antitrust authorities,9 proceeding with its request to enter OECD’s Competition Committee,10 and signing cooperation agreements with other BRICS countries.11

Once again, CADE’s performance in the past year was recognised by Global Competition Review (GCR), which rated the authority among the top 10 best antitrust authorities in the world.12 Furthermore, during the 2018 ABA Antitrust Spring Meeting, the Brazilian antitrust

---

7 These figures consider the regular leniency agreements, the leniency plus agreements and amendments to these agreements. See CADE’s 2019 Yearbook.
8 CADE’s Ordinance # 21/2018 provides the legal framework to allow third parties access to documents used in administrative investigations.
10 See www.cade.gov.br/noticias/cade-participa-de-reuniao-em-processo-de-adesao-ao-comite-de-concorrencia-da-ocde.
authority received two awards: the Agency of the Year in the Americas by GCR and the ‘Best Soft Law’ by Concurrences.\textsuperscript{13} Once again, CADE is a finalist for the Antitrust Writing Awards – promoted by Concurrences and George Washington University Law School Competition Law Centre – in the ‘Best Soft Law’ category for its Guidelines for Antitrust Remedies and in the ‘Procedure’ category for its Resolution on Discovery Policy.\textsuperscript{14}

The year 2019 promises to be a game-changing year for CADE. The new government in Brazil will appoint four new commissioners to the Administrative Tribunal, a new Superintendent General, and a new Federal Attorney at CADE. All appointments must be previously approved by the Brazilian Federal Senate. In addition, the Brazilian press has published several articles revealing an unparalleled interest in CADE by the Ministers of Economy and of Justice appointed by the new Brazilian President, whose profiles indicate CADE will be allocated even more resources to tackle cartels, especially cartels in public biddings.

II CARTELS

Since 2012, the SG, the CADE unit responsible for investigating anticompetitive conduct, has been trying to clear the backlog of cartel cases. In 2018, CADE’s Administrative Tribunal decided twice the number of cartel cases decided in 2017.\textsuperscript{15} In nine of them (45 per cent), CADE did not convict any defendants – against only three (30 per cent) in 2017.\textsuperscript{16} The fines imposed by CADE in cartel convictions total 600 million reais. In addition, CADE also initiated 35 new cartel investigations and executed 49 TCCs related to cartel investigations – including cases originated from Operation Car Wash – that amounted to 1.26 billion reais in financial compensation being paid by the defendants.\textsuperscript{17}

i Significant cases

In 2018, CADE concluded various administrative proceedings concerning cartels.

In March, 18 companies, 39 individuals and three unions were condemned for cartel formation in the national sea salt market. According to CADE, the documents and pieces of evidence collected indicated that the defendants agreed to define prices, control the supply, and split the market. The conducts were supported by sectoral associations and trade unions. The SG also concluded that four companies organised a parallel collusion to obtain advantages in public bids held by Empresa Baiana de Alimentos S/A – EBAL. The fine applied by CADE was 289.5 million reais.\textsuperscript{18}

\textsuperscript{18} CADE Administrative Proceeding No. 08012.005882/2008-38, Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).
In June, CADE’s Administrative Tribunal approved three cease-and-desist agreements to settle a cartel probe in the foreign exchange market, involving the Brazilian real and offshore currencies.19 The agreements were signed between CADE and the financial institutions Royal Bank of Canada and Morgan Stanley Bank. A total of 42.9 million reais was collected to the Fund for the Defence of Diffuse Rights.20 According to CADE, there was strong evidence that the defendants agreed to fix the exchange rate spread, to coordinate the purchase and sale of currency and the price proposal for customers, as well as setting back the activity of other operators in the currency exchange market involving the Brazilian currency.

Another important case was the conviction, in August, of Toshiba Corporation and Mitsubishi Electric Corporation (Melco) owing to their involvement in the global gas-insulated switchgear (GIS) cartel.21 From 1988 to 2004, the participating companies coordinated the concession of GIS projects, fixing prices and dividing geographic markets. The alleged deal would have affected all consumer countries, except the United States and Canada, since both countries were excluded from the discussions as a result of the strict antitrust laws adopted by both of them. Later China and Russia were also excluded from the discussions, due to the position gained by the ABB Group (another cartel participant) in these markets. Concerning the effects in Brazil, the investigations pointed out that the cartel affected the Brazilian electric system and companies that had acquired high-tension GIS separately, and medium and high-tension equipment for the composition of substations. CADE imposed fines of approximately 4.9 million reais on both companies.22

In the same month, CADE concluded that manufacturers of TV colour picture tubes (CPTs)23 and PC colour display tubes (CDTs)24 had colluded to accomplish anticompetitive practices. According to the Brazilian antitrust authority, the cartel would have been active between 1995 and 2007. The Administrative Tribunal followed the decision rendered by Commissioner Paulo Burnier and condemned the companies Toshiba Corporation and MT Picture Display for cartel activity in the international market of CPTs, imposing fines totalling 4.9 million reais.25

In December, the SG recommended the conviction by CADE’s Administrative Tribunal of 16 companies and 52 individuals over allegations they were involved in a cartel to fix bids for public train contracts. According to the investigations carried out by the SG, the fraud occurred in at least 27 projects in the cities of São Paulo, Brasília, Porto Alegre and Belo Horizonte in Brazil. CADE concluded that Mitsu, Bombardier, Alstom, Balfour Beatty, Construccion y Auxiliar de Ferrocarriles (CAF), Hyundai-Rotem, and part of Hyundai Motor would have participated in the cartel. The investigation was initiated in 2013 after CADE executed a leniency agreement with Siemens, who voluntarily self-reported its alleged involvement in the price-fixing scheme to lessen its responsibility.26

---

20 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).
22 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).
25 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).
The SG carried out at least three high-profile dawn raids in 2018, which were related to investigations regarding cartels in the following markets: (1) the Brazilian market of orthoses and prostheses;\(^{27}\) (2) public bids held by federal agencies for the contracting of outsourced services;\(^{28}\) and (3) public bids carried out by the state of Espírito Santo for the service contracting of asphalt paving.\(^{29}\)

### ii Trends, developments and strategies

On 6 March 2013, CADE enacted Regulation No. 5/2013, which modified the rules regarding settlements. The purpose of this Regulation was to increase the incentives for companies to cooperate by adding more predictability and transparency regarding the amount of contribution to be paid. It contains guidelines on the levels of the settling sums to be paid by settling parties, which will vary depending on, *inter alia*, the level of cooperation and the moment of the investigation. Parties who are being investigated for cartel behaviour, however, need to acknowledge their participation in the violation in order to be able to settle. Since its enactment, over 249 TCCs have been executed under the new Regulation. In 2018, the Administrative Tribunal and the SG executed a total of 49 TCCs related to cartel investigations involving several markets, which amounted to 1.26 billion reais in financial compensation being paid by the defendants.\(^{30}\) The aforementioned regulation on settlements has been proving to be a very effective tool to end investigations that otherwise could take years to be decided, releasing a significant amount of public resources that could be redirected to other investigations in Brazil.

### iii Outlook

An examination of the cases initiated and concluded in recent years suggests that the investigation of cartels continues to be an enforcement priority for CADE. In 2017, CADE executed an all-time high number of leniency agreements and settlement agreements, many of which were related to Operation Car Wash. In 2018, CADE continued to analyse and to execute agreements related to public biddings.

In the past few years, CADE has devoted a substantial amount of resources to the investigations and leniency agreements related to Operation Car Wash. Owing to the profiles of the new Ministers of Justice and of Economy – and the fact the government will appoint a new General Superintendent in 2019 – CADE is expected to allocate even more resources to tackling cartels, especially cartels in public biddings. This may have the side effects of delaying other investigations and of preventing CADE from pursuing new ones. This scenario highlights the importance of boosting CADE’s human and financial resources as soon as possible, as CADE has historically been understaffed. Despite the agency’s strong commitment to efficient enforcement and continuing developments in recent years, there is a risk that certain antitrust violations may go undetected and unpunished to the detriment of free competition and of Brazilian consumers due to a lack of sufficient personnel and resources.


III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

In 2018, CADE’s Administrative Tribunal analysed a total of seven cases related to unilateral conducts. Since 2017, the investigation of unilateral anticompetitive behaviour has been one of the priorities of CADE’s current General Superintendent.31

In March 2018, CADE closed an administrative proceeding involving Volkswagen, Fiat and Ford, which concerned an investigation into auto parts.32 The case was based on a complaint filed by the National Association of Auto Parts Manufacturers (ANFAPE) in 2007 in which it alleged that these companies were using their IP rights in an abusive manner. The SG argued that enforcing IP rights to prohibit independent manufacturers of automotive parts from selling their own auto parts on the aftermarket would constitute an abuse of the industrial property law. However, following the opinion issued by Commissioner Maurício Bandeira Maia, CADE’s Administrative Tribunal decided that there was no evidence of anticompetitive conduct and dismissed the complaint.

In October 2018, CADE’s Administrative Tribunal analysed the Terminal Handling Charge 2 (THC2) imposed by port operators to handle containers at the terminal before loading them into the vessel. According to Marimex, the company that requested the preventive measure granted by CADE’s Administrative Tribunal’s, BTC, in its capacity as port operator, was imposing charges as a condition to release the containers.33 Commissioner Burnier concluded that BTC was a monopolist in the port terminal in which it was active and abused its dominant position to impose commercial conditions. The Commissioner also concluded that the unlawfulness of this charge is established by CADE’s case law for more than 10 years. In August 2018, CADE imposed fines totalling 5.7 million reais34 on Rodrimar and Rio Grande, operators of the port terminals of Port of Santos and Rio Grande, respectively, due to the same anticompetitive conducts.35

Also in October, CADE condemned Unilever to pay 29.4 million reais36 for preventing competitors from having access to the market of ice cream for immediate consumption in the cities of São Paulo and Rio de Janeiro.37 At least four exclusivity agreements were identified by the antitrust authority, involving (1) exclusivity of storage freezers; (2) minimal sales; (3) exclusivity of merchandising; and (4) exclusivity of sales. Initial investigations indicated that Nestlé was also involved in the anticompetitive conducts, especially in small shops, such as cafeterias and snack bars, but, for the lack of dominant position, CADE condemned Unilever only.

In 2018, CADE also executed 11 cease-and-desist agreements that totalled 70 million reais, which may be divided into three major groups:

a In March, in order to assure the contractual freedom in the real estate market, CADE executed a cease-and-desist agreement with the Brazilian Federal Council of Real Estate

---

34 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).
36 Exchange rate as of 31 December 2018 (1 BRL = 0.2580778 USD).
Brokers (COFECI) and with the Regional Councils (CRECIS) to end the imposition of maximum and minimum prices for brokerage commission. The agreement also stipulated a pecuniary contribution of 75,000 reais.38

Also in March 2018, Booking, Decolar and Expedia, all of them online travel agencies (OTAs), committed themselves to stop using their current price-parity clause policy and decided to renounce the conditions imposed on hotels that offer accommodation on their platforms. The administrative inquiry was started by the SG in 2016 after a complaint filed by the Brazilian Forum of Hotel Operators. The anticompetitive conduct aimed at guaranteeing more advantageous prices, room availability and other conditions at the OTAs’ websites, in comparison to those offered by the hotel chains in their own sales channels (online and offline) or in competing platforms. CADE concluded that the imposition of broad parity clauses would limit the competition among travel agencies, regulating the final prices offered to consumers.39

From July to September, CADE reached five cease-and-desist agreements with major banks after a lengthy investigation into anticompetitive practices in the electronic payment market.40 CADE opened this investigation in 2016 to probe, among other things, the banks’ exclusivity contracts with commercial establishments and the adoption of other anticompetitive practices that prevented small companies from accessing the market. As a pecuniary contribution, Itaú and Rede agreed to pay 21 million reais to the Fund for the Defence of Diffuse Rights. In addition, Banco do Brasil and Bradesco agreed to pay 1.9 million reais and 2.2 million reais in fines, respectively. Cielo SA, which is controlled by Banco do Brasil and Bradesco and is considered Brazil’s largest credit and debit card operator, also paid 29.7 million reais.41 This was the largest nominal contribution ever collected by CADE in a TCC involving unilateral conduct related to administrative inquiries.

ii Trends, developments and strategies

As previously mentioned, since 2017, the current General Superintendent has been stating in public speeches that, after focusing on cartels and mergers for so long, it is now time for CADE to focus more attention on unilateral conducts, which can be very harmful to competition.42 This statement was reinforced by CADE’s President in his 2018 review.43

iii Outlook

CADE’s enforcement priorities were always clearly focused on fighting cartels, meaning that cases involving unilateral conduct represented a lower proportion of CADE’s enforcement activities. Since 2017, public speeches by competition authorities have been indicating a

---

38 See www.cade.gov.br/noticias/acordo-revoga-tabela-de-honorarios-para-corretores-de-imoveis. Exchange rate as of December 31, 2018 (1 BRL = 0.2580778 USD).
40 CADE, Administrative Proceeding No. 08700.001860/2016-51.
41 See www.cade.gov.br/noticias/acordo-revoga-tabela-de-honorarios-para-corretores-de-imoveis. Exchange rate as of December 31, 2018 (1 BRL = 0.2580778 USD).
42 See https://globalcompetitionreview.com/article/1149505/cape-to-focus-on-unilateral-conduct.
possible shift on this policy and more enforcement in this area. Although there was a noticeable change in the level of enforcement against unilateral conducts, CADE still allocates much more resources to fighting cartels. It will be important to track closely how CADE’s efforts related to unilateral conducts will unfold in 2019, especially considering the new authorities to be appointed by the new government.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Trends, developments and strategies

Even though the Brazilian Competition Act does not limit CADE’s jurisdiction to enforce competition law in regulated sectors, certain aspects of its jurisdiction are still unclear and are being analysed by the Brazilian courts. After years of discussion regarding CADE’s jurisdiction to enforce competition law over banking mergers and conducts, CADE and the Brazilian Central Bank (BACEN) have finally reached an agreement. As the Brazilian Competition Act does not limit CADE’s jurisdiction to enforce competition law in regulated sectors, CADE understood that it had jurisdiction to enforce competition law in all sectors, including in the banking sector, although the Brazilian courts have so far sided with the argument sustained by BACEN, according to which BACEN should be solely responsible for enforcing competition law in the banking sector due to the sector’s peculiarities. In 2017, CADE and BACEN established a working group to develop studies about competition defence in the Brazilian financial system. In 2018, these bodies signed a memorandum of understanding (MoU) to coordinate and give greater predictability to the assessment of mergers involving companies in the financial sector. This MoU states that BACEN and CADE will foster the exchange of information and that a consent from both bodies will be required for approval of mergers.44

In addition, CADE was also active in trying to influence public policy regarding regulated sectors. In May 2018, due to the truckers’ strike initiated after a rise in diesel prices, CADE proposed several measures to reduce gas prices in Brazil. The government, however, decided to fix delivery prices. In June, CADE sent an opinion to the Brazilian Supreme Court (STF) arguing the government’s policy harmed consumers, the market and the free competition. CADE opposed the policy, arguing it had effects similar to those of a cartel. The authority also initiated a preparatory procedure to probe any anticompetitive conducts.45 The STF did not render a final decision on this matter.

In November, CADE held an open audience to debate the competitive impacts of the Brazilian financial sector’s verticalisation. The panels counted on the speeches and contributions of several experts, public officers and companies’ representatives, who debated the structure of this specific market and related competition concerns. CADE’s President declared ‘CADE understands the necessity to participate actively in discussions about possible solutions to enhance the competition environment in the financial sector’.46

In December, CADE and the National Civil Aviation Agency of Brazil (ANAC) also held a joint seminar to discuss the competitive impacts of ANAC’s regulations on the market. The event discussed major questions in this market, such as: joint business agreements, slots competition, a ban on companies controlled by foreigners, competition between airports, and low-cost flights.

CADE’s Department of Economic Studies also published two studies on regulated markets: health insurance and related markets (July 2018) and maritime transport of containers (December 2018). This is part of CADE’s efforts to increase competition in regulated markets by influencing regulatory policies.

**Outlook**

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

**MERGER REVIEW**

In 2018, 406 mergers were submitted to CADE’s review. CADE continued to clear merger filings under a pre-merger review system quickly and efficiently, leaving far behind the anxieties and doubts that had been raised when the current Brazilian Competition Act entered into force in 2012. Simple cases eligible for the fast-track procedure have been cleared in less than 20 days on average, while more complex cases have taken, on average, no more than 100 days to be decided.

**Significant cases**

**Blocks**

CADE blocked only one merger in 2018. In February 2018, the Administrative Tribunal blocked the acquisition of Liquigás Distribuidora S/A by Companhia Ultragaz S/A, the largest and second largest domestic market share of liquefied-petroleum gas (LPG). The Administrative Tribunal argued the purchase of Liquigás would increase the possibility for Ultragaz to exercise the abuse of market power in the LPG market. In a post-merger scenario, the new company would hold more than 40 per cent of sales in many states. The Reporting Commissioner also highlighted the existence of significant entry barriers and the lack of effective competition among the companies.

---

50 See www.cadenumeros.cade.gov.br.
In January 2018, the SG issued an opinion stating that the transaction involving the acquisition of Owens-Illinois Brazil’s glass household items unit by Nadir Figueredo Indústria e Comércio SA should not be approved. According to the SG, the Brazilian market of glass household items presents a high concentration level that would be worsened by the transaction. The SG also indicated that competition from other domestic producers and the probability of new entrants to the market were low. In June 2018, Nadir Figueredo dropped the acquisition of Owens-Illinois.

**Remedies**

CADE reviewed several high-profile merger cases in 2018, including transactions that were approved subject to sophisticated remedies packages (including structural and behavioural commitments). This is a positive effect of the merger control system enacted in 2012, which provides better incentives and a more suitable legal framework to encourage CADE and parties to seek negotiated solutions in merger cases.

In February 2018, CADE approved with restrictions the acquisition of TGM Indústria e Comércio de Turbinas e Transmissões Ltda by WEG Equipamentos Elétricos S/A, a transaction in the markets of equipment used in systems for triggering machines and for cogeneration of energy. CADE was especially concerned with the competition issues in tied selling of WEG and TGM products that integrate the energy generation system. For this reason, the Brazilian competition authority conditioned the approval of the merger to behavioural commitments. In the merger control agreement, the parties agreed to non-discriminatory conditions for the supply of the products to competitors providing third parties interested in acquiring the products with the individual prices for each components of the integrated energy generation system and guaranteeing that customers would be able to purchase each component separately or the integrated system at their own discretion.

CADE also approved with restrictions Bayer’s acquisition of Monsanto. As this was a multi-jurisdictional merger, several remedies were coordinated with the jurisdictions involved. The main remedy consisted in the divestment of all of Bayer’s assets that were related to the soybean seeds and cotton businesses, as well as the unit of non-selective herbicides based on ammonium glufosinate. Most of CADE’s commissioners said those measures would be sufficient to address antitrust concerns, since the structural remedies solved all horizontal overlaps and the vertical integrations in the affected markets created by the merger in Brazil.

In March 2018, CADE also approved with restrictions a deal in the banking sector: Itaú-Unibanco S/A’s acquisition of XP Investimentos S/A’s stake. The transaction was approved conditioned to the parties’ compliance with certain behavioural remedies aimed at ensuring the independence of the current XP controllers’ management, maintaining the pre-merger incentives, and at mitigating the risks of market discrimination through the reinforcement of vertical integrations between XP and Itaú. As an example, XP is not allowed to require exclusivity clauses from autonomous investment agents and must ease the portability of its

---


consumers to competing investment platforms. XP also committed to maintain its zero rate or zero tariff policy for investment products related to fixed-income investments.\textsuperscript{55} In August 2018, the Brazilian Central Bank also approved the transaction, but imposed more strict restrictions (e.g., BCB’s decision prohibits Itaú from acquiring control of XP in the future).

Another noteworthy transaction that was cleared in 2018 subject to remedies was the acquisition of Votorantim Siderurgia S/A by its competitor ArcelorMittal Brasil S/A. The transaction consisted in the merger between two of the three main suppliers of common long steel in Brazil. The companies negotiated a merger control agreement with behavioural and structural remedies, including the obligation to divest two packages of assets: the first package was related to the production of drawn and ordinary long rolled steel, which must be sold to an individual acquirer, without any related partner participation, directly or indirectly to the applicants or its respective economic groups; the second package was related to the markets of wire drawing and steel wire rod machines. It must be offered to an individual acquirer, different from the buyer of the first package of assets. The acquirer of the second package cannot have partner participation linked to the applicants or to the economic groups they belong to.\textsuperscript{56}

CADE’s Administrative Tribunal also approved two other transactions subject to remedies in 2018. In February, the agency approved the acquisition of Companhia Petroquímica de Pernambuco and Companhia Integrada Têxtil de Pernambuco, owned by Petrobras, by the Petrotemex Group.\textsuperscript{57} The companies agreed to set certain conditions (such as volume and price) to provide purified terephthalic acid to other companies for a limited time period. In June, CADE’s Administrative Tribunal approved the merger of Praxair, Inc (White Martins) with Linde AG\textsuperscript{58} in the industrial, special and medicinal gases market subject to structural and behavioural remedies. The merged parties agreed to divest several businesses and to provide calcium carbide gas without any discrimination.

Compulsory notification

On 5 September 2018, CADE’s Administrative Tribunal requested the compulsory submission of the acquisition of All Chemistry do Brasil by SM Empreendimentos Farmacêuticos, a merger that did not meet the legal criteria for mandatory filing.\textsuperscript{59} The authority based its decision on Article 88, Paragraph 7 of the Brazilian Competition Act, which allows CADE to request the submission of any transaction within one year from its performance.

Although CADE had already initiated several proceedings to assess whether a given transaction required compulsory submission to CADE despite not meeting the notification thresholds, this is only the second time that the body has effectively triggered this exceptional mechanism since the Brazilian Competition Act came into effect. The first case occurred in


\textsuperscript{57} CADE, Concentration Act No. 08700.004163/2017-32.

\textsuperscript{58} CADE, Concentration Act No. 08700.007777/2017-76.

\textsuperscript{59} CADE, Concentration Act No. 08700.005972/2018-42.
2016, when CADE received a complaint regarding an international transaction with effects in Brazil, whereby Guerbet SA acquired the business of contrast for X-rays and computerised tomography and magnetic resonance from Mallinckrodt Group Sarl.60

**ii  Trends, developments and strategies**

The new trends in merger review in 2018 and 2019 are as follows:

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

b  In the past few years, CADE has toughened its assessments regarding mergers in general. Vertical integrations that, at another time, would be easily cleared under the fast-track procedure are now strictly scrutinised by CADE.61 In addition, CADE also increased the number of mergers blocked.

c  Based on the profile of the new government and on analyses carried out by the specialised press,62 the several new authorities to be appointed by the new government in 2019 are expected to adopt a pro-business approach, reducing CADE’s involvement in mergers and acquisitions.

**iii  Outlook**

CADE has proved capable of efficiently examining simple transactions under a pre-merger review system, overcoming the difficulties of a limited staff and a lack of experience of the new model. Nevertheless, there are aspects of the interpretation and implementation of the new Competition Act regarding merger control that are still unclear. The improvement of the Brazilian merger control system continues to be on CADE’s agenda, as demonstrated by the new regulations and procedural matters enacted in 2018.

**VI  CONCLUSIONS**

**i  Pending cases and legislation**

In the area of anti-cartel enforcement, CADE’s Administrative Tribunal is expected to decide various cases that were reviewed by the SG in 2018 and that have been under investigation for a few years. The decisions rendered in these cases and the approach the SG may take with respect to new investigations are issues that deserve the attention of the antitrust and business communities, as they may frame the enforcement environment for the next few years.

On the merger front, the Administrative Tribunal is also expected to decide high-profile mergers, including the acquisition of Rockfibras by Saint-Gobain.63

---

60 CADE, Concentration Act No. 08700.005959/2016-21.
61 E.g., see CADE, Concentration Act No. 08700.002276/2018-84, a RAN sharing agreement between Oi and Tim. Initially, SG-CADE decided the transaction did not meet the criteria of mandatory filing. However, CADE’s Tribunal decided to call up the case and analyse it thoroughly.
63 CADE, Concentration Act No. 08700.004162/2018-79.
Analysis

Developments in recent years have shown Brazil to be a dynamic jurisdiction for competition law. The new competition law framework, which has been in place for almost six years, has been reasonably successful so far. However, it is natural that new challenges will appear as it develops. One significant concern is the risk that CADE may be over-influenced by and pressured from a political perspective, given that several cartel investigations that derived from the Car Wash Operation affect several Brazilian high-level authorities and politicians. Therefore, the risk of political appointments to key positions within CADE may increase, and this deserves attention.

This will be especially relevant in 2019. This year, the new Brazilian government will appoint four new commissioners to the Administrative Tribunal, a new Superintendent General, and a new Federal Attorney at CADE. According to the Brazilian press, the Ministers of Economy and of Justice showed an unparallel interest in CADE. Their backgrounds could give some hints about CADE’s role in the new government: the Minister of Economy holds a PhD degree from University of Chicago and has a pro-business background, while the Minister of Justice is known for his role as a federal judge of criminal cases related to Operation Car Wash. Tradition states the Ministers of Economy and Justice take turns to appoint CADE’s authorities.

In any case, CADE has already developed solid institutional foundations inspired by the best international practices in competition law enforcement and has continuously improved. Therefore, CADE is well positioned to successfully deal with all these challenges adequately, given the difficulties that it has already overcome and considering the overall evolution of competition law and policy in Brazil. CADE has also been able to convince Brazilian Congress to increase its annual budget, which is expected to translate in more resources to increase competition enforcement in the country.
Chapter 5

CANADA

Michael Koch, David Rosner and Justine Johnston

I  OVERVIEW

Competition and antitrust matters continue to attract significant attention in Canada. Following the retirement of Commissioner of Competition John Pecman in May 2018, Matthew Boswell, Senior Deputy Commissioner of Competition, has been appointed Commissioner of Competition. Commissioner Boswell has continued to highlight the importance of an innovation-friendly approach to regulation.

The Competition Bureau (Bureau) continues to encourage compliance with competition laws, modernise its policies (including its intellectual property enforcement guidelines and its cartel immunity and leniency policy), and establish and improve working relationships with law enforcement in other legal areas and other jurisdictions.

II  CARTELS

Cartel and bid-rigging enforcement continue to be top enforcement priorities of the Bureau. The cartel (Section 45) and bid-rigging (Section 47) provisions of the Competition Act (Act) are indictable offences with serious monetary and jail penalties for convicted offenders. There is no limitation period for these offences.

The Bureau identified the remedying of cartels and bid-rigging, as well as working with public procurement authorities to detect and prevent cartels and bid-rigging in public contracts, as among its most important commitments in its most recent three-year plan.2

i  Significant cases

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

1 Michael Koch and David Rosner are partners and Justine Johnston is an associate at Goodmans LLP.
In December, George Weston and Loblaw publicly admitted to their participation in what the companies say has been an industry-wide arrangement over the past 14 years to coordinate and fix the price of bread, and identified themselves collectively as the immunity applicant in this case. According to documents released by the Ontario Superior Court of Justice, the investigation alleged that prices were increased at least 15 times over this time period, in a pattern known as the 7/10 convention – seven cents more at wholesale and 10 cents more for consumers in stores.

Of the remaining companies implicated in the alleged price-fixing, Walmart has declined to comment, while the others have denied contravening any provisions of the Competition Act. With much of the documentary evidence in public court findings redacted, Sobeys and Metro have filed applications to make all the documents public. Sobeys has also threatened legal actions against Loblaw for implicating Sobeys in the scheme. The Bureau has not offered a timeline for when charges may be laid, and in early 2018, publicly clarified that there was no conclusion of wrongdoing at that time. At the time of writing, a class action lawsuit against the implicated companies is in the process of being certified; the statement of claim alleges that the implicated companies overcharged consumers by C$5 billion.

In 2017, the Bureau completed an investigation into a number of auto part suppliers with sales into Canada, as part of which Mitsubishi Electric Corporation, a Japanese manufacturer and supplier of auto parts, pleaded guilty and paid a C$13.4 million fine. Mitsubishi Electric Corporation is reported to have been party to an illegal agreement with a competing Japanese supplier of alternators and ignition coils sold to Honda, Ford and General Motors. The Bureau first learned of this cartel activity through its immunity programme. While Mitsubishi Electric Corporation was not the immunity applicant, it did participate in the Bureau’s leniency programme, and implemented a compliance programme to prevent future contravention of Canadian law. To date, public proceedings related to cartels in the auto parts industry have resulted in 13 guilty pleas and fines totalling over C$86 million.

The Bureau has continued to investigate a gasoline price-fixing conspiracy (most recently, Irving Oil Limited pleaded guilty and was fined C$287,583) and, in 2018, charged four individuals in connection with conspiring to rig bids for certain infrastructure contracts in Quebec.

Trends, developments and strategies

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

In addition, the programmes no longer automatically protect directors, officers and employees of the immunity or leniency applicant. Instead, to benefit from the programmes, such individuals would need to demonstrate their personal knowledge of the alleged
wrongdoing and their willingness to cooperate with the Bureau’s investigation. As well, wider protections are afforded to current directors, officers and employees of immunity applicants, as compared to leniency applicants. Another significant change reserves for the Bureau the right to require that witness interviews be conducted under oath, and to video or audio-record those interviews (as well as corporate proffers). Finally, all applicants are now required to provide confidentiality waivers allowing the Bureau to communicate with agencies in other jurisdictions where the applicant is applying for immunity or leniency.

The immunity and leniency programmes provide valuable incentives for parties to unlawful conduct to self-report. However, the changes may render the Bureau’s premier cartel detection tool less attractive, particularly for potential applicants that are attempting to balance varying cooperation requirements of agencies operating across different jurisdictions.

iii Outlook

Given the Bureau’s continued focus on the detection, investigation, prosecution and punishment of cartels and bid-rigging matters, companies should continue to give significant attention to ensuring compliance with applicable laws and treating all possible violations very seriously.

In cases of possible international conduct, coordination with counsel in other jurisdictions should be considered as early as possible. It also should be noted that Canada has a mutual legal assistance treaty with the United States, as well as an extradition treaty with the United States, which can be used in relation to cross-border criminal investigations.

Above all else, it is critical for companies considering possible international conduct to understand the operation of the Bureau’s immunity and leniency programmes, and what the operation of these programmes might entail for the companies’ interests under the programmes of non-Canadian agencies and in respect of possible civil suits. In addition, companies must understand well how sales across borders are accounted for, which reduces the risk that companies could face fines for the same sales in multiple jurisdictions.

III ANITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

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

The Bureau has made enforcing the reviewable practices provisions a significant priority, and has brought a number of notable cases and obtained a number of consent agreements.

i Significant cases

The Commissioner of Competition v. The Toronto Real Estate Board

In 2018, the Toronto Real Estate Board (TREB) applied for, but was denied, leave to appeal to the Supreme Court of Canada from a decision of the Federal Court of Appeal, upholding the decision of the Tribunal below. This brought to a conclusion a case first brought by the Commissioner in 2011.

TREB’s application to the Supreme Court followed its unsuccessful appeal to the Federal Court of Appeal from the Tribunal’s 2016 decision finding that TREB had abused
its dominant position pursuant to Section 79 of the Act. Specifically, the Tribunal found that TREB, through its operation of the multiple-listing service and its membership rules, controlled the market for residential real estate brokerage services in the Greater Toronto Area (GTA). The Tribunal also found that TREB has a ‘plausible competitive interest in adversely impacting competition’ in the market for residential real estate brokerage services in the GTA because it wished to shield its traditional members from new and innovative competitors (and to exclude these new competitors). The Tribunal concluded that TREB’s rules with respect to the use of the multiple-listing service were intended to insulate traditional members from innovative new competition, and had the effect of substantially preventing non-price competition.

TREB’s principal argument before the Federal Court of Appeal was that the Tribunal erred by concluding that competition had been lessened substantially without requiring the Commissioner to quantify the alleged anticompetitive effects. The Federal Court of Appeal issued its decision in December 2017, upholding the Tribunal’s decision. The Court held that the requirement imposed by the Supreme Court of Canada in Tervita – that the Commissioner quantify any quantifiable alleged anticompetitive effects in order to rely on them – did not apply in the abuse of dominance context. The Court held that no such obligation existed because that statutory scheme is different from that relating to mergers, where an efficiencies defence is available. However, the Court expressed sympathy for TREB’s arguments, explaining that ‘as a matter of logic’ the Supreme Court’s rationale for requiring that quantifiable effects be quantified ‘could equally be applied to determinations made under both’ the abuse of dominance and merger provision.

The Commissioner of Competition v. HarperCollins

Tribunal proceedings involving the e-books industry also finally concluded in 2018, with the entry by HarperCollins and the Commissioner into a consent agreement. The result of that agreement, together with Kobo’s defeat in certain collateral proceedings is that, four years after originally entering into consent agreements to address alleged anticompetitive conduct in the e-books industry and almost six years after the United States Department of Justice publicly announced its case, the Commissioner finally obtained his desired remedy in the case.

In 2014, the Commissioner announced the entering into of consent agreements with four trade book publishers in relation to an alleged agreement among competitors with respect to the sale of eBooks in Canada. Those consent agreements, if implemented, would have prohibited the publishers from utilising certain commercial terms (such as most-favoured-nation clauses) in distribution agreements with online retailers, among other things. The consent agreements were broadly similar to consent decrees entered into by those same publishers in the United States with the United States Department of Justice concerning the sale of eBooks following the launch of the iPad by Apple in 2010.

Following a challenge to these consent agreements brought by a third-party online retailer, Kobo, the agreements were rescinded on technical grounds in 2016. The Commissioner then entered into new consent agreements, addressing these technical defects. However, HarperCollins, which had originally agreed to a consent agreement in 2014, did not agree to enter into a new consent agreement in 2016. As a result, the Commissioner brought an application, alleging that HarperCollins had entered into an agreement with competitors that lessened competition substantially. In its defence, HarperCollins brought a motion for summary judgment, arguing that the Commissioner’s allegations concerned an agreement
in the United States, and that the Tribunal did not have jurisdiction over such a foreign agreement. In July 2017, the Tribunal issued a decision rejecting HarperCollins’ motion for summary judgment. The Tribunal held that the alleged conduct had a real and substantial connection to Canada, even though it occurred outside of Canada. Given the existence of such a real and substantial connection, it was within the jurisdiction of the Tribunal to make an order in respect of it. HarperCollins did not appeal the Tribunal’s decision.

The Commissioner of Competition v. Softvoyage

In January 2018, the Commissioner announced that he had entered into a consent agreement with Softvoyage Inc, a developer of travel-related software, also under the provision of the Act prohibiting the abuse of a dominant position.

Softvoyage produces software that is used by tour operators. In particular, tour operators use two types of Softvoyage software. The first type permits tour operators to manage the content of their vacation packages – that is, to assemble the various components (flights, hotel offers, etc.) into tour packages that are offered to consumers. The second type permits tour operators to provide access (i.e., to distribute) to travel agents, websites and other retailers of the tour operator’s inventory of holiday packages.

The Commissioner’s investigation concluded that Softvoyage is the dominant supplier for both types of software in Canada, with a share of sales of more than 90 per cent in each market. The Commissioner’s investigation also concluded that Softvoyage had engaged in a series of practices that had the effect of raising barriers to entry for rival suppliers. These practices included Softvoyage’s use of its control of the market for distribution software to ‘facilitate’ its control over the market for content management software through technical barriers that negatively impacted the ability of tour operators to use rivals’ content management software. Softvoyage is alleged to have then used restrictive contractual provisions in its agreements with tour operators that made entry by rivals even more difficult. These provisions included exclusivity clauses that prevented tour operators from using other distribution software, or from extracting data from Softvoyage’s content management software for use with other distribution software.

The consent agreement requires, among other things, that Softvoyage refrain from enforcing such contractual terms for a period of seven years, and to facilitate connectivity between Softvoyage’s content management software and third-party software through good faith and non-discriminatory collaboration.

The Bureau’s press release announcing the consent agreement refers to Softvoyage’s software as ‘essential’, but does not explain its conception of the concept of ‘essential facilities’, or whether this is a cognisable theory of harm under Canadian law. Softvoyage did not admit the truth of the allegations.

The Commissioner of Competition v. Vancouver Airport Authority

In October and November 2018, the application brought by the Commissioner against Vancouver Airport Authority (VAA) was heard on its merits before the Tribunal. At the time of writing, the Competition Tribunal had not released its decision.

In September 2016, the Commissioner brought an application against (VAA). VAA is a non-profit organisation that is charged with carrying out a statutory mandate to manage Vancouver International Airport in the public interest. Its board members are nominated by various levels of government and professional organisations. The application alleged that VAA controls the market for access to the airside (roughly the area within the Airport’s security
perimeter and outside the terminal), and that VAA is exercising that control in a way that substantially lessens or prevents competition in the market for the supply of galley handling services – the loading of in-flight meals onto aircraft at the airport. VAA filed a full response to the Commissioner's application, denying the Commissioner's allegations under all heads of the abuse of dominance provision.

In preparing for the hearing of this matter, the Commissioner produced a large volume of documents, but asserted ‘public interest privilege’ over a subset and refused to produce them to VAA. A series of decisions by the Competition Tribunal had established that the Commissioner was entitled to withhold from production in Tribunal (non-criminal) proceedings any document or information he had gathered from third parties in the course of his investigation by relying upon a blanket ‘public interest privilege’. VAA challenged the assertion of public interest privilege as a class privilege, arguing among other things that the operation of the privilege resulted in a serious imbalance in the procedural rights of the parties. The Tribunal, which considered VAA's challenge at first instance, rejected VAA's arguments, finding among other things that the Commissioner's ‘public interest privilege’ had long been recognised by Canadian courts.

VAA appealed the Tribunal's decision to the Federal Court of Appeal. In a decision issued in January 2018, the Federal Court of Appeal upheld VAA's challenge and abolished class-based public interest privilege. The decision rested on two pillars. First, the Court concluded that the privilege was not necessary, since there was no evidence to support the Commissioner's argument that abolition of the privilege would result in third-party sources being less inclined to provide information to the Commissioner owing to fear of reprisals. The Court noted that similar ‘candour’ arguments had been viewed sceptically by the Supreme Court of Canada, and that such scepticism was warranted given that competition law authorities in other jurisdictions carry out their investigative mandates without such a class privilege to rely upon. Second, the Court was concerned about the serious unfairness that can result from such a one-sided privilege. The effect of the decision – which will apply in all contested proceedings before the Tribunal into the future – leaves the Commissioner able to assert public interest privilege on a document-by-document basis. Such assertions of privilege, which will be fact-specific, are more likely to result in a fair process before the Tribunal.

ii  Trends, developments and strategies

The Bureau has continued its practice of seeking production and other orders under Section 11 to investigate reviewable practices. For example, in 2018, the Commissioner sought and obtained orders to obtain detailed financial and pricing records and interview a high-level executive in connection with an investigation into predatory pricing by WestJet Airlines Ltd's low-cost carrier, Scoop. Similar orders were obtained in 2016 against airlines such as First Air and Canadian North.

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

The Bureau can be expected to continue investigating and bringing enforcement actions in areas of the economy that it considers can benefit from innovation. The TREB, E-books and Softvoyage cases are just three examples of situations where the Bureau believed that it was appropriate to bring litigation to address business practices that it viewed as erecting barriers to entry or otherwise restricting innovation. In recent years, the Bureau has also conducted investigations of other companies, including Google, whose products and services are innovative. Given the Bureau’s continuing interest in promoting the conditions it believes are necessary for innovation, future investigations in these types of industries are likely.

IV MARKET STUDIES

Since his appointment, Commissioner Boswell has highlighted the importance of ensuring that the spark of innovation is not dampened by dated views on regulation.3 Under his leadership, the Bureau continues to focus on innovation industries.

i Fintech

On 26 September 2018, the Bureau released a progress report following the implementation of its market study into technology-led innovation in the Canadian financial services (fintech) sector. As expected, the Bureau adopted an advocacy approach and organised a number of outreach events. In the nine months since the publication of the study, the Bureau made formal submissions to advise Canadian decision-makers on issues such as the modernisation of payment systems, anti-money laundering and counter-terrorist activity financing regimes, and updating securities law frameworks so that they apply to virtual currencies. The market study was finalised by the Bureau in December 2017, and focused on three broad areas: payments and payment systems; different forms of lending, including crowdfunding; and advice in respect of investing. The report gives an overview of the regulatory and competitive landscape of these areas, and makes a handful of broad recommendations for policymakers and regulators, industry participants and customers (including consumers). These recommendations are intended to assist with the modernisation of the financial services regulation system in Canada and foster innovation through technology-neutral, principles-based regulation. The bulk of the Bureau’s recommendations would need to be implemented by other regulators (e.g., securities regulators), which suggests that the Bureau’s efforts in the fintech sector will be through advocacy. To this end, the Bureau committed to carrying out 10 fintech-related advocacy interventions in its 2018–2019 Annual Plan.

ii Big data

In September 2017, the Bureau published for public comment a white paper concerning ‘big data’. The paper represents an attempt to define what is meant by big data, offer views about how different provisions of the Competition Act might potentially apply to cases involving big data and summarise the Bureau’s experience to date with cases that involved different types of data.

3 ‘Advancing Competition in a Changing Marketplace’, Remarks by Matthew Boswell, Interim Commissioner of Competition, 10 October 2018 at Global Series 2018. This is available on the Competition Bureau’s website at www.competitionbureau.ca.
The Bureau’s white paper emphasises at the outset the need to ‘strike a balance’ in enforcement to ensure that innovation is not stifled by the collection and use of data, and that the Bureau considers the existing legislative framework largely effective for meeting novel cases that may arise in industries that feature big data. Importantly, unlike competition law agencies in other jurisdictions (e.g., France and Germany), the Bureau does not advocate changes to existing competition laws or novel application of existing laws in industries that feature big data. Among other things, the paper does not advocate for changes to merger notification rules to require notification of foreign companies that have minor revenues but large ‘market’ shares in Canada, or suggest that algorithms that monitor the pricing of rivals might be cartels absent some other illegal agreement among conspirators.

V MERGER REVIEW

Merger enforcement is one of the main tasks of the Bureau and has been a major source of competition enforcement cases.

The Bureau’s Mergers and Monopolistic Practices Branch reviews a wide range of mergers across all markets in or in relation to Canada to determine whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. The Commissioner has up to one year after a merger is substantially completed to challenge such mergers by filing an application with the Competition Tribunal for remedial relief, such as dissolution of the merger or divestiture of assets or shares or, with the consent of the merging parties, any other action.

The merger provisions of the Act apply to the acquisition of control over, or significant interest in, the whole or part of a business. Significant interest means the ability to materially influence the economic behaviour of the target company. The definition of ‘merger’ is broadly based to include the acquisition of shares or assets, amalgamations or combinations.

With limited exceptions, parties to a proposed merger of a certain size (summarised below) are required to file with the Commissioner certain information required by the Act, and wait a certain period of time before being in a legal position to close their proposed merger. It should be noted, however, that even in cases involving mergers below the statutory thresholds (summarised below) there is still jurisdiction under the Act for such smaller mergers to be subject to review under the merger provisions, whether or not those mergers were the subject of voluntary notification to the Bureau.

The merger notification provisions of the Competition Act contain a size of parties threshold and a size of transaction threshold, both of which must be met before advance notification of a proposed merger is required. For the size of parties threshold, the parties to the proposed merger, together with their respective affiliates, must either have assets in Canada that exceed C$400 million in aggregate value, or have had gross revenues from sales in the previous year in, from or into Canada that exceed C$400 million in aggregate value.

In 2019, the size of transaction threshold with respect to the acquisition of assets in Canada of an operating business is that either the aggregate value of the assets in Canada being acquired exceeds C$96 million in aggregate value, or the gross revenues from sales in or from Canada generated from the assets in Canada exceeds C$96 million. The dollar threshold of C$96 million is adjusted annually to account for inflation.

With respect to the acquisition of shares, the financial thresholds discussed above apply, and in addition a shareholding threshold must be crossed. The shareholding threshold is that as a result of such proposed acquisition the buyer together with its affiliates would hold more
than 20 per cent of the voting shares of a company whose shares are publicly traded, or more
than 35 per cent of the voting shares of a company whose shares are not publicly traded. If
the buyer already holds more than 20 or 35 per cent of the voting shares as applicable, but as
a result of the proposed transaction would acquire more than 50 per cent of the voting shares
of the target company, that proposed transaction would also be subject to merger notification
if the financial thresholds above are met and the exemptions to merger notification do not
apply.

The initial waiting period for a proposed merger subject to merger notification is 30
days after the required information is submitted to the Commissioner. This initial waiting
period can be extended if the Commissioner issues a supplementary information request
(SIR) to the parties to the merger before the expiry of the initial waiting period. If an SIR
is issued, the new waiting period becomes 30 days after full compliance with the SIR by
both parties. An SIR will likely be issued in cases requiring a very detailed examination to
determine if significant competition issues arise from the proposed merger. Such requests can
be extensive in nature.

i Significant cases

The Bureau continues to maintain a busy docket of merger reviews, including in respect of
transactions among Canadian companies and of non-Canadian companies with significant
assets or sales in Canada. Many of these reviews resulted in consent agreements requiring the
sale of assets or behavioural commitments. Recent notable cases include the following:

In May 2018, the Commissioner entered into a consent agreement with Metro Inc
in respect of its proposed acquisition of the Jean Coutu Group. As these companies offer
pharmacy distribution and franchise services, the Commissioner was concerned that, following
the implementation of the transaction, Metro would have an incentive to materially increase
upstream prices charged to pharmacists, decrease the quality of banner services provided to
pharmacists, or impact retail prices at pharmacies. To remedy the Commissioner’s concern
that the transaction was likely to substantially lessen competition in eight markets in Quebec,
Metro agreed to sell a number of its properties or leases to an alternate supplier of distribution
and banner services and terminate its pharmacy-related franchise and distribution agreements
in the contested markets.

In May 2018, the Commissioner entered into a consent agreement with Bayer AG
in connection with its proposed acquisition of Monsanto Company. The Commissioner
alleged that the loss of competition between Bayer and Monsanto would impact prices
and innovation in the canola seeds industry, and that the merged entity would have an
incentive to increase royalty rates to competing seed companies. In particular, the Bureau
was concerned that the transaction was likely to substantially lessen and prevent competition
for the supply of canola seeds and traits, soybean seeds and traits, seed treatments that
protect crops against nematodes, and carrot seeds. Pursuant to the consent agreement, Bayer
agreed to sell the affected businesses, and proposed BASF SE as the purchaser. The Bureau
subsequently reviewed the BASF SE acquisition. Prior to granting competition clearance,
the Commissioner entered into a consent agreement with BASF SE, whereby BASF SE was
required to divest a herbicide trait systems.

In November 2017, although it was not notifiable, the Commissioner began
investigating a transaction between Torstar Corporation and Postmedia Network to exchange
41 community newspapers’ properties and commuter daily newspapers. On the date of
closing, Postmedia Network and Torstar Corporation subsidiary Metroland Media Group Ltd. announced that 36 of the 41 newspapers would be closed following the deal. Ultimately, the Commissioner decided not to challenge the transaction before the Competition Tribunal.4

ii Trends, developments and strategies

The Bureau’s acceptance of efficiency claims in an increasing number of merger reviews demonstrates the power of this defence under Canadian law, and the importance of the efficiencies defence as a tool for companies seeking to engage in important strategic transactions. Obtaining the benefit of the efficiencies defence, however, requires careful and early planning, as well as the assistance of experts able to organise and marshal the evidence necessary to support such efficiencies claims.

In addition, the Bureau’s continued close cooperation with agencies in other jurisdictions – particularly the United States Federal Trade Commission and the Antitrust Division of the Department of Justice – highlights the importance of ensuring close collaboration between counsel in different jurisdictions charged with obtaining clearance for the same merger.

iii Outlook

The Bureau can be expected to continue treating the review of mergers as one of its most important priorities, particularly as the number of strategic mergers in the economy remains high. Unfortunately, it remains the case that the Bureau’s efforts are conducted amid a relative dearth of jurisprudence from the Tribunal on the subject of mergers. This is driven by various factors, including the fact that parties involved in mergers are typically under significant time pressure to close their transactions, and the process before the Tribunal does not at present accommodate the expedited consideration of mergers challenged by the Commissioner. This places a premium on ‘getting the deal done’, which can sometimes be at the expense of a detailed competition analysis. The Bench and Bar Committee of the Canadian Bar Association’s Competition Law Section has set up a Merger Process Fast Track Working Group to look into, and make recommendations for, how the review of challenged mergers can be expedited, to allow for the Competition Tribunal’s consideration of challenged mergers on a timeline more commensurate with the commercial realities of mergers. In January 2019, the Competition Tribunal released a Practice Direction on an expedited proceeding process that will improve the efficiency and effectiveness of Tribunal proceedings for appropriate matters.

VI CONCLUSIONS

The Bureau’s enforcement actions have been directed at furthering competition in a broad variety of Canadian industries, ranging from automotive parts, manufacturing, media, retail, e-commerce, fintech and air transportation. The Bureau has continued to advocate for Canadian consumers by promoting the benefits of increased competition in regulated sectors of the economy. In the future, the Bureau can be expected to focus its efforts on the consumer impacts of the digital economy, including technologies such as pricing algorithms and blockchain that may impede competition or innovation. The Bureau will also continue to collaborate with domestic regulators and policymakers, as well as its international counterparts on merger reviews and criminal and civil investigations.

4 As at the time of writing, the Bureau continues to investigate the transaction under Section 45 of the Act.
Recent developments are likely to reverberate for some time in Canadian competition law. Cartel investigations and prosecutions will remain a priority and continue, although the effect of the new immunity and leniency programmes on such investigations and prosecutions remains to be determined. Bureau enforcement activity will be affected by the developing Tribunal jurisprudence regarding the abuse of dominant position provision. The Federal Court of Appeal’s decision regarding public interest privilege will affect how future litigation is conducted before the Tribunal for years to come. The Bureau’s increasing recognition of the value of efficiencies underlines the importance of this defence as a tool in the arsenal of companies seeking clearance for their strategic mergers from the Bureau.
Chapter 6

CHINA

Michael Gu¹

I OVERVIEW

The year 2018 marked the tenth anniversary of the implementation of the PRC Anti-monopoly Law. The most influential event was the integration of the three former antitrust enforcement agencies. In 2018, the antitrust enforcement functions of China’s three former antitrust agencies – the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM) – were consolidated into a newly established agency, the State Administration for Market Regulation (SAMR). The establishment of the SAMR was approved by the National People’s Congress on 17 March 2018. The SAMR is responsible for the supervision of markets and the maintenance of market order. The SAMR comprises 27 divisions, including the Anti-monopoly Bureau, which is responsible for the supervision and enforcement of the Anti-monopoly Law. The bureau’s functions include drafting antimonopoly rules and guidelines, enforcing the Anti-monopoly Law, assisting enterprises in responding to foreign investigations, promoting the fair competition review system, undertaking international cooperation and undertaking the day-to-day work of the State Council Anti-monopoly Commission, etc.

Generally, antitrust enforcement has become the norm. However, the total amount of antitrust fines imposed by the SAMR in 2018 was relatively low compared with that in previous years – only 183.6 million yuan. While in 2017 the total amount reached more than 600 million yuan. According to the information disclosed in an SAMR meeting,² the SAMR has initiated 32 investigations on alleged monopoly agreements and abuse of market dominance in 2018. Among them, 15 cases were closed. The penalties touched a variety of industries (transportation, pharmaceutical, nature gas, electricity and furniture, etc.). It is notable that in 2018, the SAMR imposed a fine of 84 million yuan in total on two subsidiaries of Petro China Company Limited (Petro China) for resale price maintenance. Also, the identification of competitors in the Shenzhen tally companies case demonstrates SAMR’s strict approach and its zero tolerance for monopolistic behaviours.

In 2018, the SAMR maintained a consistently rigorous and prudent attitude towards merger control review. The number of cases concluded was significantly increased and the efficiency was remarkably improved. As to the cases that were conditionally approved, the SAMR imposed various tailored conditions. In addition, the SAMR investigated more non-filing cases and imposed more penalties on the non-filers compared with 2017.

¹ Michael Gu is a founding partner of AnJie Law Firm. The author would like to thank associates Sun Sihui and Grace Wu for their contributions to this chapter.

i Prioritisation and resource allocation of enforcement authorities

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

As to legislative work, the SAMR promulgated two sets of measures on the administrative penalty procedures to regulate the investigations initiated by the SAMR. On 26 December 2018, the SAMR promulgated the Interim Provisions on Administrative Penalty Procedures of the SAMR and the Interim Measures for Administrative Penalty Hearings of the SAMR. These two sets of measures apply to the investigations launched by the SAMR, including investigations into antimonopoly behaviours. The two sets of measures clarify the principle of case jurisdiction, rules for investigation, and evidence collection, retrieval, production and preservation, and hearing procedures. Furthermore, the two sets of measures regulate the time limit for the case handling. After the implementation date of these measures (1 April 2019), it is expected that the investigation, hearing and penalty procedures will be more transparent and predictable.

Regarding the legislature in merger control review, the SAMR revised seven guidelines in 2018. However, the amendments concerned only wording changes due to the institutional reform. There is no material change compared with the guidelines implemented by MOFCOM previously.

The SAMR was relatively active in its antitrust enforcement practices after integration. The agency began to publish its penalty decisions on its website from June 2018. In 2018, the SAMR published seven cases and its local counterparts published 14 cases. In addition, the SAMR and its local counterparts published five cases that were terminated or suspended without any penalties.

As to merger control review, according to data published on its website, the SAMR unconditionally concluded 444 cases in 2018, a significant increase from 325 in 2017. Furthermore, four cases were conditionally cleared in 2018. Meanwhile, the SAMR significantly strengthened its supervision of and penalties for non-filing parties. A total of 13 penalty decisions were published throughout the year, which reached a peak of non-filing enforcement crackdown.

ii Enforcement agenda

The SAMR stated in its press conference on 16 November 2018 that the antitrust enforcement authority has been keeping a close eye on suspected monopolistic behaviours in key sectors that are of particular concern to the general public such as automotives, gas, power supply, water supply, telecommunications, pharmaceutical, electricity, education,

---

finance, insurance and architecture, etc. Additionally, the SAMR will enhance international coordination regarding competition policies and antitrust enforcement, as the status of competition rules in the international economic and trade rules system is increasingly important. The newly established antitrust agency will strengthen antimonopoly international exchanges and cooperation; safeguard fair competition in the international market; strengthen consultations on multiple and bilateral competition issues; and establish rules for protecting investment and trade liberalisation.

In terms of merger control, the SAMR’s law enforcement maintained MOFCOM’s professionalism and stability after the integration. According to data released by the SAMR, the number of unconditional approved cases in 2018 increased significantly compared with that in 2017. However, in practice, strict rules concerning the material and data required by the SAMR still apply. In particular, during the pre-review stage before official case acceptance, notified parties must often submit detailed materials. Therefore, this requirement may also extend the wait time before case filing. As to conditionally approved cases, the SAMR attached various tailored conditions specifically addressing competition concerns. In addition, a number of ‘gun-jumping’ cases were published in 2018 and the increased penalties against non-filers showed that the SAMR is strengthening its enforcement crackdown on non-filers.

II CARTELS

The number of cartel cases reached a peak in 2018. The SAMR and local agencies concluded and published 13 cartel cases in 2018. The investigation and penalties targeted industries including manufacturing, training, shipping and ports, architecture, gas, medical, furniture, engineering testing, fireworks, etc. However, the amount of fines imposed by the SAMR was relatively low compared with that of previous years. The most significant case was the Tianjin Storage Yard cartel case,\(^6\) in which 17 enterprises were imposed a total fine of 45 million yuan. In addition, the identification of competitors was further clarified by the SAMR in the Shenzhen tally companies case.\(^7\) Also, trade associations remained one of the focuses in the antimonopoly law enforcement by the SAMR. Trade associations were involved in five out of the 13 cartel cases.

i Significant cases

**Shenzhen tally companies case**

On 20 July 2018, the SAMR published a decision fining two Shenzhen tally companies a total of 3,163,108 yuan for entering into a horizontal monopoly agreement. According to the decision, China United Tally Shenzhen and China Ocean Shipping Tally Shenzhen reached and implemented an agreement to divide sales and service areas for the tallying market in the western area of the Port of Shenzhen. In addition, the two companies raised tallying prices from May 2013 to August 2016.

The notable feature of this case lays in the identification of the companies as independent competitors, for the two companies share the same shareholder, who owns a 50

---

\(^6\) The original Chinese penalty decision is available at the website of Tianjin Port Storage Yard: http://samr.saic.gov.cn/gg/201812/t20181211_277378.html.

\(^7\) The original Chinese penalty decision is available at the SAMR’s website: http://samr.saic.gov.cn/gg/201807/t20180720_275163.html.
per cent share in the two companies respectively. First, the SAMR found that the companies’ ownership structures did not negate their competitive relationship. Although the shareholder owned a 50 per cent interest in both companies, it performed different roles for each. The shareholder was the controlling shareholder in one tallying company while it did not hold a controlling position in the other tallying company. Second, the SAMR found that the two companies had been independently operated and managed. In addition, the SAMR relied on the companies’ articles of association and inquiry records of relevant staff to prove that there had been a competitive relationship between the two tallying companies. However, such detailed information was not disclosed in the SAMR’s decision.

During the investigation, the two companies argued that they were not competitors since they were both affiliates within the same group. However, the SAMR dismissed this argument for a number of reasons. It noted that according to the relevant provision regulating port management issued by the State Council and the Ministry of Transport: (1) port tally companies should introduce a competition mechanism to the market; and (2) any two tallying companies in one port cannot be controlled by the same investment entity. It seems that the SAMR adopts a strict view on the identification of competitors. Normally, if one shareholder owns 50 per cent of the shares respectively in two companies, the two companies will be regarded as jointly controlled by the same shareholder (i.e., the same entity). Moreover, the fact that two companies are actually competing with each other does not necessarily mean that they constitute competitors in the sense of the Anti-monopoly Law, for the reason that different subsidiaries in the same group can also compete with each other.

This is one of the first cases to be announced by the newly established SAMR and may therefore indicate its attitude towards certain industries and behaviours. In particular, the way in which the competitors in this case were identified could raise new compliance challenges for companies operating business in China.

**Tianjin Storage Yard cartel case**

On 16 November 2018, Tianjin Development and Reform Commission concluded the most high-profile cartel case of the year in terms of the total amount of penalties. A total of 17 port logistics companies were accused of reaching and implementing price collusion in connection with general surcharges and unloading charges in Tianjin port. The 17 port logistics companies were fined a total of 45 million yuan.

The SAMR’s probe into this case was triggered by a voluntary self-reporter – Tianjin Waidai Logistic, which was eventually exempted from punishment by virtue of the leniency programme.

According to the penalty decision, from 2010, the port logistics companies had discussed the price of general surcharges and unloading charges in Tianjin port by means of signing proposals, holding meetings, and exchanging emails and telephone discussions. Particularly, these logistics companies reached many proposals on fixing the price of general surcharges and unloading charges in December 2010, April 2011, March 2012 and December 2012. In this way, these logistics port companies formed a relatively stable price alliance with each other.

According to the evidence, the involved companies collectively increased the price of general surcharges and unloading charges several times. The duration and degree of such price rises were basically the same as those agreed in the monopoly agreements. The SAMR concluded that the evidence showed that the involved enterprises reached and implemented the horizontal monopoly agreement, which violated Article 13 of the Anti-monopoly Law.
As to the penalties, considering the responsive cooperation, rectification made by the companies involved, along with the nature, extent and duration of the illegal behaviours, the SAMR imposed fines amounting to 2 to 5 per cent of their respective revenues in 2017. However, the first reporter that voluntarily disclosed its collusion to the SAMR enjoyed the benefits of the leniency programme – being exempted from penalties.

In recent years, the antitrust authorities have paid great attention to the shipping and port industry. In late 2016, the NDRC launched investigations into container shipping companies for suspected price fixing.\(^8\) A total of 18 shipping companies voluntarily reduced their terminal handling charges following the NDRC’s probe. Before that, the NDRC cracked down on international ocean shipping companies\(^9\) in 2014. Furthermore, in 2018 the SAMR remained its concerns on the shipping and port industry and concluded three cases in this industry. The anti-monopoly enforcement authorities will keep an eye on this industry and regulate the anticompetitive behaviours as well as the disorder phenomenon in the coming year.

**ii Trends, developments and strategies**

2018 saw a significant increase in the number of cartel cases. However, the total amount of penalties was relatively low. Trade association remains the target of antitrust agencies. Five of the 13 cases involved trade associations. For example, Zhongshan Gas Trade Association was fined 150,000 yuan by Guangdong Provincial Development and Reform Commission for organising its members to conduct market segmentation\(^10\) and Beihai Driver Training Association was fined 250,000 yuan for organising its members to reach and implement price collusion agreements.\(^11\) Trade associations are self-regulatory agencies that provide industry services, of which members are usually ‘peer’ competitors that share a fierce competitive relationship. Industry associations cannot organise their members to reach and implement horizontal monopoly agreements even though industry associations may be exploited by some leading members on occasion.

Moreover, the SAMR holds a strict view in cartel cases, particularly on the identification of competitors. Two companies in the same industry with their 50 per cent shares respectively owned by the same shareholder may still be regarded as competitors. When enterprises assess whether their affiliates could be identified as competing parties, the equity structure should not be the only consideration. The actual operating situation (the decision power, the board of directors and the concurrent of senior executives, etc.) should also be considered.

**iii Outlook**

The supervision and investigation of cartel cases remains the focus of the antitrust authorities. It is expected that in 2019 the SAMR and local agencies will reinforce their supervision on cartel and enforcement efforts so as to uphold fair market competition. According to the

---

\(^8\) For a detailed discussion in relation to the investigation on the container shipping companies, see *The Public Competition Enforcement Review* (tenth edition), pp. 84.


Interim Provisions on Administrative Penalty Procedures of the SAMR promulgated in 2018, the provincial level Administrations for Market Regulation (AMRs) will be responsible for enforcing the antimonopoly law in their respective province. However, the SAMR may take over the antitrust probe from local AMRs when it comes to high-profile cases. At the same time, the authorities will strengthen their cooperation with competition authorities from other jurisdictions in dealing with international cartel cases.

Moreover, the SAMR published the Rules on Prohibition of Monopoly Agreements for public consultation on 3 January 2019. The formal rules are expected to be published in 2019. The guidelines may provide enterprises with a more comprehensive and clearer guidance on antimonopoly compliance.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In 2018, the SAMR and local agencies concluded four abuse of dominance cases. Among these cases, two cases were terminated without any penalties. This shows the importance of active rectification and cooperation during the investigation.

Furthermore, the antitrust agencies concluded and published only one case in relation to vertical restriction cases. However, the investigation on resale price maintenance was still one of the key antitrust enforcement priorities.

i Significant cases

Chlorphenamine APIs case

On 30 December 2018, the SAMR issued its penalty decisions against Hunan Erkang Pharmaceutical Management Co, Ltd (Erkang) and Henan Jiushi Pharmaceutical Co, Ltd (Jiushi) for their abuse of dominance in relation to chlorphenamine active pharmaceutical ingredients (APIs). The two enterprises were fined a total of 10 million yuan.

The relevant market in this case was chlorphenamine APIs, which are widely used to produce anti-allergy medicine. In China, there are only three licensed manufacturers of chlorphenamine, including Jiushi, India Supriya Lifescience Ltd (Supriya India) and Shanghai Harsen Morden Pharmaceutical Co, Ltd. Erkang did not engage in production of chlorphenamine. However, Erkang signed an exclusive distribution agreement with Supriya India to control the source of import of chlorphenamine. On the other hand, Erkang entered into a strategic cooperation agreement with Jiushi in February 2018 to collectively supply chlorphenamine. According to the penalty decision, the combined market share of Erkang and Jiushi reached 96.38 per cent in 2017. Therefore, the SAMR deduced that Erkang and Jiushi collectively held the dominant market position in chlorphenamine APIs.

According to the penalty decision, Erkang and Jiushi abused their dominance by: (1) refusing to supply to downstream purchasers on the grounds that chlorphenamine was out of stock or other reasons that led to unavailability of chlorphenamine; and (2) bundling sales of chlorphenamine APIs with Erkang’s other pharmaceutical accessories without a valid reason.

In addition to the aforementioned behaviours implemented by Erkang and Jiushi, Erkang had raised the price of chlorphenamine to 2,940 yuan per kilogram, which was four

---

times the average purchase cost of chlorphenamine as at July 2018. Furthermore, the SAMR found that the price was also much higher than 700 yuan per kilogram, which was offered by Jiushi to its downstream manufacturers.

The SAMR concluded that Erkang and Jiushi had abused their dominance and imposed a total fine of 10 million yuan. In addition to refusing to supply without a valid reason and bundling sales, Erkang also sold chlorphenamine at unfairly high prices. That may be the reason why Erkang was fined 8 per cent of its 2017 revenue, which was relatively higher than the penalties imposed on the other pharmaceutical violators. Meanwhile, 8 per cent of revenue was the highest percentage out of the penalties imposed in 2018.

In recent years, antitrust law enforcement authorities have shone a spotlight on enterprises engaged in the manufacture and sale of APIs. The legal risks associated with the following behaviours in APIs industry are relatively high: (1) refusal to deal; (2) imposing unfair prices; (3) tying and bundling; and (4) imposing unreasonable trading conditions, etc.

**Petro China case**

On 26 January 2018, the NDRC penalised two subsidiaries of Petro China – PetroChina Daqing Oilfield Natural Gas and PetroChina Natural Gas Sales Daqing – for their maintenance of the minimum resale price on their downstream distributors for gas sold to consumers. The SAMR published the above penalty decision on 27 July 2018. According to the penalty decision, the two Petro China subsidiaries had been hit with a total fine of 84.06 million yuan, amounting to 6 per cent of their respective revenues for the previous year.

The SAMR found that the two branches had reached and implemented a minimum resale price maintenance agreement with 13 downstream compressed natural gas filling stations in Heilongjiang Province. According to the decision, the two branches conducted the following wrongdoings:

\( a \) They held meetings with the downstream purchasers to discuss the minimum resale price and arrange for the signing of such agreements. Also, they circulated a supplementary notice to enhance the implementation of such vertical agreements.

\( b \) The two companies supervised the involved companies to implement such vertical agreements and required the downstreamers to submit information of targeted consumers, volumes and selling prices at a regular interval. In addition, the two companies built up a group to supervise the implementation of the agreements by conducting on-site inspections.

\( c \) The two companies threatened to reduce or suspend gas supplies to the downstreamers that refused to obey the policy of resale price maintenance.

The SAMR held that the two companies had violated Article 14(2) of the Anti-monopoly Law by concluding and implementing a monopolistic agreement to restrict the minimum resale price of gas. The companies’ violation had severely restricted and eliminated competition in the natural gas market, undermined fair competition and impaired consumer interests. The SAMR imposed fines equivalent to 6 per cent of the two companies’ respective revenues for the last year. PetroChina Daqing Oilfield Natural Gas was fined 38.76 million yuan and PetroChina Natural Gas Sales Daqing was fined 45.3 million yuan.

---

This case is a typical monopolistic case involving resale price maintenance. The entities that were penalised are subsidiaries of PetroChina, a centrally administered state-owned enterprise. And the industry involved in this case is one of the natural monopoly industries. The case implies that the SAMR is expected to be more aggressive in its antitrust enforcement. Whether a company is a foreign company or state-owned, and whether the related industry is or is not a special industry, if a company violates the Anti-monopoly Law, it should expect to be scrutinised by the SAMR.

ii Trends, developments and strategies

As in the past, antitrust law enforcement authorities have kept an eye on the medical industry, particularly on the enterprises engaged in the manufacture and sale of APIs. The dominant position of the APIs enterprises can be explained for the reasons that: (1) few enterprises actually compete in certain APIs markets; (2) APIs manufacturers provide the active ingredients of drugs with a strong ability to control the market and downstream pharmaceuticals have no choice but to submit to and rely on the APIs manufacturers; and (3) China has a strict certification system for supervising the production of APIs and it is difficult to enter into APIs markets.

Another trend in the cases concluded by the antitrust authorities is the increase of terminated cases. The decisions to terminate various investigations revealed that in such cases, the companies submitted their commitments to rectify their behaviours and asked for a suspension. The antitrust enforcement agencies decided whether to suspend the investigation based on the nature of the illegality of violations, the duration of the illegal activities, the cooperation with the investigation and the commitment of rectification submitted by the companies. According to the published cases, normally one year after rectification, the companies involved were allowed to submit an application for termination of the investigation to the antitrust enforcement agencies. The agencies exercise discretion power when deciding whether to terminate an investigation according to the performance of rectification.

iii Outlook

In 2018, the SAMR and local enforcement agencies announced five cases in which the investigation was suspended or terminated. The termination of investigated cases reflects the importance of cooperation and active rectification by the relevant enterprises under investigation. All of the five cases targeted abuse of market dominance, focusing on the wrongdoings of tie-in sales and imposing unreasonable conditions.

Compared with cartel cases, the number of dominance cases and resale price maintenance cases was small in 2018. This is possibly because the SAMR was busy with the establishment and integration of the new antitrust authority; as the investigation of and the evidence collection in dominance cases are much more difficult than cartel cases. It is estimated that the SAMR will strengthen its crackdown on dominance cases and resale price maintenance cases in 2019, particularly with the assistance of local antitrust authorities.
IV MERGER REVIEW

According to the data released on the SAMR’s website, in 2018 the SAMR unconditionally approved 444 cases, a significant increase from 2017 (325 cases). Among these cases, 359 cases were concluded in Phase I (30 days from the acceptance date), accounting for 80.8 per cent of all concluded cases. The conclusion rate increased considerably compared with that in 2017 (76.9 per cent cases concluded in Phase I).

As to simple cases, a total of 362 cases were concluded in 2018, accounting for 81.53 per cent of all cases. The proportion of simple cases increased slightly compared with that of 2017 (the number of simple cases accounting for around 80.6 per cent of total cases in 2017). On average, simple cases took 16 days to be concluded, which is notably reduced from 24 days in 2017. And 99.4 per cent of the simple cases were cleared within 30 days after they were accepted by the SAMR. This demonstrates that simple case procedure plays an active role in enhancing the efficiency of concentration filing, particularly in the reduction of reviewing time.

i Significant cases

Penalties for non-filers

In 2018, the SAMR significantly strengthened its supervision of and penalties for non-filing parties. Over the course of the year, 13 decisions were published, a sign that the SAMR is cracking down on non-filers. By the end of 2018, the SAMR/MOFCOM had released 30 non-filing cases and imposed total fines of 9.85 million yuan on 47 undertakings. The biggest fine issued was 400,000 yuan, while the smallest was 150,000 yuan. According to the statistics, since the merger review function was transferred from MOFCOM to the SAMR, penalty amounts have increased notably. The fine imposed on each party to a non-filing joint venture increased from 150,000 yuan to 300,000 yuan. The SAMR initiates investigations of non-filing based on self-observation, third-party reporting, and voluntary reporting by notifiable parties.

The non-filing of notifiable acquisitions is usually referred to as ‘gun jumping’. The most common oversight of notifiable parties is the non-fulfilment of filing obligations in a step-by-step acquisition. The implementation of the first-step transaction indicates that the concentration has started; failure to file first-step transactions with the SAMR will constitute gun jumping. A typical case is the acquisition of Eldorado by Paper Excellence BV. The SAMR considers the object of the acquisition and the relationship between the different steps. Notifiable parties must submit their notifications and file with the SAMR before implementing the first step of a package deal composed of several steps.

In addition, the SAMR has no mercy on the non-filers that failed to file with the competition agency long time ago; and it conducts retrospective investigations once a failure has been discovered. For example, Linde Hong Kong was penalised three times in 2018 for its non-filing of three former joint ventures. These joint ventures were established in either 2011 or 2012. It is notable that the SAMR severely punished non-filing that happened seven years ago.

The SAMR may impose a maximum fine of 500,000 yuan on non-filers. The nature, extent and duration of the non-filers’ behaviour must be considered, as well as the transaction’s
China

competitive effects. In addition to fines, penalties may include (1) the cessation of the concentration; (2) the disposal of shares or assets by a specified deadline; (3) the transfer of certain business operations by a specified deadline; and (4) other necessary measures (e.g., publication of the penalty decision). In addition, once penalties have been published, the non-filer’s business reputation and social image will be damaged and its subsequent notification or filings with other government agencies may be adversely affected.

Bayer’s acquisition of Monsanto

On 13 March 2018, MOFCOM conditionally approved the acquisition of Monsanto by Bayer. The case was filed on 5 December 2016 and accepted by MOFCOM on 24 February 2017 after withdrawal and refile by Bayer due to the change of the agent firm. On 8 September 2017, the parties withdrew the case again and further refiled the case after several days.

MOFCOM found that Bayer and Monsanto were overlapped in 12 product markets (including different kinds of vegetable seeds, traits and digital agriculture) and vertically connected in three markets. MOFCOM believed that the concentration might have the impact of eliminating and restricting competition on the Chinese market of non-selective herbicides, vegetable seeds (e.g., long-day onion seeds, carrot seeds under cutting process for sales, and large-fruit tomato seeds), and the global market of corn, soybean cotton and oilseed rape traits and digital agriculture.

Bayer and Monsanto were two global agriculture giants and collectively owned over 60 per cent of the overlapped product markets. The total market share of the two parties was much higher than the other competitors in the relevant market. MOFCOM concluded that the transaction would eliminate the competition between the two parties and would have adverse effects on the relevant markets. Also, MOFCOM believed that Bayer had the motive and ability to conduct bundling sales of seeds, traits and agrochemical products concerning non-selective herbicides. And there were not likely to be any new effective competitors in the relevant Chinese market in the short term. In addition, MOFCOM believed that the concentration would have negative impacts on the technical progress in relevant traits. Before the transaction, the two parties both had the power of innovation in the market of digital agriculture with large investments in research and development. Upon completion of the transaction, the entity may reduce its input in innovation and therefore would have adverse impacts on technical progress. This is the second profound case in terms of concern over innovation in the industry of agricultural chemistry. In the Dow/DuPont case, MOFCOM also considered that the combination of the two chemical giants would reduce the motivation and investment in innovation.

MOFCOM notified the filing parties of the adverse effects on the relevant market and held several rounds of negotiations with the parties. Upon evaluation, MOFCOM concluded that the final remedy proposal submitted by the parties would reduce the negative effects of the concentration. The conditions imposed on the entity after the concentration included: (1) to divest Bayer’s business of vegetable seeds worldwide, including relevant facilities, personnel, intellectual property rights and assets; (2) to divest Bayer’s non-selective herbicide 15

The announcement is available at MOFCOM’s website: http://fldj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml.


© 2019 Law Business Research Ltd
business; (3) to divest Bayer’s corn, soybean, cotton and oilseed trait business; and (4) to allow Chinese agricultural software and application developers to connect their software to the platform of the combined entity within five years on the basis of fairness, reasonableness and non-discriminatory clauses, and allow all Chinese users to register and use the products.

The merger of Essilor International and Luxottica Group

On 25 July 2018, the SAMR conditionally cleared the merger of Essilor International and Luxottica Group. This marked the first conditional merger clearance case reviewed by the SAMR. The SAMR concluded that the proposed merger might exclude or restrict competition in the Chinese wholesale markets for optical lenses, optical frames, and sunglasses, as well as the Chinese retail market for glasses products.

The parties submitted the merger filing on 23 May 2017 and the SAMR officially accepted the case on 17 August 2017. The parties withdrew their filing on 11 February 2018, which was near the end of extended review period. The SAMR accepted the refiling of the parties on 7 March 2018 and conditionally cleared the merger in Phase II. It took more than 400 days from the date of first submission to the date of conditional clearance. During the case review, the SAMR solicited feedback from relevant government departments, industry associations and downstream enterprises, and held several seminars to assess the definition of the relevant markets and the structure of the market competition. Also, the SAMR hired an independent consulting party to conduct economic analysis on the proposed concentration.

The SAMR defined seven relevant product markets – six wholesale markets and one retail market. As to the geographic market, the geographic market of the wholesale products was China, and the geographic market of the retail glasses was the Chinese urban market. The parties collectively owned an almost 50 per cent market share in the relevant product markets, while the market share of the other competitors was relatively lower than the combined entity. After analysis, the SAMR concluded that:

\[a\] the proposed transaction was expected to further strengthen the combined entity’s control over the wholesale markets for mid-to-high-end optical lenses, low-end optical lenses and the mid-to-high-end sunglasses;

\[b\] the proposed transaction would increase the likelihood of the combined entity engaging in bundling or tie-in sales in the market for optical lenses, optical frames and sunglasses; and

\[c\] the proposed transaction may eliminate or restrict competition in the glasses retail market by enforcing unfair trading terms and refusing to supply popular products through a special programme.

Therefore, the SAMR concluded that the combination of the two eyeglasses enterprises might have anticompetitive impacts on the Chinese relevant markets. After multiple rounds of negotiations, the SAMR concluded the remedies proposed by the two enterprises would eliminate the impacts of the combination.

Essilor, Luxottica and the combined entity are required to fulfil the following obligations:

(1) not engaging in the tie-in practice nor imposing unreasonable trading conditions without justifiable reasons; (2) making their special programme available to Chinese eyeglasses stores and let the stores participate in the programme by their sole discretion; (3) not imposing

exclusive conditions on Chinese stores nor prohibit or restrict Chinese stores from selling lenses, frames, and sunglasses supplied by competitors; (4) supplying eyeglasses products and necessary trademark licences on fair, reasonable, and non-discriminatory terms; (5) not selling eyewear products at below-cost prices without justifiable reasons; and (6) reporting to the SAMR on any proposed acquisition of a Chinese target within 10 working days of signing the acquisition agreement.

In this case, the SAMR hired a third party to study the possible impacts caused by the concentration, and made the prohibition of tie-in practice one of the remedies to approve the combination. Additionally, Chinese antitrust agency increasingly relies on a variety of analysis tools to assist in the case review (e.g., economic analysis, research reports from third parties).

United Technologies’ acquisition of Rockwell Collins

On 23 November 2018, the SAMR conditionally approved the proposed acquisition of Rockwell Collins by United Technologies. The SAMR was concerned that the transaction might eliminate or restrict competition in 14 markets. The SAMR believed that after the transaction the combined entity’s market share in the 14 markets would reach 50 per cent, even almost 70 per cent in some markets. The SAMR concluded that:

a the transaction may further enhance United Technologies’ market power in each of the 14 overlapped markets;

b the transaction may eliminate the close competition between the two companies in the market for rudder brake pedal systems, while before the transaction the two parties were two major players closely competing with each other;

c after the concentration, the parties would have the ability to conduct bundling sales, which would eliminate and restrict competition in the relevant market, particularly for the markets in which downstream aircraft manufacturers have weak bargaining power; and

d the transaction may also discourage United Technologies from investing in the research and development of innovative products in the market for oxygen-supply systems. Also, United Technologies may slow the pace of new-product launches, which will eventually have an adverse impact on competition and technological progress.

It is notable that the SAMR narrowed the total market volume of some overlapped markets in this case. The SAMR believed that the concentration would result in the parties obtaining a share of 65 to 70 per cent in the global adjustable horizontal stabiliser actuator market. Based on the product’s total volume, the market share would be only 40 to 45 per cent after the acquisition. However, the SAMR believed that the part produced by aircraft manufacturers for their self-use would not enter the market; as such, that part was excluded. This would result in the market share of the merged entity increasing to 65 to 70 per cent after the acquisition. The exclusion of the self-use part from the calculation of market share also happened in the global rudder brake pedal system market. This calculation method would make the total market volume shrink and the market share increase, which would have a material change on the evaluation of the competition.

---

China

The SAMR cleared this case with both structural and behavioural remedies. Compared with structural remedies, behavioural remedies were customised. The SAMR attached various customised conditions closely related to competition concerns after carefully studying and analysing the relevant market, the characteristics and competition status of the upstream and downstream market, and the economic analysis. The structural remedies included the divesting of business units and R&D projects; and the behavioural remedies included the prohibition from tying or proactively bundling, or imposing other unreasonable conditions on transactions, to force Chinese customers to purchase product portfolios. Also, the combined entity shall not substantially change their current business models in some affected markets if the demand for related products still exists in Chinese markets.

Furthermore, the SAMR had particular concerns regarding possible bundling in complementary product markets. The SAMR may intervene when the economic analysis shows that the merged entity may gain more profits by bundling or tying after the concentration. The SAMR was concerned with the possible leverage effect associated with the bundling or tying. The entity may leverage its power in a dominant market into the other market and therefore damage the market competition.

ii Trends, developments and strategies

The SAMR has become more stringent and detail-oriented with respect to the analysis of relevant markets and the competition impact for mergers. All the four conditionally cleared cases in 2018 were withdrawn just before the review period expired and subsequently refiled. The long review period observed in each of the above cases was partly due to the complicated market and a lack of authoritative data. Case withdrawal can buy the parties more time to communicate with the SAMR if the concentration would otherwise be prohibited due to the lack of satisfactory commitments.

The long review process for the conditionally approved cases also reflects that the SAMR takes a prudent approach by consulting extensively with third parties, including industry regulators, industry associations, upstream and downstream enterprises and competitors. In contrast, for the cases unconditionally approved, the rate of case review increased significantly. Among the unconditionally approved cases, 80.8 per cent of cases were cleared in Phase I (i.e., 30 days from the acceptance date). In particular, for the cases applied to the simple case review procedure, 99.4 per cent cases were concluded in Phase I. On average, simple cases took only 16 days to be concluded. It is worth mentioning that the SAMR may not officially accept a case unless the materials can satisfy the requirements.

iii Outlook

It is expected that in 2019 the SAMR’s merger control enforcement will maintain its professionalism and stability. In addition, the large number of gun-jumping cases and the increased fines indicate that the SAMR is gradually strengthening its enforcement crackdown on non-filers. Furthermore, the proposed revision of the Anti-monomopoly Law is expected to increase the penalties for non-filing.

V CONCLUSIONS

i Pending cases and legislation

In May 2018, the SAMR raided the China offices of memory chip makers Micron, Samsung, and SK Hynix, all of which are major players in the market for dynamic random access memory.
memory (DRAM). The raids were prompted by complaints from downstream Chinese companies that the three giants were engaged in price collusion as well as other unfair conducts. On 16 November 2018, the SAMR disclosed in its press conference\textsuperscript{19} that the SAMR has already received a significant amount of evidence from the three companies and the investigation is still ongoing with significant progress.

As to the legislative work, proposed guidelines to be promulgated by the SAMR include:
\begin{itemize}
  \item[a] Provisions on the Prohibition of Monopolistic Agreements;
  \item[b] Provisions on the Prohibition of Abuse of Dominant Market Position;
  \item[c] Provision on the Prohibition of Abuse of Administrative Power to Exclude and Restrict Competition; and
\end{itemize}

\section*{Analysis}

In general, the SAMR will step up its antitrust enforcement in 2019. After 10 years of Anti-monopoly Law implementation, China’s antitrust enforcement agency has accumulated a wealth of experience. On 27 December 2018, the SAMR held a national market regulation conference. Zhang Mao, the director of the SAMR, summarised the work of 2018 and the work arrangement for the next year, emphasising that competition enforcement would be strengthened in 2019. He stated that enforcement will continually focus on industries related to livelihood such as public welfare, pharmaceutical, building materials, and daily consumer goods. In addition, the SAMR will strengthen its investigation on monopoly agreements and abuse of dominant position.\textsuperscript{20} Furthermore, in 2019, we expect more guidelines will be promulgated that will promote antimonopoly law enforcement and promote the establishment and development of a relatively mature and complete antimonopoly legal framework.

In terms of merger control review, the enforcement of the SAMR promises to be more rigorous and meticulous. In particular, the SAMR is enhancing its crackdown on non-filers. Companies should pay close attention to the nature and pattern of the merger control review, as well as the revision of the Anti-monopoly Law. Furthermore, companies are advised to acknowledge the thresholds and criteria of merger filing in order to fulfil their obligations to avoid penalties and any adverse consequences of closing a transaction.

\textsuperscript{19} The report of the press conference is available at: http://www.china.com.cn/zhibo/content_72615279.htm.
I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

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

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

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

ii Enforcement agenda

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

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

---

1 Enrique Álvarez is a partner and Darío Cadena is an associate at Lloreda Camacho & Co.
2 Article 6, Paragraph 1 of Article 8 and Article 9 of Law 1340 of 2009.
promoting competition in the oil, gas and power markets; and
promoting competition in the pharmaceutical market. 4

According to the WEF Global Competitiveness Report 2017–2018, the effectiveness of Colombia’s antitrust policy is ranked 71st out of 137 countries, a loss of two places compared to the 2016–2017 rankings. Despite this, it is important to note SIC was nominated in 2012 by Global Competition Review as one of the best competition authorities in the Americas, and currently holds a three-star rating.

SIC’s principal achievements during 2018 were as follows: 5

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

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

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

However, SIC cannot review:

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

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

According to the Private Competitiveness Council, the recommendations to enhance antitrust regulations in Colombia are as follows: 7

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

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

---

7 See footnote 5.
II CARTELS

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

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

- directly or indirectly fixing prices;
- fixing discriminatory conditions in commercialisation against third parties;
- market allocation among producers or distributors;
- allocating production or supplying quotas;
- allocating or limiting the supply of production inputs;
- limiting technical developments;
- mandatory bundling sales;
- refraining from producing a good or service, or affecting its production levels;
- bid rigging or having the effect of distributing contract awards of competitions, or setting terms of the request for proposals (RFP) for both public and private processes; and
- preventing third parties from accessing markets or marketing channels. 8

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

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

i Significant cases

Since 2016, SIC has issued several major decisions against cartels in the toilet paper, baby nappies and sugar markets. The decisions involving toilet paper and baby nappies producers are significant, as the investigations began through the leniency programme and mark the first time fines have been waived due to the collaboration received during the investigation proceedings.

---

8 Added by Article 16 of Law 590 of 2000.
9 Law 599 of 2000 as amended by Law 1,474 of 2012.
In the Toilet Paper case, in which SIC found evidence of a price-fixing scheme, the agency levied fines against four companies and 21 individuals for a total of 185 billion Colombian pesos, while the fines against 12 sugar mills and 12 individuals that were found to have engaged in a scheme to allocate production quotas reached 260 billion Colombian pesos.

ii  Trends, developments and strategies

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

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

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

iii  Outlook

After using, for the first time, the leniency programme to prosecute cartels, SIC determined that it was necessary to refine the rules governing leniency. Hence, in July 2015 the new set of rules for leniency were enacted. Although some issues that limited the application of the leniency programme were addressed, others – such as the elimination of the criminal prosecution when collaborating with SIC – would require the amendment of Law 1,340. Of particular interest is the presumption included in the Leniency Decree by which, unless evidence to the contrary exists, every applicant is deemed not to be the instigator of the cartel, as instigators are not eligible for the leniency benefits. In 2016, SIC announced the creation of a task force to investigate and prosecute bid-rigging activity that will work closely

10  Law and Competition Policy in Colombia, 2009, OECD.
with criminal prosecutors. Since its inception, this new task force has been involved in high-profile investigations, such as the *Odebrecht* case, and it has also uncovered collusive practices affecting public procurement at the national and local levels.

### III \hspace{1cm} **ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE**

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

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

- a. the reduction of prices below costs to eliminate competitors or prevent their entry or expansion;
- b. the application of discriminatory conditions to equivalent transactions, which put a consumer or supplier at a disadvantage compared with another consumer or provider under similar conditions;
- c. conduct with the purpose or effect of subordinating the supply of a product to bundled sales;
- d. the sale to a consumer under conditions different from those offered to another consumer when it is intended to reduce or eliminate competition in the market;
- e. selling or servicing in any part of the country at a price different from that in another part of the country, when the purpose or effect of said practice is to reduce or eliminate competition in that part of the country (in this case, it will be considered abusive conduct only when the prices do not correspond to the cost structure of the transaction); and
- f. obstructing or preventing third-party access to markets or marketing channels.

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

#### i \hspace{1cm} Significant cases

In 2013, SIC sanctioned Empresa de Energía de Boyacá (EBSA) in Resolution 3694 of 2013, confirmed by Resolution 12,237 of 2013. EBSA is an energy distribution and commercialisation public utilities company with private and public capital. SIC found that EBSA had market power in the commercialisation of energy services in several municipalities of Boyacá and Santander (99.9 per cent of the market share), but that it did not have such a dominant position in the calibration of energy meters market. EBSA abused its dominant position in the commercialisation of the energy services market by subordinating the supply

---

12 Law 1,480 of 2011.
of its services to the acceptance of additional obligations independent of its business object, such as charging for the homologation of energy meters sold by third parties. This charge had two effects:

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

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

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

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

### ii  Trends, developments and strategies

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

### iii  Outlook

It is likely that the recent enforcement trend will remain unchanged, meaning an increase in the number of investigations, and higher sanctions due to the enforcement of the sanctions under the Competition Act are expected. SIC has announced that it plans to actively prosecute false advertisements, which implies a violation of the advertising rules of the Consumer Statute can, therefore, also be prosecuted as a unilateral anticompetitive act if it significantly affects the market.

---

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

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

- public utilities;
- the energy sector;
- communications (including telecommunications and postal services);
- finance and insurance; and
- air transportation.

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

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

i Significant cases

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

- impeded its users from changing to another operator, since it refused to provide them with a personal identification number necessary for number portability;
- sold locked mobile phones, which could only be used with Claro and not with other carriers; and

---

17 Article 1 of Law 155 of 1959.
Colombia

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

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

ii Trends, developments and strategies

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

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

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

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

iii Outlook

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

In the case of the telecommunications industry, the CRC, which is a collegiate body specialised in the industry, holds legal powers to *ex ante* define relevant markets and impose measures to protect competition in the industry. The current government has discussed a new telecommunications law that could include changes to the CRC’s powers. However, the bill of law, although advertised as a policy priority for the government, has not gained traction in Congress.

V STATE AID

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

a price stabilisation funds;

b funds for agricultural development;

c the establishment of minimum guaranteed prices;

d regulation of internal markets for agricultural products;

e chain agreements in the agricultural industry;

f the safeguards regime;

g special public utilities tariffs for the agricultural industry;

h subsidised loans for the agricultural industry; and

i state aid for commercialisation of agricultural products due to shortage of supplies.

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

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

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

i Significant cases

In 2013, SIC opened an investigation\(^\text{18}\) against the several utilities companies owned by the district of Bogotá – UAESP, EAAB and Aguas Bogotá – and the companies’ most important directors, including the then Mayor of Bogotá, for alleged breaches of the general prohibition against agreements, practices, procedures and systems affecting free competition, and for preventing third parties from accessing markets or marketing channels, pursuant to Law 155 of 1959 and Decree 2,153 of 1992. The investigation began as an inquiry into the newly adopted waste management system in Bogotá and concluded with a decision in which SIC found that free competition had been impaired. SIC’s initial decision, rendered in April 2014, imposed total fines in excess of 80 billion Colombian pesos on both companies and individuals, and was confirmed on review in September 2014. The then mayor of Bogotá was personally fined 400 million Colombian pesos, while EAAB received a fine of 61 billion Colombian pesos for its role in thwarting competition by foreclosing entry into the market.

ii Trends, developments and strategies

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

\(^{18}\) SIC Resolution 14,902 of 2013.
Outlook

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

VI MERGER REVIEW

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

Business integrations can take one of the following forms:

a. horizontal integration: when an integration takes place between companies that perform the same or similar economic activities (such as whenever integration occurs between competitors); or

b. vertical integration: when an integration takes place between companies that participate in the same economic process but at different stages of the value chain (such as when integration occurs between a manufacturer and its suppliers of raw materials or its distributors).

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

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

a. subjective threshold: the companies involved in the transaction develop the same economic activity (horizontal transactions), or are part of the same value chain (vertical transactions); and

b. objective threshold: the combined annual operating income of the companies involved is equal to or more than 60,000 current monthly minimum legal wages, or the total combined assets of the companies involved is equivalent to or more than 60,000 current monthly minimum legal wages, in the year prior to the transaction.

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

a. If none of the above-mentioned subjective and objective thresholds are met, the business integration does not need to be reported to SIC.

b. However, if the business combination meets any of the above subjective and objective thresholds, and the combined market share of the companies involved is less than 20 per cent of the relevant market, the transaction shall be deemed authorised by simply giving prior notice to SIC regarding the transaction. In this case, the information to be furnished to SIC is basically the parties involved, the legal form of the transaction.
(merger, acquisition of control, acquisition of shares or assets, etc.), the relevant market (product market and geographic market), the share participation in the relevant market and the methodology to calculate them.

c If the business combination meets any of the above subjective and objective thresholds, and the combined market share of the companies involved equals or exceeds 20 per cent of the relevant market, prior authorisation must be requested from SIC, subject to the following rules:

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

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

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

a fines imposed on each company involved of up to 100,000 current monthly minimum legal wages, or a fine equivalent to 150 per cent of the profit derived from the conduct – whichever is higher; and

b fines imposed on any manager, director or statutory auditor who facilitates, authorises, executes or tolerates conduct violating the rules on protection of competition of up to 2,000 current monthly minimum legal wages. In this case, it is expressly prohibited that the company, the parent company, subsidiary companies or associated companies with the same corporate group to which the manager, representative or statutory auditor belongs or belonged to, pay or guarantee the fine imposed on behalf of such individuals.

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

i Significant cases

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

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

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

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

1. **GSM data clearing services**;
2. **finance and accounting business process outsourcing (F&A BPO)**;
3. **revenue assurance and fraud management**;
4. **peer-to-peer SMS messaging (P2P SMS)**; and
5. **business intelligence**.

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

### Trends, developments and strategies

In 2018, 165 cases were submitted to SIC for merger review, which represents a slight increase in cases compared with the 150 cases filed in 2017. The figures recorded for 2013 regarding the amount of time SIC took to issue a decision once a filing is presented remained more or less the same for 2018, and are as follows:

1. **prior notifications**: 2.11 business days;
2. **pre-evaluation filings (fast-track)**: one month and 17 days; and
3. **full evaluation filings**: three months and 10 days.

---

19 Resolution 525 of 2014. The most important data regarding the conditions in this Resolution are confidential and were not made public.

20 Resolution 5,545 of 2014.
In 2015, SIC issued Resolution 10,930, in which it:

a. clarified certain issues, such as the definition of control;
b. outlined the events in which no merger review is required (e.g., events that do not fulfill the subjective and objective thresholds, business integrations among controlled parties or between parties of an entrepreneurial group);
c. outlined the criteria to determine the assets and income of the parties involved in a transaction that are to be taken into account in relation to the reporting thresholds. Specifically, it clarify the instances when foreign income should be included in the calculation; and
d. adjusted some of the documents that have to be filed to SIC for merger review.

iii Outlook

Since April 2012, all documents for merger review may be submitted online via SIC’s website. SIC encourages this to simplify the merger review process.

Furthermore, SIC has made a clear distinction between collaboration agreements, which are subject to specific cartel and restrictive agreement regulation, and business integrations under joint venture agreements (with or without the incorporation of a new company), which are subject to merger review regulation. The main difference is that in business integrations, competition ceases definitively or for a long time between competing market agents of a relevant market, while collaboration agreements are entered into for a determined term, and at least a certain form of competition is retained between the competing market agents, which can be either actual or potential. Other differing elements are the degree of independence and integration between the competing companies. In 2018, SIC updated its merger review guidelines following an OECD recommendation.

VII CONCLUSIONS

i Pending cases and legislation

As previously mentioned, SIC is in charge of the ex post enforcement of competition regulations. There are several investigations currently open and awaiting a decision by SIC, but it is worth noting that SIC has decided to enhance its capability to undertake high-profile cases in order to issue decisions that may have exemplary effects among competitors, and to impose exemplary fines under Law 1,340 of 2009.

The statute of limitations has also been increased in the Competition Law from three to five years. Hence, SIC has ample time to conduct investigations and impose sanctions for the violations of competition laws.

ii Analysis

The most recent amendment to the Competition Law is Decree 19 of 2012, which made some changes to the investigation procedure for violations of the rules of competition and restrictive

---

22 Pursuant to Article 28 of Law 222 of 1995.
practices. The modifications introduced include an amendment to the general structure of the administrative procedure enacted by Decree 2,153 of 1992; the notification and publication of certain administrative acts; and the opportunity for third-party interventions.

This amendment to the competition regulation also created an additional reputational sanction for offenders or investigated parties accused of anticompetitive conduct who offer guarantees in exchange for the early termination of investigations, since their conduct will be revealed to the public.
I OVERVIEW

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

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

a into formal or informal restrictive agreements and practices that have as their object or effect the elimination, restriction or distortion of competition, and in particular agreements that:
  • fix, directly or indirectly, the purchase or selling prices or other trading conditions;
  • limit or control production, markets, technical development or investments;
  • divide markets or other resources of supply into geographical or other sectors;
  • apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
  • make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject matter of the contract;

b of abuses by one or more undertakings of a dominant position, especially if:
  • they affect or may affect the direct or indirect fixing of unfair purchase or selling prices, or any other unfair (under the circumstances) trading conditions;
  • they limit production, distribution or technical development to the prejudice of consumers;
  • they apply dissimilar conditions to equivalent transactions, thereby placing certain undertakings at a competitive disadvantage; or
• they make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject matter of such contracts;

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

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

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

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

a to carry out the secretarial work of the Commission

b to maintain the Commission’s registers;

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

d to introduce complaints and submit recommendations to the Commission;

e to make any necessary communications and publications; and

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

II CARTELS

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

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

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

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

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

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

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

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

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

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

c. The Commission announced that it initiated infringement proceedings against Hermes Airports Ltd for possible infringement of Section 6(1)(a) of the Competition Law. The aforementioned undertaking, as the operator of Larnaca International Airport, holds a dominant position in the market for the provision of administration services at Larnaca International Airport and in the market for the provision of valet parking areas within the airport so that other companies may offer their services. A Princess Airport Parking Ltd, C&A Stop and Fly Ltd and X Xanthos Airport Parking Services Ltd filed a
complaint with the Commission that Hermes Airports Ltd employed certain practices and imposed abusive conditions on companies that wished to offer parking and valet parking services at the airport.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

State aid is regulated by a separate and distinct legislative framework and a separate and distinct independent authority. Pursuant to the State Aid Control Laws of 2001 to 2009, the Council of Ministers of the Republic of Cyprus appoints the Commissioner for State Aid Control, who is competent and responsible mainly for the following:

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

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

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

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

A scheme providing financing by the Cyprus Tourism Organisation for the enrichment and modernisation of tourism and the lengthening of the tourism season, with a budget of €16 million until 2020.

V MERGER REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

VI CONCLUSIONS

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

In 2017, the House of Representatives enacted the new Law on Certain Rules Governing Actions for Damages for Infringement of Competition Law of 2017, which was published on 21 July 2017. The new Law was passed for purposes of national transposition of, and harmonisation with, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. The new Law introduces new rules with respect to, among others, the following:

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

2 Law No. 113(I)/2017.
I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

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

Finnish competition enforcement is likely to undergo some changes in the near future. The Competition Act entered into force on 1 November 2011, replacing the former Act on Competition Restrictions. A new amendment process began in 2015, and in May 2018, a Government Bill on amendments to the Competition Act was presented to the Parliament. A parliamentary review of the proposal is currently under way.

Other recent significant developments concerned private enforcement, especially with the implementation of the EU Directive on Antitrust Damages Actions into national law by the new Antitrust Damages Act, which entered into force on 26 December 2016.

ii Enforcement agenda

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

The FCCA has announced that its objectives for the years 2017–2020 include continuing to focus on the detection of hardcore cartels. The FCCA will also emphasise effective merger control with the intention of preventing the emergence of harmful concentrations in advance. Furthermore, the FCCA will continue to implement its supervisory powers concerning...
public sector entities with regard to competitive neutrality issues. The FCCA will also aim to ensure an efficient start to its new task of supervising the legality of public procurement, which was assigned to it as of the beginning of 2017.\(^7\)

II CARTELS

Finland has had a leniency programme in place since 1 May 2004. The programme was updated in the Competition Act, which entered into force in November 2011, and is now laid out in Sections 14 to 17 of the Competition Act. The leniency programme is very similar to the European Competition Network model leniency programme. In 2016, the revised leniency guidelines issued in 2011\(^8\) were replaced with new guidelines\(^9\) that take account of the new Antitrust Damages Act.

The FCCA received its first leniency case only minutes after the entry into force of the programme in 2004.\(^10\) However, after a spectacular start, there have been only a few leniency applications, which has clearly been a disappointment to the FCCA.\(^11\) The relatively small number of leniency cases is reflected in the number of the FCCA’s penalty payment proposals to the Market Court in cartel cases. In 2014, 2015, 2016 and 2018 the FCCA only brought one cartel case before the Market Court each year, while in 2013 and 2017 no cases were brought before the Market Court by the FCCA.

i Significant cases

**FCCA’s penalty payment proposal in the Coach Company cartel**

On 25 January 2016, the FCCA submitted a proposal to the Market Court to impose a fine of €38 million on seven coach companies, the Finnish Bus and Coach Association and Oy Matkahuolto Ab (Matkahuolto), a service and marketing company that promotes bus and coach services in Finland. The FCCA also ordered Matkahuolto to cease all anticompetitive measures to foreclose competing coach companies from the market. The FCCA had started its investigations in 2011 on the basis of a complaint lodged by competitors.

According to the proposal, the alleged cartel started in autumn 2008 and still partially continued at the time of the proposal. In December 2009, legislation was amended to open up coach traffic for competition. In a mutual understanding, major coach companies tried to prevent the opening of the market and new competitors’ entry to the market, among other things, by preventing competitors from accessing the travel and parcel services of Matkahuolto. Consumers could not find competitors’ departure information from Matkahuolto’s timetables or buy their tickets from Matkahuolto. Moreover, competitors were denied access to Matkahuolto’s parcel delivery system, access to which would have been

---

7 One of the most important aspects of this new task is the supervision of significant errors and omissions, such as illegal direct awards of contract.
8 Immunity from and reduction of fines in cartel cases: Guidelines on the application of the Competition Act, 2/2011.
9 Guidelines on immunity from and reduction of penalty payments in cartel cases: Guidelines on the application of the Competition Act (2016).
10 The application was made in the Raw Wood Procurement infringement case.
11 According to Government Bill 88/2010 (p. 23), there had been approximately 10 leniency applications by June 2010.
essential from a business perspective. In measuring the amount of the proposed fine, the FCCA took into account as an aggravating factor that the Finnish Bus and Coach Association had previously been sanctioned for price recommendation.

On 14 December 2017, the Market Court found the coach companies, the Finnish Bus and Coach Association and Matkahuolto guilty of restricting competition. However, the Market Court found that lobbying work, discussions and negotiations related thereto as well as measures concerning opposing the issuing of route licences did not constitute a prohibited restriction of competition. As a result, the fines imposed by the Market Court were significantly lower than those proposed by the FCCA, amounting to a total of €1.1 million. The decision of the Market Court has been appealed to the SAC.

**FCCA’s penalty payment proposal in the EPS insulation infringement case**

On 4 December 2018, the FCCA submitted a proposal to the Market Court to impose a fine of over €4 million in total on two EPS insulation producers, Thermisol Oy and UK-Muovi Oy, for prohibited cooperation between competitors in the EPS insulation market in Finland. Styroplast Oy applied for leniency.

According to the FCCA, the alleged infringement began in November 2012 and continued until the end of 2014. Pursuant to the FCCA’s proposal, the three companies infringed competition rules by agreeing on the amounts, timing and implementation of price increases. The case is currently pending before the Market Court.

### ii Trends, developments and strategies

As discussed above, the fight against cartels continues to be one of the FCCA’s main priorities. The detection of cartels has been boosted by increasing cooperation between the competition authorities and the contracting entities responsible for public procurement. The FCCA has announced that it will bring all detected cartel infringements before the Market Court.\(^\text{12}\) Corresponding to EU rules, the fines may equal 10 per cent of the undertaking’s turnover at the most.\(^\text{13}\) The FCCA’s new Director General has publicly emphasised the need for a higher level of fines than what has been imposed by the courts in practice, arguing that higher fines would have a stronger deterrent effect, and welcomed the idea of criminalising cartel conduct in Finland.

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

---

\(^{12}\) FCCA press release, 20 February 2012.

\(^{13}\) The highest cartel fines in Finland to date were imposed in the *Asphalt* case in 2009 (totalling €82.6 million). For example, the fines in the *Raw Wood Procurement* infringement case in 2009 amounted to €51 million in total. The *Asphalt* case is partly still pending before the courts as damages claims.
for a preliminary ruling to the European Court of Justice regarding the question of economic succession in determining the parties liable for damages. Significant damages cases concerning an infringement involving the procurement of raw wood came to an end in January 2019, when the Supreme Court dismissed an application for leave to appeal by one of the claimants. Further, multiple damages claims are pending before the Helsinki District Court in an abuse of dominance case involving national dairy products champion Valio Ltd (Valio).

iii Outlook

It seems clear that the FCCA will continue to focus on the investigation of hardcore cartels. Under the prioritising rule of Section 32 of the Competition Act, the FCCA does not need to conduct an in-depth investigation if an infringement is deemed unlikely at the outset or, irrespective of the infringement’s likelihood, if competition is considered effective on the whole. Moreover, according to publicly available information, the FCCA is currently investigating new cartel cases that may in future result in penalty payment proposals to the Market Court.

III ANTI TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

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

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

However, the FCCA has made one significant fine proposal in a dominance case to the Market Court in recent years. In December 2012, the FCCA proposed that the Market Court impose a fine of €70 million on Valio. The Market Court rendered its decision in the case in summer 2014, and it is summarised below. The decision of the Market Court became final when the SAC dismissed Valio’s appeal in December 2016.

In 2018, the FCCA concluded three investigations regarding suspected restraints on competition. In two of the cases, the companies involved changed their suspected market behaviour on their own initiative, and in one case the FCCA found that there was no evidence of anticompetitive behaviour.

i Significant cases

Restrains on competition

FCCA’s commitment decision concerning bus ticket pricing

In March 2018, the FCCA issued a commitment decision concerning Matkahuolto’s pricing and rate tables. Matkahuolto sells its own ticket products. Matkahuolto’s single ticket pricing was based on a rate table published on its website. In addition, the rate table was included in agreements between Matkahuolto and individual coach companies. According to the FCCA’s preliminary assessment, the individual coach companies had widely used the rate table as the basis for their ticket pricing, which led to significant anticompetitive effects, as it restricted price competition and limited consumers’ choice.
As a result, Matkahuolto committed to refraining from confirming and publishing rate tables on its website or as a part of its agreements with the individual coach companies. In addition, Matkahuolto committed to stop selling its own single tickets, the price of which was based on the rate table, to consumers. Matkahuolto may continue selling single tickets, but the independent transport providers must set the retail price.

FCCA's commitment decision concerning copyrights

The FCCA issued a commitment decision in December 2018 concerning the terms and conditions of Teasto ry's affiliation agreements. The FCCA had started its investigations in 2014. Teasto is the sole Finnish copyright organisation for composers, lyricists, arrangers and companies that publish music.

The membership agreement between Teasto and the composers, lyricists, arrangers and music publishers that it represents included an exclusivity clause according to which the economic rights of the clients' works were assigned to Teasto. In 2017, Teasto divided the economic rights under its administration into five categories. Clients were given the right to withdraw categories of rights, but not rights to individual works, from Teasto's administration. In addition, clients were only allowed to grant licences of use to their works in specific situations. According to the FCCA, the exclusivity clause was not necessary for protecting the rights of Teasto's clients with regard to the users of their works. Furthermore, the categorisation of rights encouraged the holders of those rights to concentrate the administration of all their works to Teasto.

Teasto committed to amending the membership agreements. The amendments will allow for clients to withdraw their individual works from Teasto's administration and, in addition, to grant licences of use to their works on a case-by-case basis without having to remove entire categories of rights or terminating their membership agreements in order to be able to do so.

Abuse of dominance

Predatory pricing

In June 2014, the Market Court handed down a decision in a case in which national dairy products champion Valio was accused by the FCCA of having abused its dominant position on the Finnish market for fresh milk. Valio had allegedly engaged in predatory pricing with the aim of driving out its main competitor Arla Oy (Arla, formerly Arla Ingman Oy Ab).

The Market Court upheld the FCCA decision of December 2012, in which the FCCA had ordered Valio to cease its conduct. The Court found that Valio had sold fresh milk below average variable costs in order to drive out competition and eventually raise prices. Additionally, the Court imposed a fine amounting to €70 million on Valio as proposed by the FCCA. Valio appealed the Market Court's decision to the SAC. As previously mentioned, the SAC upheld the Market Court's ruling in December 2016. This is the highest single fine ever imposed in Finland for any competition law infringement.

The Market Court applied both Finnish competition law and Article 102 TFEU. The question of Valio’s dominance had been established in previous decisions, and despite Valio’s objections, the Market Court held that Valio was in a dominant position on the Finnish market for fresh milk. The FCCA had argued that based on EU case law, the relevant test

14 Judgment of the Market Court of 26 June 2014, record No. 458/12/KR and record No. 36/13/KR.
for predatory pricing is selling below average variable costs, which is in itself an indication of abuse of dominance. According to the FCCA, the cost of raw milk was a variable cost. On the basis of such a calculation, Valio had sold fresh milk at a loss during the relevant period.

The Market Court agreed with the FCCA that pricing below average variable costs is an indication of abuse, and noted that case law did not require evidence of intent in such a case. The FCCA had in any case invoked evidence that Valio had the intent of driving out its competitor, Arla, from the market. The Market Court agreed that emails by Valio’s management showed that Valio had the intent of foreclosing the market and regaining a higher market share. In addition, the rebates given to specific customers had the effect of amplifying the foreclosing effect of the predatory pricing. Arla was forced to offer even lower prices than Valio in order to keep its customers from switching to Valio. The Market Court viewed this as a clear indication of the intent to foreclose Arla from the market. This behaviour could not be objectively justified. Valio had previously been sanctioned for abusing its dominant position, which increased the fine. In addition, the Market Court found Valio’s unwillingness to cease the conduct during the administrative proceedings to be an aggravating factor.

Arla lodged a damages claim of €58 million against Valio before the Helsinki District Court, but the parties settled the matter in September 2018. Other claims have also been lodged. Although Valio has settled with a number of other claimants as well, several claims are currently pending before the court.

ii Outlook

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

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

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Trends, developments and strategies

FCCA’s supervisory powers concerning competitive neutrality

Chapter 4a of the Competition Act entrusts the FCCA with a supervisory task to enhance competitive neutrality between public and private businesses. Pursuant to the Chapter, the

---

15 See, for instance, decisions of the FCCA in Liikennevakuutuskeskus of 20 December 2012, record No. 130/14.00.00/2011, Fonecta Oy of 1 October 2012, record No. 452/14.00.00/2011, and Alko Oy, Stella Wines Oy of 19 March 2012, record No. 764/14.00.00/2011.

16 FCCA strategy paper for 2015–2018, p. 3.
FCCA has the power to intervene in the business activities of the municipalities, the joint municipal authorities and the state, as well as the entities over which they have control if such public sector entity is distorting the conditions for competition or preventing the establishment or development of competition on the market.

So far, the FCCA has published eight decisions concerning competitive neutrality, four of which were published in 2018. For example, in December 2018, the FCCA rendered a decision concerning the Customs Laboratory, a part of the Finnish Customs, and the laboratory’s activities in the market for laboratory services. The Customs Laboratory is a testing laboratory accredited by the Finnish Accreditation Service, and it also acts as a national reference laboratory. According to the Customs Laboratory, it had not actively promoted its services in the market for laboratory services. However, owing to the well-known quality of the laboratory’s work, private customers had bought services from it. During the investigations, the Customs Laboratory announced that it would no longer provide services to private parties or participate in calls for tender. In the future, services will only be offered to governmental agencies and institutions. The FCCA closed its investigations and considered that under these new circumstances, the effects on competitive neutrality are unlikely to be serious.

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

ii  **Outlook**

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

V  **STATE AID**

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

---

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

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

### i Significant cases

**Alleged illegal state aid awarded to Yliopiston Apteekki Oy**

In October 2017, the European Commission concluded its investigations concerning alleged illegal state aid to Yliopiston Apteekki Oy (University Pharmacy), which is owned by the University of Helsinki. According to a complaint made in 2015, the fact that pursuant to the Medicines Act,\(^\text{19}\) University Pharmacy may keep up to 16 branch pharmacies, when a licensed pharmacist may only keep up to three branch pharmacies, and that University Pharmacy is not charged for the use of extra licences, constitutes illegal state aid. In addition, University Pharmacy would allegedly have benefited from preferential tax treatment through the reimbursement of taxes to the University of Helsinki. Nevertheless, the European Commission came to the conclusion that the two measures do not constitute state aid within the meaning of Article 107(1) TFEU.

### ii Trends, developments and strategies

In general, practices concerning the application of EU state aid rules are gradually being formed, and national courts are increasingly applying state aid rules. For instance, the SAC has in recent years annulled several administrative court decisions partly due to the courts omitting to consider the applicability of the state aid rules, or to follow the relevant procedures in their decision-making. The cases concerned, *inter alia*, the sale of land, guarantees and subscription of shares in a directed share issue.\(^\text{20}\)

### iii Outlook

In June 2017, the Finnish Media Federation, an advocacy organisation for the Finnish media industry and printing companies, lodged a complaint to the European Commission claiming that the public funding of Yleisradio Oy’s (Yle) textual journalistic online content constitutes prohibited state aid. Yle is a national media company owned mostly by the state, and its operations are funded primarily through the Public Broadcasting Tax. According to the Finnish Media Federation, the provision of textual journalism online is not to be considered broadcasting under the Amsterdam Protocol and the Communication on public service

\(^{18}\) See the Act on the Application of Certain State Aid Provisions of the European Union (300/2001), Government Decree on the Notification Procedures concerning State Aid to the Commission (89/2011) and the Act on the Openness and Obligation to Provide Information on Economic Activities Concerning Certain Undertakings (19/2003).

\(^{19}\) 395/1987.

broadcasting. Instead, the services in question should be evaluated under the EU services of general economic interest doctrine. The Finnish Media Federation argued that since a private supply of said services already existed in the Finnish market, there was no need to qualify textual journalistic online content as a service of general economic interest. In addition, the production of Yle’s wide textual journalistic online content leads to a disproportionate distortion of competition. The Commission’s investigation is currently pending.

VI MERGER REVIEW

The provisions on merger control were last revised in the 2011 reform of the Competition Act with the purpose of bringing them further into line with EU rules. Most notably, the dominance test applied under the old rules was replaced by the significant impediment of effective competition test, which was introduced to enable the FCCA to shift the focus of its review more towards the competitive effects of mergers.

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

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

Once a concentration has been notified to the FCCA, it has a period of one month to investigate and either clear the concentration (possibly with conditions) or to initiate a Phase II investigation. If a Phase II investigation is opened, the FCCA has an additional three months (or five months, with the permission of the Market Court) to approve the concentration with or without conditions, or to request the Market Court to prohibit it. If the FCCA requests such a prohibition, the Market Court must make its decision either to clear the concentration with or without conditions or prohibit it within three months.

The majority of notified concentrations are cleared in Phase I. In 2018, the FCCA issued approximately 39 merger decisions, and Phase II investigations were initiated in only nine cases.

i Significant cases

**FCCA conditional approval in Eurofins/VTT Expert Services/Labtium**

In May 2018, the FCCA conditionally approved the acquisition of VTT Expert Services Oy and its subsidiary Labtium Oy by Eurofins Product Testing LUX Holding SARL (Eurofins). Eurofins is part of the Eurofins Scientific Group and offers bioanalytical laboratory and expert services in the food, agricultural and environmental sectors. VTT Expert Services and Labtium offer commercial testing, inspection and certification services in the construction, environmental and industrial sectors.

The FCCA started Phase II investigations in February 2018, arguing that the acquisition could lead to harmful effects on competition particularly in the environmental sector’s testing, inspection and certification service market. According to the FCCA, the acquisition

---

brought together the two biggest operators in the market for solid fuel analysis and resulted in a significant combined market share. Nevertheless, the FCCA approved the merger subject to conditions. To eliminate the negative effects of the transaction, Eurofins committed to divesting its operation unit that focuses on solid fuels analytics services.

**FCCA conditional approval in Colosseum Dental Group/Med Group Hammaslääkärit**

In July 2018, the FCCA conditionally approved the acquisition of Med Group Hammaslääkärit Oy by Colosseum Dental Group. Colosseum Dental Group is an international company that provides oral health and dental services, and owns Oral Hammaslääkärit Oy in Finland.

The FCCA launched Phase II investigations in April 2018 in order to determine, among other things, the extent to which public sector dental care creates competition pressure on private sector services. The FCCA considered that the transaction would impede effective competition in the private oral health market in four municipalities, where the market for private dental services was already highly concentrated. In addition, the FCCA considered that no new operators who could reduce the adverse competitive effects of the acquisition were likely to enter the market.

The FCCA approved the merger subject to conditions. Colosseum Dental Group committed to selling one of its clinics in all four municipalities, to not recruiting dentists from the dental clinics it is selling in the next two years, and to not buying the sold clinics back in the next 10 years.

**FCCA conditional approval in Avarn Security/Prevent 360**

In October 2018, the FCCA conditionally approved the acquisition of Prevent 360 Holding Oy by Avarn Security Holding AS (Avarn), part of the Norwegian Sector Alarm Group. The companies offer manned guarding and security services to the public sector and to corporate clients.

The FCCA launched Phase II investigations in July 2018, arguing that the acquisition might affect competition in the security services market. According to the FCCA, the acquisition would concentrate the market even further and reduce competition especially between companies offering manned guarding and security services nationally.

According to the FCCA, the investigations revealed that the acquisition would have adverse competitive effects on the market segment of large clients and would reduce the number of main market operators from three to two. The FCCA approved the merger subject to conditions. Avarn committed to divesting a part of the merging entity’s manned guarding and security services business, and to subcontracting manned patrol guarding services, alarm response services, and alarm receiving centre services to its competitors or potential competitors for a period of three years.

**FCCA approval in Terveystalo/Attendo**

In December 2018, the FCCA approved the acquisition of Attendo Terveyspalvelut Oy (Attendo) by Terveystalo Healthcare Oy (Terveystalo). Both companies provide healthcare services.

The FCCA initiated Phase II investigations in July 2018 because it considered that the transaction could have adverse effects on competition in the Finnish market for healthcare services. In October 2018, the Market Court extended the time limit for the investigations at the FCCA’s request due to the planned healthcare and social services reform, which is
currently under parliamentary review, and the uncertainties related to the form and execution of the reform. The FCCA assessed the effects of the acquisition both in the market situation preceding the planned reform and following it. The FCCA based its assessment of the post-reform market on, among other things, a view of how competition would function in a new ‘freedom of choice’ market. The FCCA came to the conclusion that there were only minor overlaps in the business operations of the companies, and that the acquisition would not significantly impede effective competition.

ii Trends, developments and strategies
The FCCA has itself noted that the need for reform of the Finnish merger control provisions should be investigated, including an assessment of whether the current turnover thresholds are still appropriate.22

iii Outlook
As mentioned above, amendments to the Competition Act with regard to, among other things, some aspects of merger control are under consideration. The Government Bill on amendments to the Competition Act includes proposals for changes regarding, among other things, the FCCA’s handling times in merger control. Pursuant to the proposal, the deadlines of Phase I and II investigations would be calculated in working days instead of calendar days. Instead of the current one-month deadline, the deadline for Phase I investigations would be changed to 23 working days. Likewise, Phase II investigations would be carried out in 69 working days instead of three months.

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

Nevertheless, no major developments are expected to take place in Finnish merger control in the immediate future. The FCCA anticipates that there will be a significant number of problematic transactions likely to have particularly serious effects on competition.23

VII CONCLUSIONS
i Pending cases and legislation
In addition to the Coach Company and EPS Insulation cases, there are currently two other major public enforcement cases pending before the courts.24 As for merger control, there are currently no Phase II investigations pending in the FCCA.

As previously mentioned, amendments to the Competition Act are currently being prepared. In March 2017, shortly before the publication of the European Commission’s proposal for a directive intended to empower Member States’ competition authorities to be

---

22 FCCA press release, 5 October 2018.
24 On 29 February 2016, the Market Court found that the Finnish Bakery Federation had given price recommendations to its members with the intention of restricting competition. On 30 March 2016, the Market Court dismissed the FCCA’s penalty payment proposal on power line constructors Eltel Networks Oy and Eltel Group Oy for their participation in an alleged competition infringement as time barred. Both cases are currently pending before the SAC.
more effective enforcers\textsuperscript{25} (ECN+ directive) a working group appointed by the Ministry of Economic Affairs and Employment submitted a report suggesting amendments to the Act.\textsuperscript{26} In May 2018, a Government Bill\textsuperscript{27} on amendments to the Competition Act was presented to the Parliament, and it is currently under parliamentary review.

The proposed amendments concern, among other things, the FCCA’s inspection powers, the FCCA’s handling times and the exchange of information between national authorities. The first amendments to the Competition Act are intended to take effect as soon as possible. The implementation process of the ECN+ directive,\textsuperscript{28} which was signed into law in December 2018, into national law is expected to result in further amendments.

ii Analysis

2018 was a busy year for the FCCA regarding merger control. It conducted Phase II investigations in nine cases, which is an all-time high in the FCCA’s history. In the field of antitrust, the FCCA submitted a penalty payment proposal in the \textit{EPS Insulation} case and conducted some investigations concerning suspected anticompetitive behaviour. The legislative process aiming to amend the Competition Act will continue in 2019.

\textsuperscript{25} Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final, 22 March 2017.


\textsuperscript{27} Government Bill 68/2018.

\textsuperscript{28} 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.
I OVERVIEW

The French Competition Authority (FCA) is the administrative body in charge of enforcing European and domestic competition rules in France. In 2018, it issued 26 contentious decisions, of which 13 imposed fines amounting to an aggregate €240 million. Although half of the Authority’s contentious decisions imposed fines, the total amount is much less significant than in previous years (€498 million in 2017, €1 billion in 2015 and €1.2 billion in 2014). Of the 13 decisions imposing fines this year,

- eight sanctioned anticompetitive agreements, under Article L.420-1 of the French Commercial Code or Article 101 of the Treaty on the Functioning of the European Union (TFEU);
- one sanctioned an abuse of a dominant position, under Article L.420-2 of the French Commercial Code;
- two sanctioned unjustified exclusive imports rights to the French overseas territories, under Article L.420-2-1 of the French Commercial Code;
- one sanctioned a failure to implement remedies conditioning the previous authorisation of a merger, under Article L.430-8, IV of the French Commercial Code; and
- one sanctioned a failure to comply with commitments agreed upon during a settlement procedure, under Article L.464-3 of the French Commercial Code.

As to its merger control attributions, the FCA issued 235 decisions this year, all authorising the notified operation.

2018 marked Isabelle de Silva’s second year at the head of the FCA. As such, the President of the Authority was called before the senatorial Committee for Economic Affairs to present an assessment of her first year in office in 2017 and draw up the Authority’s priorities for 2018. The digital sector remained under close scrutiny, with a report on online advertising, particular attention towards selective distribution and online retail, and new perspectives on big data and algorithms. Competition in the agricultural sector and food-retail was another focal point of the year, not only for the FCA, but also for courts and the legislator. In addition, the Authority published its procedural notice on the settlement procedure, and announced the first measures of its plan to modernise and simplify merger review in France.

---

1 Olivier Billard is a partner at Bredin Prat.
2 Isabelle de Silva’s hearing, Commission for Economic Affairs, 14 March 2018.
This year saw new appointments among public competition enforcement authorities in France. The FCA welcomed a new Vice-President, Fabienne Siredey-Garnier, who took office in April. Virginie Beaumeunier, former General Rapporteur at the FCA, was made head of the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF). A specific competition authority was created for the special collectivity of New Caledonia, where the FCA will no longer have jurisdiction. Finally, Bruno Lasserre, former President of the FCA, became head of the Council of State (France’s Supreme Administrative Court) in May 2018.

These and other relevant developments are discussed below.

II CARTELS

The enforcement of Article L.420-1 of the French Commercial Code and Article 101 TFEU, which prohibit anticompetitive practices and cartels, is one of the prime missions of the FCA. In 2018, the Authority issued four decisions sanctioning cartels, fining 18 undertakings for an aggregate amount of €205 million. These figures show a slight decrease compared to 2017 (seven cartel decisions, and one notable €302 million fine against PVC manufacturers) but are in line with the previous year (€203 million). In any case, the lesser number of cartel decisions should not be interpreted as a sign of diminished interest from the FCA, and tackling cartels remains one of its priorities when allocating resources: the Authority was also active on the investigation front this year and leniency applications reached a peak in France. The following cases are worth exploring.

i Significant cases

The largest fine of the year was a cartel sanction, namely a €189 million fine handed down to six household appliance manufacturers, among the largest in the sector since they account for about 70 per cent of the sales of white goods in France. The FCA found that they had agreed on recommended retail prices, which increased the cost for distributors and ultimately affected consumers, hampering the otherwise downward trend of prices in the sector. All participants submitted settlement requests and consequently had their fines reduced; one had its fine lowered pursuant to its leniency application, with an additional reduction for active cooperation in the investigation. As is often the case, the Authority favoured settlement because all companies opted for it, but will sometimes not grant it where just one participant refuses to settle. The amounts were high despite settlement, which can be explained by the nature of the infringement – a secret cartel – but also by the fact that it affected consumer goods, meaning the Authority considers the damage to the economy to be much higher. Finally, the case is particularly noteworthy in that the FCA made use of the notion of single, repeated infringement for the first time. As participation to the cartel had been interrupted for a year and a half, the infringement was not continuous; nonetheless, since the practices before and after the interruption were similar and followed the same objective, the infringement was single and repeated. In such cases, the period of interruption cannot be taken into account for the calculation of the fine; however the fact that the enforcer considers the infraction to

3 FCA, decision 18-D-24 of 5 December 2018.
be single and repeated can be crucial with regard to the limitation period, since the Authority
will be able to catch and sanction much older practices than it would have if they had been
regarded as two separate infringements.

In another notable case this year, the FCA fined 11 wholesale distributors of veterinary
products as well as their professional organisation for a total of €16 million. It found that
the three biggest companies of the sector had entered into non-aggression pacts. In addition,
all distributors and their organisation had taken advantage of the bluetongue health crisis
and the mandatory vaccination campaigns that followed by agreeing on cost levels they
submitted to the government to maximise their compensation and on the prices they charged
veterinarians for vaccines.

The FCA also looked into bid-rigging practices among companies offering security
services for tobacco shops. Following a DGCCRF investigation, several companies were
found to have submitted cover quotes, but the FCA only fined one since other participants
had agreed to the settlement procedure offered by the DGCCRF. The case goes to show how
it has become quite common for the DGCCRF to bring cases to the attention of the FCA,
pursuant to Article L.464-9 of the French Commercial Code, which allows for referrals from
the DGCCRF to the Authority. In 2018, four of the 13 sanction decisions issued by the FCA
resulted from referrals by the DGCCRF after companies refused to settle before it.

As regards judicial appeals, the Court of Appeal of Paris (CAP) issued its ruling on
the Welded Mesh cartel of Réunion. In 2016, the Authority had fined four construction
companies and two logistics companies €5 million for taking part in a cartel on the markets
of welded mesh and metal frames. The CAP confirmed the bulk of the decision, with a slight
alteration as to fines. The Authority had applied the aggravating circumstance of belonging
to a large group to two participants, and therefore equally increased their fines by 15 per
cent. The Court ruled that the assessment of this circumstance should not only take into
account the individual situation of an undertaking, but also compare it to other participants.
In the case at hand, although both companies did belong to a large group, one of them was
much larger than the other. It followed that the FCA should have increased their sanction by
different proportions instead of using the same rate. The CAP therefore diminished the fine
increase of one of them from 15 per cent to 7 per cent.

ii Trends, developments and strategies

New procedural notice on settlement procedure

The FCA issued its procedural notice on the settlement procedure in December 2018. The
French settlement procedure was created in 2015, replacing the ‘no contest of objections’
procedure. Pursuant to Article L.464-2, III of the French Commercial Code, an undertaking
that does not dispute the reality of the objections notified to it can be offered a settlement
proposal at the discretion of the FCA, which sets out a minimum and maximum amount for
the fine that could possibly ensue. The new notice provides guidance as to the conditions of
eligibility and the conduct of proceedings before the investigation services. It specifies that

5 FCA, decision 18-D-05 of 13 March 2018.
6 FCA, decision 18-D-02 of 19 February 2018; decision 18-D-05 of 13 March 2018; decision 18-D-17 of
7 CAP, 15 March 2018, No. 16/14231, ruling on an appeal against FCA, decision 16-D-09 of 12 May 2016.
8 FCA, procedural notice of 21 December 2018 on the settlement procedure.
no document transmitted by the parties during the settlement procedure will be included in the investigation file, even in the event that it does not result in a successful settlement; in addition, where the settlement negotiations are in fact successful, the report cannot be disclosed to other parties to the procedure nor to third parties.

**Leniency applications from cartel participants**

The head of the FCA’s investigation services noticed a surge in leniency applications in cartel proceedings this year. Only one company had reportedly applied in 2017, but that number jumped to seven in 2018. The trend could be explained by the increasing number of small and medium-sized companies applying for leniency, whereas the procedure had only previously seemed to attract larger groups. In addition, the rapporteur noted that applications increasingly came from French companies, indicating the development of a compliance culture in France.

### Outlook

The FCA’s investigation services were particularly active this year and opened investigations into several key sectors. Some of the most notable probes made public this year could lead to important cases in the years to come. In January, unannounced inspections were carried out in the local subsidiaries of several companies working in the sector of production, import and distribution of tobacco products in January; however, the FCA has since dropped the investigation. In March, the investigation services of the FCA carried out dawn raids in the cosmetics distribution sector, in a joint operation with the investigation and prosecution services of the Belgian authority. Finally, the offices of companies in engineering and technology consulting, IT services and software publishing were probed in November, and several luxury watch retailers were raided in January 2019.

### III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The FCA’s antitrust enforcement activity, other than cartels, covers restrictive agreements under Article L.420-1 of the French Commercial Code and Article 101 TFEU as well as abuse of a dominant position under Article L.420-2 of the French Commercial Code and Article 102 TFEU.

#### Significant cases

Among other notable cases, the FCA imposed a €355,000 fine on manufacturers and wholesale distributors of liquid fertilizers. It found that producers and distributors had agreed on a vertical pricing scheme, which led to the harmonisation of fertilizer prices. The decision is particularly interesting concerning sanctions, since the Authority granted a fine reduction on the grounds of financial difficulties, which it rarely does; as a result, one of the companies saw its fine reduced by over 99 per cent.

The Authority also issued two decisions sanctioning companies for unjustified exclusive imports in the French overseas territory this year. Although such exclusivity rights relate to antitrust, these decisions rely on a specific legal basis, distinct from Articles L.420-1

---

9 FCA, decision 18-D-26 of 20 December 2018.
10 FCA, decision 18-D-03 of 20 February 2018 and decision 18-D-21 of 8 October 2018.
France

and L.420-2. Since the ‘Lurel act’ of 2012, the FCA is also in charge of enforcing Article L.420-2-1 of the French Commercial Code, which prohibits unjustified exclusivity provisions in overseas territories. October’s was the fifth decision issued on such exclusive imports since the creation of the ban.

Finally, the FCA fined a recruitment company €4.5 million for not complying with commitments agreed upon during a cartel settlement.\(^{11}\) In 2009, the enforcer had fined three agencies for sharing sensitive information; some of them settled, and had their fines reduced after agreeing to commitments made out to reduce market transparency. To that end, one undertaking was supposed to market some of its products through independent subsidiaries; nevertheless, the Authority found that it had appointed its own director of strategy as head of one of these subsidiaries, thus failing to comply with its commitment. The FCA reiterated that it views violations of commitments as serious infringements, especially in cases such as this one where companies had offered them at their own initiative.

As for the courts, the CAP issued a long-awaited ruling\(^{12}\) on a 2012 FCA decision, after a referral by the Supreme Court. In 2012, the FCA had imposed a €60.9 million fine on SNCF for abusing its dominant position by preventing rivals from accessing vital infrastructures and using strategic information it obtained from competitors when they applied to use its infrastructure. The FCA also found that SCNF was engaging in predatory pricing, but issued an injunction instead of a fine on this account, forcing the company to increase its fees so as to cover its costs. In a first appeal decision in 2014, the CAP found that SNCF’s prices were not predatory and partially quashed the FCA’s decision; the CAP’s ruling was then quashed by the Supreme Court and referred back. This time, the CAP ruled that SNCF had committed exclusionary abuse; however, it reduced the initial fine by 13 per cent to €53 million.

The Supreme Court, meanwhile, settled an important matter as to the extension of leniency to a parent company.\(^{13}\) In 2012, the FCA had fined several companies that took part in a cartel of commodity chemicals. One of the undertakings was granted full immunity; however its parent company, which was found jointly liable, since it controlled one of the participants at the time of the infringement, could not benefit from immunity because it had lost control of the company since and had not requested immunity on its own. The Supreme Court fully confirmed that, for an undertaking to be extended the benefit of immunity granted to its subsidiary, it had to be its parent company at the time of immunity application, no matter the fact that it was at the time of the infringement.

Finally, a court of first instance shed light on the interactions between public and private enforcement.\(^{14}\) Competitors had filed an action for damages following a commitment decision by the FCA, meaning that the Authority did identify potential anticompetitive practices but closed the case without confirming nor ruling out the existence of an infringement. The court ruled that a commitment decision did not prevent them from claiming they were harmed by the practices at hand and obtaining damages if they could prove that these practices were indeed anticompetitive. To that aim, the judge is allowed to use the FCA’s decision as commencement of proof of the anticompetitive nature of the practices.

\(^{11}\) FCA, decision 18-D-09 of 21 June 2018.

\(^{12}\) CAP, 20 December 2018, No. 17/01304.

\(^{13}\) Supreme Court, 10 July 2018, No. 17-13973 and 17-14140.

\(^{14}\) Tribunal de Grande Instance de Paris, 22 February 2018, No. 15/09129.
Trends, developments and strategies

Selective distribution and online sales: implementing Coty

Following the European Court of Justice’s (ECJ) Coty ruling in 2017, attention was brought to selective distribution and online retail in France this year. The FCA fined a chainsaw manufacturer €7 million for prohibiting its distributors from selling products online. It found that the nature of the products and the need to preserve brand image justified a ban on third-party platforms, but the fact that the manufacturer’s terms of sales de facto prohibited distributors from selling on their own websites as well disproportionately limited competition. The FCA declared that this decision, its first on online sales restriction since Coty, should be used for guidance as to the applicable framework for selective distribution online. As to the CAP, it also followed in the footsteps of the ECJ and cleared several clauses organising Coty France’s selective distribution network.

Renewed interest for excessive pricing cases

Enforcers are looking more and more into exploitative abuse, in particular excessive pricing, as a series of cases in the pharmaceutical industry recently showed (Pfizer and Flynn in the UK, Aspen Pharma in Italy and now under EU investigation, or CD Pharma in Denmark). France is no exception, and 2018 showed a renewed interest for excessive pricing cases. In September, the FCA imposed a €199,000 fine for abusive prices on Sanicorse, an operator handling the disposal of infectious medical waste from healthcare activities in Corsica. The Authority stated that Sanicorse had committed exploitative abuse by increasing its prices abruptly, significantly, durably, and without justification. In another sector, the President of the FCA announced in December that online hotel booking platforms were currently under review for a potential case of excessive pricing.

Due process

Due process remains a much-debated issue in France when it comes to FCA proceedings. Undertakings often file for judicial review of the dawn raids they were subject to, although it remains quite rare that courts grant their demands and overturn the operations. In a rare instance, in 2018, the CAP fully overturned a probe carried out at Darty in 2013. It found that FCA agents had breached Darty’s rights of defence by preventing employees from calling lawyers at the beginning of the raid. The FCA was hence ordered to return all documents seized during the probe and refrain from using them or copies of them in its investigation.

15 ECJ, 6 December 2017, case C-230/16.
16 FCA, decision 18-D-23 of 24 October 2018.
17 CAP, 28 February 2018, No. 16/022633.
18 UK Competition and Markets Authority, case CE/9742-13, decision of 7 December 2016 partially quashed by the Competition Appeal Tribunal.
19 Italian Competition Authority, case A480, decision of 29 September 2016.
20 Danish Competition Council, decision of 31 January 2018.
21 FCA, decision 18-D-17 of 20 September 2018, made available in English by the FCA. An appeal is pending.
22 First President of the CAP, 28 March 2018, No. 17/16586.
France

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Online advertising sector

The FCA published the results of its investigation into online display advertising, following an opinion on search advertising in 2010. It observed the sector was characterised by the complexity of its processes and numerous stakeholders, two of them generating most of the revenues, namely Google and Facebook. It identified their main competitive advantages as being their popularity among users, their targeting capabilities, and vertical integration. It should also be noted that in the course of the consultation the FCA was made aware of potential anticompetitive practices in the sector. While it is not legally permitted to fully assess them within the context of an opinion, a preliminary examination will be conducted on the basis of the consultation’s results to determine whether investigations should be opened.

Fallout of the Endives ruling in the agricultural sector

In the wake of the Endives ruling and the adoption of the Omnibus Regulation, the FCA published an opinion clarifying the conditions of application of competition law to the agricultural sector. The opinion addressed four main issues. First, as to horizontal practices between producers, the FCA fully implemented the Endives reasoning, reiterating that practices used by producer organisations and associations of producer organisations and formally recognised by Member States could be cleared if they were absolutely necessary in order to achieve the objectives of the organisation. Second, the FCA focused on vertical agreements, between inter-branch organisations which include producers, processors and distributors. Inter-branch organisations are allowed to provide indicators and standard value-sharing clauses to their members, but fixing prices and setting quotas is explicitly banned, and the organisation must comply with competition rules, especially when collecting what can be sensitive commercial information. Third, regarding tripartite agreements (contracts between producers, intermediaries and distributors), the FCA established they bring large efficiency gains, but become problematic when market shares exceed the 30 per cent threshold set by EU law. Finally, the Authority addressed competition exemptions for specific products. Member States are allowed to adopt supply control measures for products covered by specific designations of origin and for wine. The FCA underlined that these exemptions only applied to volume management but not to prices. The DGCCRF is now expected to draft guidelines for the sector, based on the FCA’s opinion.

The Supreme Court, which had made the reference for a preliminary ruling in the Endives case, also issued its ruling on the matter in September. In accordance with the ECJ ruling, it maintained that endive farmers were not allowed to set minimum prices although

24 ECJ, 14 November 2017, case C-671/15.
27 Supreme Court, 12 September 2018, No. 14-19589.
they could coordinate to some extent within approved producer organisations; it quashed the 2014 appeal decision, which had fully exonerated the farmers, sending them back to the CAP where they will have to once again contest a €3.6 million fine dating back to 2012.

ii Outlook

The Authority should maintain its focus on the digital sector. In June 2018, it launched a project with the Bundeskartellamt to study algorithms and their potential anticompetitive effects, building on their joint paper ‘Competition and data’ published in 2016. A report is expected for 2019. The FCA is also preparing an opinion on the import and distribution of consumer goods in the French overseas department, analysing price evolution and the potential causes for the enduring price differential with metropolitan markets. Other sectors of interest in 2019 include the audiovisual sector, as the FCA will issue an opinion in preparation of a future decree reforming the sector, as well as healthcare, since two opinions on medicinal products are expected for early 2019: the first on their distribution in urban areas; the second on the setting of prices in the industry.

V STATE AID

State aid rules are enforced at the European level by the European Commission (EC) and the Court of Justice of the European Union (CJEU). In 2018, the EC made 29 decisions on measures implemented by France; 26 of them were decisions not to raise objections, one found that the measures at hand did not constitute state aid,28 one approved most of the scheme while ordering France to recoup a partial amount,29 and one initiated a formal investigation procedure.30 The following cases are worth exploring.

i Significant cases

After a first negative decision in 2004, quashed on appeal, the EC found that the €9 billion shareholder loan granted to France Telecom in 2002 did not constitute state aid, since it could not be proven that a private investor would not have acted similarly.31 The Commission also approved a plan jointly notified by France, Germany, Italy and the UK to grant €1.75 billion to joint research and innovation in the field of microelectronics; the integrated project was deemed to be compatible with EU state aid rules and to contribute to a common European interest.32

As regards European courts, the CJEU put an end to the 15-year legal battle over tax breaks granted by France to EDF and confirmed that France will have to recoup €1.37 billion. In 2003, the Commission had found that France had waived a tax claim in favour of EDF, breaching EU state aid rules; however, this first decision was annulled by the General Court (GC). The Commission adopted a new decision in 2015, still finding the aid was incompatible. In January 2018, the GC sided with the Commission and dismissed

28 EC, 18 May 2018, case SA.12594.
29 EC, 31 July 2018, case SA.36511.
30 EC, 4 July 2018, case SA.47867.
31 EC, 18 May 2018, SA.12594.
32 EC, 18 December 2018, SA.48705.
EDF’s action, stating that France had indeed granted an illegal tax waiver and rejecting the argument that the private investor test should have been used. In December, the ECJ dismissed EDF’s appeal.

The ECJ also issued its ruling in the Sernam case, dating back to 2001. At that time, the Commission had conditionally authorised restructuring aid of €503 million in favour of Sernam, a private company then wholly owned by SNCF. It later appeared that the conditions for compatibility had not been complied with, and that France had granted €41 million worth of additional, new aid. As a result, a second EC decision declared the €41 million to be incompatible aid and set new conditions for the compatibility of the initial €503 million. Pursuant to those new conditions, Sernam had to sell its assets en bloc. In order to enable this divestment, SNCF recapitalised Sernam, waived its debt and granted certain guarantees to the purchaser. In 2012, the Commission found that the conditions set in its second decision had not been met, and that the €41 million aid had not been recouped. As a result, the €503 million aid authorised in 2001 now had to be viewed as incompatible. In addition, the measures granted to allow for the sale of Sernam’s assets constituted new incompatible aid. In the end, a total of €642 million had to be recouped. In 2015, the GC dismissed an action brought by SNCF seeking the annulment of the 2012 decision. This year, the ECJ dismissed SNCF’s appeal, making France’s recovery obligation final.

ii  Trends, developments and strategies

Public support to the energy sector

The EC has dedicated an increasing part of the state aid agenda to public funds for the energy sector. In particular, the Commission cleared several French measures furthering the Union’s energy and climate objectives. The first pertained to CSPE, a surcharge paid by electricity consumers. The EC reviewed CSPE reductions granted to electricity-intensive consumers, which it deemed compatible with state aid rules since those reductions were linked to support measures for renewable energy. Some, however, will have to be recouped because they exceeded authorised levels. The EC also approved a support scheme of €200 million to electricity production from renewable sources for self-consumption.

Commission inquiry into French airports’ support in favour of Ryanair continues

The European Commission has opened another in-depth investigation into potential aid in favour of Ryanair in French airports, this time in Montpellier. It will examine marketing agreements between Ryanair and the local tourism association, an independent organisation funded mostly by public entities. This new investigation echoes three GC decisions this

34  ECJ, 13 December 2018, case C-211/18.
35  EC, 23 May 2001, case SA.12522.
37  GC, 17 décembre 2015, case T-242/12.
38  ECJ, 7 March 2018, case C-127/16.
39  EC, 31 July 2018, case SA.36511.
40  EC, 22 October 2018, case SA.49180.
41  EC, 4 July 2018, case SA.47867.
year, regarding support in favour of Ryanair at the Nimes, Angouleme and Pau airports: the Court confirmed that France will have to recoup €5 to €7 million, €870,000 and €1.5 to €2.2 million respectively.

VI MERGER REVIEW

In 2018, the FCA issued 235 merger review decisions under Articles L.430-1 to L.430-10 of the French Commercial Code, which shows steady transactional activity in line with 2017 (236 decisions) and 2016 (230 decisions). All were clearances, among which four were granted subject to commitments and one subject to injunctions, only the second case of injunctions since the Authority was entrusted with merger control powers. The main sectors affected by transactional activity were the food retail sector, automotive retail, property development and real estate, and insurance services.

i Significant cases

The standout case of 2018 was the first Phase III decision, as the Minister for the Economy decided to use his power to re-examine an operation for the first time since that procedure was created in 2008. Cofigeo had notified the acquisition of certain assets of the Agripole group. The FCA conditionally cleared the transaction in July 2018. The Authority had identified multiple competition concerns, yet Cofigeo did not offer adequate remedies; as a result, the FCA used its power of injunctions to order divestments. This injunction power allows it, under exceptional circumstances, to impose remedies and clear the transaction rather than block it, and had only been used once until now. The Minister for the Economy then chose to reassess the deal pursuant to Article L.430-7-1 of the French Commercial Code, which grants him power to evoke a case on grounds of public interest other than competition concerns. The Minister required employment and industrial policy commitments but no divestments, and adopted an authorisation decision that overruled that of the Authority, rendering the initial injunctions void.

This year also brought new developments regarding the Fnac/Darty merger. The FCA had cleared the acquisition in 2016 provided that Fnac Darty divest several stores. The purchaser presented for some of these stores was not approved, and no other buyer was found before the deadline. As a result, the Authority imposed a €20 million fine for failure to meet part of the commitments. Meanwhile, Fnac Darty challenged the constitutionality of the law which allows the President of the Authority to approve or reject a purchaser alone, without referring to the College; the Council ruled that this power was conform with the Constitution.

---

42 GC, 13 December 2018, case T-53/16.
43 GC, 13 December 2018, case T-111/15.
44 GC, 13 December 2018, case T-165/15.
46 FCA, decision 18-DCC-95 of 14 June 2018, acquisition of Agripole (William Saurin) by Cofigeo (later overturned by decision of the Minister for the Economy).
47 FCA decision 18-DCC-95 of 14 June 2018.
48 Minister for the Economy and Finance, decision of 19 July 2018.
49 FCA, decision 18-D-16 of 27 July 2018.
50 Constitutional Council, decision QPC 2018-702 of 20 April 2018.
In April, the FCA cleared the acquisition of Sarenza by Monoprix \(^{51}\) and of André by Spartoo.\(^{52}\) The two deals were independent, however the Authority examined them jointly since they raised similar questions. Both of them involved the merger of two operators of the retail sector, with each time one being a physical distribution group and the other an online selling platform. The Authority saw those transactions as the sign of a trend of omnichannel group development. Building on that assessment, the FCA announced that it planned to open a market study into ‘phygital’ distribution, since its development is ‘one of the biggest changes to the economy in recent years’\(^{53}\).

Finally, the FCA cleared the merger of two property advertising websites.\(^{54}\) It was the first time it had reviewed an operation between two online platforms, and most of its analysis focused on the importance of data and potential network cross-effects.

### ii Outlook

**Upcoming decisions**

As regards next year’s prospects, 24 operations were under review at the time of writing. Among other notable projects, the Authority is examining a joint venture between RATP, the state-owned public transport operator, and Keolis, a Franco-Quebecois private operator, which would run the new express line between Paris and CDG Airport. No less than seven of the 24 operations being reviewed pertain to the food retail sector.

**Purchasing agreements in the food retail sector**

Joint purchasing agreements, although not analysed as mergers, are still subject to mandatory notification to the FCA if they exceed certain turnovers, under a specific procedure created in 2015 and set out by Article L.462-10 of the French Commercial Code. Accordingly, two sets of purchasing agreements were notified, for information, in May and June 2018. The Authority decided to open an in-depth investigation and extended the scope of inquiry to a third agreement\(^{55}\).

**Modernisation and simplification of the French merger procedure**

The FCA is currently in the process of modernising and simplifying merger review proceedings. This year, it published the results of a consultation launched in 2017. It confirmed the existing thresholds were still appropriate, including the specific threshold applicable to the retail sector. Although the possibility of a new transaction value threshold was entertained at some point, this option was ruled out. The Authority is now looking into introducing ex post control, and launched a new consultation on the issue. As for simplification, it suggested reducing the amount of information required for notification, extending the scope of the simplified procedure, and creating an ‘ultra-simplified, dematerialised’ procedure. New merger guidelines are expected for spring 2019.

\(^{51}\) FCA, decision 18-DCC-50 of 20 April 2018.
\(^{52}\) FCA, decision 18-DCC-53 of 20 April 2018.
\(^{54}\) FCA, decision 18-DCC-18 of 1 February 2018.
VII CONCLUSIONS

The FCA announced its priorities for 2019 in January. Sectoral focus will include the digital sector, healthcare, distribution and energy. In addition, the Authority will continue to carefully examine the state of competition in the French overseas territories.

Next year, attention should also be paid to the implementation of the settlement procedure under the recent notice and to the upcoming new merger guidelines. Finally, the legal framework within which the FCA operates could undergo substantial transformation and its powers could be significantly strengthened as part of the Action Plan for Business Growth and Transformation (PACTE bill) currently under discussion in the Senate.
Chapter 11

GERMANY

Evelyn Niitväli and Marc Reysen

I OVERVIEW

In 2018, the German Federal Cartel Office (FCO) celebrated its 60th anniversary. The FCO was founded in 1958 and began its work with 53 members of staff. Its task in the beginning was the prosecution of cartels and abuses of market power. Much – but not everything – has changed since then. The authority now has a staff of around 350 and has gained further competences, in particular in the area of merger control, which was added to its ‘portfolio’ in 1973, as well as public procurement law. Since 2017, the FCO can also carry out sector inquiries into consumer protection issues – a competence that the authority has already put into practice twice.

Prioritisation and resource allocation of enforcement authorities

The year 2018 proved again that the FCO is an extremely active enforcer. A key area of activity of the authority's work was and is the digital economy. This applies not only as regards the enforcement activities of the FCO. Rather, the authority also actively contributes to the development of policy and administrative practice in this area. For example, in June 2018, the FCO launched a joint project together with the French Autorité de la Concurrence which aims at analysing the challenges raised by algorithms. This project follows the joint paper of both authorities on ‘Competition Law and Data’ that had been published in May 2016.

In a press release, Andreas Mundt, the President of the FCO, pointed out: ‘Our key focus is on protecting competition in the digital economy. We have two key objectives when it comes to the major internet companies. Our task is to keep markets open to ensure they remain contestable and companies continue to have the opportunity to be successful with new ideas. We also need to make sure consumers can select the products and services matching their requirements in a transparent and fair environment.’ Following this approach, the FCO pursued a number of cases in the digital economy. In particular, the FCO initiated proceedings against Amazon to examine its terms and business practices towards sellers and

1 Evelyn Niitväli and Marc Reysen are partners at RCAA.
2 Joint press release of the FCO and the Autorité de la Concurrence of 19 June 2018. The FCO’s press releases, case summaries and decisions are available at the FCO’s website: www.bundeskartellamt.de. Some are available in English.
4 See FCO press release of 29 November 2018.

© 2019 Law Business Research Ltd
in February 2019 closed its investigation against Facebook by prohibiting the company from combining user data from different sources.\(^5\) The authority also launched a sector inquiry into market conditions in the online advertising sector.\(^6\)

\footnote{5}{See FCO press release of 7 February 2019.}
\footnote{6}{See FCO press release of 1 February 2018.}

\section*{Enforcement agenda}

\subsection*{Cartels}

The enforcement activities of the FCO in the area of cartels remained strong in 2018, encompassing, \textit{inter alia}, seven dawn raids at 51 companies. Moreover, 2018 saw a significant increase in the amount of fines imposed by the FCO compared to the previous year: in 2017, the FCO imposed fines totalling ‘only’ approximately €66 million, whereas in 2018 fines in cartel proceedings totalled approximately €376 million. According to the authority, the higher level of fines in 2018 was mainly due to the fact that in the middle of 2017 the so-called ‘sausage gap’ in German law, which enabled companies to escape a fine of the FCO through internal restructuring measures, was finally closed. The FCO took up a number of new cases after the law was amended.\(^7\)

\footnote{7}{See FCO press release of 20 December 2018.}

\subsection*{Merger review}

In the area of merger review, there was no such downward trend. In 2018, the FCO received approximately 1,300 merger control notifications.\(^8\) In 12 of the cases filed in 2018, the FCO opened an in-depth investigation (i.e., the Phase II review). One of these cases was prohibited, while three were cleared by the FCO without conditions. In four cases, the parties abandoned their planned merger projects and withdrew their notifications. In four cases, the proceedings were still pending at the end of January 2019.

\subsection*{Horizontal and vertical restrictive agreements}

The FCO’s enforcement agenda as regards horizontal and vertical restrictive agreements covered both the old and the new: the authority not only dealt with cases in the digital sphere, such as the setting up of online trading platforms, but also with some ‘classic’ competition law problems, in particular the work of trade associations.

\subsection*{Dominance}

One of the most publicly visible enforcement matters of the FCO continued throughout 2018: the investigation into terms and conditions used by Facebook to establish whether these breached German data protection rules. The FCO started 2019 with a ‘bang’, by imposing far-reaching restrictions as regards the processing of user data on the company.\(^9\)

\footnote{8}{See FCO press release of 20 December 2018.}
\footnote{9}{See FCO press release of 7 February 2019 and case summary of 15 February 2019.}
II CARTELS

i Significant cases

In 2018 the FCO imposed fines of around €376 million on 22 companies and trade associations as well as 20 individuals. The cases concerned a number of different sectors, in detail:

a In July 2018, the FCO imposed fines totalling approximately €205 million on six special steel companies, a trade association and 10 individuals for concluding price-fixing agreements and exchanging competitively sensitive information. The proceedings were initiated in November 2015 with a sector-wide dawn raid triggered by a leniency application. The leniency applicant escaped a fine. The companies fined admitted to the accusations and agreed to a settlement. Moreover, four of the companies had also cooperated with the FCO during the investigation, which was taken into account in the calculation of the fine. Investigations into four other companies and a trade association are still ongoing. The special steel products that were the subject of the agreements were generally sold based on a price model which essentially consisted of a so-called base price and surcharges for certain inputs, especially scrap and alloys. According to the findings of the authority, the steel producers had jointly agreed on and implemented a uniform method for calculating the scrap and alloy surcharges. There was also a basic agreement between the companies that the surcharges were supposed to be passed on to the customers on a 1:1 basis. The agreements were in place at least from 2004 until the latest the dawn raid in November 2015. The FCO found that trade associations played a decisive role in the agreements: association meetings were used as a platform for implementing the cartel. Moreover, they also played an active role by processing and providing the companies involved with data for coordinating the scrap and alloy surcharges.

b In February 2018, the FCO imposed another fine on a harbour towage service provider for agreeing on quota cartels for several German ports. Other cartelists had already been fined at the end of 2017. In total, the FCO imposed fines of approximately €17.5 million on four companies and their representatives. All companies had agreed on a settlement. Furthermore, three of the fined companies had cooperated with the FCO. The leniency applicant was not fined.

c Also in February 2018, the FCO imposed a fine on another wholesaler for sanitary equipment – thereby concluding its investigation as regards a coordination with respect to the calculation of gross price lists and sales prices by wholesalers of sanitary, heating and air conditioning products over several years. Nine other companies had already been fined in 2015 and 2016. The fines imposed on the 10 companies and one individual amounted to approximately €23 million.

d Fines amounting to a total of €16 million were imposed on the newspaper publishing company DuMont, an individual responsible as well as – a rather unusual occurrence – a lawyer. In late 2000, DuMont and another newspaper publishing company agreed not to attack the other party’s market shares. The agreement was flanked by a plan.

---

10 See FCO press release of 12 July 2018.
12 See FCO case summary of 16 March 2018.
to establish cross-holdings between the two company groups as well as purchase and pre-emption rights for DuMont. The parties assumed that the cross-holdings would ensure that they would not ‘ruin the markets’ for each other. In order to ‘formalise’ this arrangement, the parties entered into an agreement that also included an allocation of circulation areas. This agreement was concluded at a notary in Switzerland in December 2000. As the parties were aware that the agreement would not be legally binding, they entered into a similar contract – only covering the proposed cross-holdings and pre-emption right but excluding the market allocation – at a notary in Germany at the same time. In March 2004, the parties notified the FCO of the proposed acquisition of 18 per cent of the shares by DuMont in the other publishing company. Owing to concerns raised by the FCO, the percentage of shares to be acquired was reduced to 9 per cent during the proceedings. Moreover, the parties also abandoned the pre-emption right that had originally been agreed upon. Nonetheless, the FCO prohibited the proposed acquisition. The parties challenged the prohibition decision before the Higher Regional Court in Düsseldorf. The court reversed the FCO’s decision – in particular taking into consideration that the parties had abandoned the proposed pre-emption right. Following the decision of the court, DuMont acquired 9 per cent of the shares in its ‘rival’. Shortly thereafter, the parties again agreed on a new pre-emption right for DuMont. The contract was again concluded at a notary in Switzerland and – not surprisingly – without informing the FCO. Moreover, a couple of months later DuMont increased its shareholding to the originally planned 18 per cent. The increase was discussed with the FCO – however, again without disclosing the pre-emption right. The contractual arrangements as well as the communication with the FCO were effected via a lawyer who advised DuMont group during the entire period and was actively involved in the operations. The parties eventually terminated their agreements in December 2016 and one of the companies filed a leniency application with the FCO. The authority conducted a dawn raid at DuMont’s head offices and also at the law firm in which the lawyer involved is active. The leniency applicant in the case was not fined. Moreover, DuMont group and the individual responsible agreed to a settlement. In its press release as well as in the case summary, the FCO stressed the fact that the cooperation between DuMont and the other party to the agreement were not covered by the exemption for the press sector in Section 30(2b) of the German Act against Restraints of Competition (ARC) that was introduced in summer 2017. While this provision allows for cooperations between publishers to strengthen their economic basis for intermedia competition, the provision does not apply to price-fixing, territorial and customer allocation agreements.

Fines of €13.2 million in total were imposed on two potato and onion packaging companies for fixing prices as regards their supplies to the Metro group.14 The proceedings against the two companies were initiated in May 2013 with a sector-wide dawn raid following a leniency application. According to the findings of the FCO, at least since early 2003 until the start of the proceedings, persons responsible at the companies involved had been in regular telephone contact with one another, especially in the run-up to the weekly offer for packed potatoes and onions. In their calls the company representatives informed one another of their purchase prices for potatoes

---

Germany

and onions and agreed to use the same raw product price as the basis for their internal calculation of offer prices as well as the same or approximately the same amounts for other cost items.

The last fining decision of 2018 concerned asphalt. The FCO imposed a fine of €1.43 million on a manufacturer of asphalt mixes for participating in a cartel involving prices, sales areas, customers and quotas for the supply of construction companies in the Rhine-Main area between 2005 and 2013. The cartel took the form of supplier consortia. The proceedings were initiated by a leniency application and the leniency applicant escaped a fine. The proceedings against another company – or rather its legal successor – were discontinued as the company had taken restructuring measures in order to make use of the so-called ‘sausage gap’. The FCO pointed out that the companies involved in the cartel had been forming supplier consortia for years even though in most cases one company could have met the demand alone. Thus, the consortia mostly served to steady the market (i.e., to avoid competition for prices and bids among the participating undertakings). The fined manufacturer admitted to the accusations and agreed to a settlement.

Trends, developments and strategies

As in previous years, the track record of the FCO in 2018 illustrates the importance of leniency applications and other tip-offs to uncover competition law infringements. Furthermore, the trend of reaching settlements with the undertakings involved in a cartel remains unbroken. However, there is a significant downward trend when it comes to leniency applications: from 59 in 2016 to 37 in 2017 to only 21 in 2018. Whether this is due to a reduction in cartel activity – as a result of greater awareness of such issues and increased compliance activities in many companies – or based on the ever-increasing risk and impact of follow-on damage claims remains to be seen.

Another noteworthy development in the area of cartel enforcement concerned the investigation into metal packaging manufacturers. The FCO had initiated cartel proceedings against the manufacturers in spring 2015 on the basis of an anonymous tip-off. However, in April 2018 the authority referred the ongoing proceedings to the European Commission.15 While the FCO explained that it had uncovered evidence that the alleged offences were not limited to Germany but affected a number of other EU member states as well, there seems to have been another and more important motive for the referral: during the proceedings of the FCO, some of the companies under investigation carried out corporate restructuring measures as a result of which the FCO might not have been able to impose a fine on such companies owing to the ‘sausage gap’. The European Commission faces no such difficulties. The FCO had warned companies for years that it might refer cases to the European Commission to make sure that the cartel members would not profit from the loophole in German law. With this referral the FCO demonstrated that the warnings were indeed not only empty threats.

15 See FCO press release of 27 April 2018.
iii  Outlook
Irrespective of the downward trend in terms of leniency applications, uncovering and investigating cartels was again a key area of the FCO’s activity throughout 2018 and can be expected to remain so in years to come. However, the FCO may have to resort to other tools and techniques in order to detect cartels outside of its leniency programme.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

Horizontal agreements
According to the FCO, the authority received an increasing number of enquiries from the engineering sector and the metal industry concerning cooperations between producers and their business customers or suppliers. The focus of these cooperations was often on platform models designed to improve digital networking for market participants. One of the projects the FCO dealt with in 2018 was the launch of a business-to-business online trading platform for steel products which was allowed by the authority subject to certain modifications of the original plans.16 In particular, the FCO had been concerned that the platform would increase transparency. Therefore, the platform had to be designed in such a way that there would be no anticompetitive exchange of information on prices and product availability. In particular, prices should only be visible to customers logged in on the platform and any new customer would have to identify itself with their VAT number. Moreover, there had to be organisational separation between the operator of the platform and its corporate group in order to make sure that there would not be a flow of sensitive information.

Another case in the steel industry concerned the reorganisation of a trade association. After several cartel proceedings in the industry, the German Steel Federation decided to take measures in order to reduce the risks of competition law infringements within the association’s framework.17 In particular, the association decided to limit the committee work to topics that are essential for representing the political interests of the German steel industry. Furthermore, the association installed an internal clearing centre and reorganised its activities in the area of collecting data and publishing statistics.

In October 2018, the FCO announced that it would be reviewing the cooperation between the pay-television provider Sky Deutschland and the operator of the DAZN streaming service Perform as regards the broadcasting of the Champions League in Germany.18 Sky had acquired the broadcasting rights for all matches between 2018 and 2021 in a tender. Following such tender, Sky and DAZN divided the rights among themselves. The FCO is concerned that the agreement could contribute to a further consolidation of Sky’s market position and will examine whether the cooperation may restrict competition by object or effect.

Another proceeding that the FCO initiated in 2018 concerns Germany’s largest furniture purchasing cooperation.19 The proceedings were triggered because an additional retailer intended to join the cooperation. The FCO – while acknowledging that joint purchasing

---

17  See FCO case summary of 17 September 2018.
18  See FCO press release of 16 October 2018.
19  See FCO press release of 24 October 2018.
cooperations can be beneficial in particular for smaller furniture retailers – stressed the fact that it wants to make sure that the buying power of purchasing cooperations does not increase to an extent that it raises concerns with regard to the furniture manufacturing landscape as a whole, which is mostly characterised by small and medium-sized manufacturers. The authority is concerned that ‘if manufacturers are unable to compete in the long run because they cannot cope with the pressure raised by the retailers’ conditions and disappear from the market as a result, there will be less variety on the market and prices will increase, putting consumers at a disadvantage’.

**Vertical restrictions**

The year 2018 started as 2017 had ended: with a success for the FCO in court. In a decision of 12 December 2017, which was published on 19 January 2018, the Federal Court of Justice confirmed the FCO’s decision in the ASICS case.\(^{20}\) According to the decision, ASICS may not forbid its dealers from using price comparison engines as such per se prohibitions which are not tied to quality requirements were inadmissible hardcore restrictions.

On 28 February 2018, the Higher Regional Court of Düsseldorf increased the fine that had been imposed on drugstore chain Rossman for vertical price fixing as regards the sale of roasted coffee more than fivefold – from €5.25 million that had been imposed by the FCO to €30 million.\(^{21}\) The court fully confirmed the findings of the FCO. When setting the fine, it took into account that the case concerned a vertical infringement of competition law with nationwide horizontal effects in the sale of a major consumer good.

Outside of these two court cases, 2018 appears to be a somewhat ‘slower’ year when it comes decisions of the FCO in the vertical sphere with only one notable case: in early 2018, the FCO closed a sample investigation it had conducted against the purchasing conditions for raw milk of Deutsche Milchkontor eG (DMK), Germany’s largest dairy. Long-term exclusive supply agreements locked farmers into the relationship with a single customer whose ability to unilaterally retroactively set prices could lead to market foreclosure. While the changes DMK made to its agreements did not completely remove the FCO’s concerns, they were considered an encouraging first step in the right direction and sufficient to close its investigation for the time being.\(^{22}\)

**Abuse of dominance**

In 2018, the FCO conducted a number of abuse of dominance proceedings. However, the year started with a victory of the FCO before the Federal Court of Justice. In a decision of 23 January 2018, the Federal Court of Justice confirmed key elements of a decision of the FCO against the German retailer EDEKA from 2014.\(^{23}\) After its takeover of the stores of rival retailer ‘Plus’ in 2008, EDEKA had unilaterally demanded certain favourable conditions from its suppliers. These conditions were often referred to as ‘wedding rebates’ (Hochzeitsrabatte). The FCO started an investigation as regards EDEKA’s demands in relation to the suppliers of sparkling wines as an example and found that such demands constituted


\(^{21}\) See FCO press release of 1 March 2018.

\(^{22}\) See FCO press release of 9 January 2018.

\(^{23}\) See Federal Court of Justice, decision of 23 January 2018 – Az. KVR 3/17.
an abuse of a dominant position. On appeal by EDEKA, the Higher Regional Court of Düsseldorf annulled the FCO’s decision. The FCO in turn appealed against the decision of the Higher Regional Court in three key points and the Federal Court of Justice confirmed the position of the authority in this regard: (1) it found that EDEKA’s demands for an alignment of conditions to individual, more beneficial conditions that had been granted to Plus constituted an abuse of bargaining power; (2) the Court also regarded EDEKA’s demand for its own payment terms to be adjusted per se to those of Plus as abusive; and (3) finally, it held that EDEKA’s request on suppliers to share the costs for the refurbishments of outlets was an abuse of bargaining power.

In a similar case in the furniture sector, the FCO objected to a demand by furniture retailer XXXLutz that conditions it enjoyed should also retroactively be applied to purchases made by another retailer it had acquired.24 The FCO pointed out that it saw no objective justification for demanding such benefits and that the fact that suppliers complied to such demands without objections could be a sign of their dependency on the retailer. Given the intervention of the authority, XXXLutz decided to abandon its demands for retroactive adjustments of the purchase conditions.

In May 2018, the FCO informed the public that it would not initiate abuse of dominance proceedings against German airline Lufthansa.25 After the insolvency of rival airline Air Berlin in 2017, Lufthansa held a monopoly position on several German domestic routes. A random analysis of price data showed that the prices of flights on connections that had become a monopoly were on average approximately 25 to 30 per cent higher than in the previous year when Air Berlin had still been operating. In individual cases the price increases were even higher. However, the FCO found that the price increases were only short term. From January 2018, British airline easyJet started offering flight connections on several of the previous ‘monopoly routes’. The FCO found that in February 2018 the prices on these routes fell by on average 25 to 30 per cent compared to the prices in autumn 2017 (i.e., after the market exit of Air Berlin). Thus, the prices ended up at roughly the same level as before. In its press release and case summary regarding the case, the FCO highlighted that the question as to whether the price increases were the result of a price algorithm or human intervention was of no significance for the investigation and its outcome. In any event, the use of an algorithm for pricing would not relieve a company of its responsibility. While letting Lufthansa ‘off the hook’ for the time being, the FCO ended its report by stressing that it will keep an eye on the industry: ‘The Bundeskartellamt will continue to closely observe developments on the German domestic flight markets. If it receives tip-offs about abusively excessive prices it will again consider whether to initiate proceedings.’

Online retailer Amazon had no such luck and did not escape with a simple ‘warning’. Rather, in November 2018 the FCO initiated abuse of dominance proceedings against the company with the aim of examining Amazon’s terms of business and practices towards sellers on its German marketplace amazon.de.26 According to the FCO, the terms of business and practices that might be considered as abusive are liability provisions to the disadvantage of sellers in combination with choice of law and jurisdiction clauses, rules on product reviews, the non-transparent termination and blocking of sellers’ accounts, withholding or delaying payment, clauses assigning rights to use the information material that a seller has to provide

26 See FCO press release of 29 November 2018.
with regard to the products offered and terms of business on pan-European despatch. The proceedings were triggered by numerous complaints the FCO had received from sellers. In contrast to the investigation of the European Commission, the FCO in its proceedings will not focus on Amazon’s use of data to the disadvantage of marketplace sellers.

The year 2019 started with another milestone in the area of abuse of dominance proceedings: on 6 February 2019, the FCO issued its decision against Facebook and imposed far-reaching restrictions as regards the processing of user data on the company.27

ii Trends, developments and strategies

The fact that there were not many decisions of the FCO as regards vertical restrictions in 2018 by no means implies that the authority has lost its interest in this regard. Rather, it can be expected that vertical restrictions both in the digital as well as in the ‘brick and mortar’ sphere will remain a high priority on the FCO’s enforcement agenda. This is illustrated by the fact that 2019 started with fines totalling €13.4 million on a bicycle wholesaler, its representatives and 47 retailers for vertical price fixing.28

iii Outlook

The FCO is actively involved in the ongoing debate in Germany and other jurisdictions as to whether the competition law regime is well suited to deal with all the challenges brought about by the digital economy or whether it needs to be ‘modernised’ to avoid an enforcement gap. At any rate, the authority has not shied away from taking up cases in the digital sphere with its existing tools, even if that meant entering into uncharted legal waters.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

In February 2018, the FCO opened a sector inquiry into the online advertising sector.29 Pointing to the growth of the sector and its economic relevance for advertisers and content providers active on the internet the authority feels a need to better understand the highly technical nature of this business, the possible access to and processing of data, and the role played by large companies ‘with considerable market relevance’ that other players claim have been able to set up closed systems (also referred to as ‘walled gardens’).

With regard to the sector inquiry into online comparison websites in the areas of travel, energy, insurance, telecommunications and financial services, the FCO presented its findings in December 2018.30 According to the authority, the inquiry confirmed the initial suspicions of consumer rights violations. In particular, consumers were apparently often not informed about the details of the ranking criteria for their search results and the comparison website’s recommendations. This was considered as misleading.

29 See FCO press release of 1 February 2018.
30 See FCO press release of 12 December 2018 as well as the paper ‘Consumer rights and comparison websites: Need for action’ which is available on the website of the FCO at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_V.pdf?__blob=publicationFile&v=2.
In March 2018, the FCO published its latest annual report on the work of the Market Transparency Unit for Fuels – which incidentally celebrated its fifth anniversary in 2018.\textsuperscript{31} Some of the key findings of the report include the fact there are still significant price differences – of up to 30 cents/litre within one town – in the course of each day.

In the telecommunications sector, the FCO provided comments to the Federal Network Agency as regards the allocation of frequencies in mobile communications.\textsuperscript{32} In its press release, the FCO indicated that the authority had received several complaints from third-party providers about a lack of access to the mobile communications network in Germany. Given the paramount importance of mobile communications, the FCO pointed out that it would be desirable if a fourth network operator were to enter the market during the upcoming auction for mobile frequencies. Moreover, the authority stressed that it would be highly relevant for competition that service providers and mobile network operators be granted or retain their claim to appropriate non-discriminatory access to mobile communications networks.

ii Trends, developments and strategies

In addition to energy, fuel retailing and telecommunications which the FCO has been monitoring for years, the new competences of the authority in the area of consumer protection have opened new industries to the scrutiny of the FCO. It can be expected that the FCO will not only keep up but rather increase its activities in the consumer protection sphere and the authority also seems to be lobbying for additional competences in this regard.

iii Outlook

In December 2017, the FCO launched a sector inquiry into smart TVs to clarify whether and to what extent smart TV manufacturers collect, pass on, and commercially use personal data, and whether consumers are being appropriately informed.\textsuperscript{33} The FCO has continued its inquiry throughout 2018. A first report on the findings is expected in 2019.

VI MERGER REVIEW

i Significant cases

In 2018, the FCO opened an in-depth investigation in only 12 out of approximately 1,300 concentrations that were notified. Thus, more than 99 per cent of cases were cleared during the preliminary investigation. The cases that raised competition concerns covered various industries, such as hospitals and nursing homes, folding machines, office supplies, container services and bearings. In the majority of cases the concerns of the authority were based on horizontal relations between the parties. However, the authority also addressed vertical issues such as foreclosure. In detail:

a In February 2018, the agricultural cooperatives RWZ and Langard abandoned their plans to set up a joint venture after the FCO had issued a statement of objections.\textsuperscript{34} After conducting intensive inquiries, the FCO concluded that the proposed transaction would have resulted in market shares of up to 50 per cent on regional markets (1) for

\textsuperscript{31} See FCO press release of 16 March 2018 and of 30 November 2018.

\textsuperscript{32} See FCO press release of 24 August 2018.

\textsuperscript{33} See FCO press release of 13 December 2017.

\textsuperscript{34} See FCO press release of 23 February 2018.
The acquisition of rail wagon leasing company CIT by its competitor VTG was only cleared subject to a condition precedent. The FCO found that VTG was already the largest supplier in Europe and that CIT, one of the last few remaining medium-sized players, was a close competitor. Since VTG had already acquired several competitors in recent years, the FCO expected that the acquisition of CIT would lead to the creation of a dominant position. In order to obtain clearance, the parties agreed to sell the entire business of CIT’s German and Luxemburg subsidiaries and a certain number of additional freight cars to an independent third party before implementing the proposed transaction.

In June 2018, Horizon and Brink withdrew their merger notification following a statement of objections issued by the FCO. Both companies are manufacturers of towbars for cars and light utility vehicles. Horizon, the largest supplier and market leader as regards towbars, had wanted to acquire Brink, the third-largest supplier. The FCO raised concerns as the transaction would have reduced the number of providers of refuelling (or bunkering) services to shipping vessels in the German part of the river Rhine from three to two. Moreover, in contrast to the one remaining competitor the merged entity would also have been vertically integrated in the upstream fuel trading markets.

Another transaction that was abandoned in June 2018 after the FCO had expressed concerns was the planned acquisition of NWB by Reinplus. According to the findings of the authority, the transaction would have reduced the number of providers of refuelling (or bunkering) services to shipping vessels in the German part of the river Rhine from three to two. Moreover, in contrast to the one remaining competitor the merged entity would also have been vertically integrated in the upstream fuel trading markets.

In July 2018, the FCO cleared the acquisition of 40 per cent of the shares in and sole control of Deutsche Gießdraht by Aurubis. Deutsche Gießdraht was a joint venture between Aurubis and Coldelco and the transaction increased Aurubis’ participation to 100 per cent. Deutsche Gießdraht produced continuous cast copper rods exclusively for its parent companies, which then sold such rods to industrial processors and traders in competition with one another. Thus, as a result of the transaction Codelco would disappear from the market and no longer be a competitor of Aurubis as regards the sale of copper rods. The FCO, however, found that customers after the concentration would still have the possibility to switch to alternative suppliers as there were several domestic and foreign producers in Europe supplying rods of comparable quality.

After conducting an in-depth investigation, the FCO cleared the acquisition of the marine cargo handling business of TTS by Cargotec. This case is noteworthy as the authority could not prohibit the transaction even though the parties apparently had a strong market position as regards the manufacture of technical ship supplies, such as ship cranes, hatch covers, winches as well as ramps, outer doors, etc. This was due to
the fact that demand for such products in Germany was weak. Therefore, the FCO had to apply the ‘minor markets clause’, according to which the FCO shall not prohibit a concentration if the impediment to effective competition concerns one or more markets that had a sales volume of less than €15 million in the last calendar year.39

The FCO also conducted an in-depth review as regards the acquisition of Helene Müntefering-Gockeln, a waste management company operating in the Ruhr area, by Remondis, Germany’s largest waste management company.40 The authority was concerned, inter alia, about the strong position of Remondis in the waste management markets in the Ruhr area. The FCO also examined whether the transaction could lead to a foreclosure of competitors with regard to access to sorting facilities. In this regard, it found that competitors already had sufficient capacities for sorting waste or were planning to build large enough facilities to prevent Remondis from foreclosure. In the end, after a review of around five months, in December 2018 the transaction was cleared unconditionally – in particular taking into consideration the large number of smaller competitors. The authority pointed out, however, that ‘any further acquisitions may . . . have to be very closely examined’.

In January 2019, the FCO prohibited the launch of a joint venture between the two bearing manufacturers Miba and Zollern.41 The authority found that the parties had a very strong position as regards the supply of plain bearings for large bore engines. The joint venture would have meant the loss of a supplier in an already highly concentrated market.

In a case regarding hospitals and nursing homes in the Cologne area the parties withdrew their notification in December 2018 after the FCO raised competition concerns.

Another case in which the parties withdrew their notification in January 2019 concerned the proposed acquisition of licences from National Geographic Partners by German publishing company Gruner + Jahr.

Trends, developments and strategies

In July 2018, the FCO together with the Austrian Federal Competition Authority published their hotly anticipated joint guidance on the new transaction value thresholds that were introduced into the ARC in 2017. According to such new threshold, transactions will need to be notified to the FCO if (1) the combined worldwide turnover of all companies exceeds €500 million; (2) one of the parties has a turnover in Germany of more than €25 million; (3) neither the target nor any other undertaking concerned has a turnover in Germany of more than €5 million; (4) the value of the consideration for the transaction exceeds €400 million; and (5) the target is active in Germany to a considerable extent. The guidance provides an overview of the definition of the consideration as well as further guidance as to what is considered as substantial domestic operations.

Outlook

The digital economy is likely to continue to be of particular interest to the FCO – also in the area of merger control. The transaction value threshold mentioned above was actually

40 See FCO press release of 13 December 2018.
introduced in order to enable the FCO to review acquisitions of digital companies or start-ups with a high market value but low turnover, such as the acquisition of WhatsApp by Facebook in 2014, which did not meet the thresholds for a merger control filing in Germany. Another sector that is expected to come under closer scrutiny due to the new thresholds is the pharmaceutical sector. However, so far experience with the transaction value threshold and whether it actually catches the cases the authority would like to review is limited.

VII CONCLUSIONS

The FCO continues to be an extremely active enforcer and is not afraid to take on cases or topics even if they are controversial or involve untested concepts. This applies in particular to the enforcement of competition law in the internet economy – an area in which the authority can rightfully be described as a pioneer.
I OVERVIEW

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

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

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

---

1 Emmanuel Dryllerakis and Cleomenis Yannikas are senior partners at Dryllerakis & Associates.
A major change that the new Law introduced is a five-year statute of limitations. Until that change, the position of the HCC on this point had been vague, but nevertheless with the tendency that there was no statute of limitations, except for a fine (and not for the recognition of a violation). This led to rulings on violations that occurred more than 20 years ago. The new provision aligns Greek legislation with EU legislation and adopts the jurisprudence of the European courts.

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

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

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

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

The new Law has also modified and introduced various fines:

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

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

Finally, the new Law has introduced changes to the notification obligations. Under the new Law’s provisions, the post-merger notification (Article 4a of Law 703/77) is abolished and there is no obligation to notify agreements that fall under Article 1 (in line with EU law). It should also be borne in mind that the power that the Ministers of Regional Development and of Finance had under the previous Law to approve a concentration that had been prohibited by the HCC has now been rescinded under the new Law.

A new regulation for the functioning and operation of the HCC has been issued by a Common Ministerial Decision dated 16 January 2013. The new regulation aligns the
procedural framework of the HCC to the new Law, and also inserts provisions deriving from the experience of the HCC. In addition, it defines the internal operational system and financial administration of the HCC, taking into consideration the rules of transparency and efficiency of its financial resources.

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

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

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

i Prioritisation and resource allocation of enforcement authorities

In 2018, according to the latest data published by the HCC, 15 decisions were issued regarding concentrations (including gun-jumping and modification of remedies) and eight regarding Articles 1 and 2 of Law 3959/2011 (formerly Articles 1 and 2 of Law 703/77 and equivalent to Articles 101 and 102 TFEU). The HCC also published an opinion, requested by the Ministry of Economy and Development, on amending Law 3959/2011 for the establishment of a partial payment of fines mechanism to facilitate the payment of fines by undertakings. The HCC supported such mechanism, but only on condition that the undertaking concerned waive the right to appeal against the HCC’s decision. The amendment has not yet taken place.

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

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

ii Enforcement agenda

On 7 July 2011, the HCC issued a notice on enforcement priorities. According to this, the prioritisation of cases is generally based on the criterion of public interest. In this context, and according to the HCC, priority is given to ex officio investigations or complaints pertaining to: a hardcore restrictions (price fixing, market sharing, and sales or production restrictions) of national scope, especially in cases of horizontal agreements (cartels), particularly taking into account the market position of the undertakings involved, the structure of the relevant market and the estimated number of the affected consumers;

2 HCC decision No. 38/2018.
products and services of major importance to the Greek consumer where the anticompetitive practice under examination may have a significant impact on prices or the quality of the services (especially as compared with Member States of the European Union); and

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

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

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

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

On 24 May 2012, pursuant to Article 14(2) of the Competition Act,3 the HCC adopted an internal management tool in the form of a point system for the investigation of cases by the Directorate General. In particular, according to this decision, the Directorate General shall investigate pending cases according to their ranking on the basis of a point system, which essentially exemplifies and quantifies the priority criteria set out in the Notice on Enforcement Priorities.4

On 24 September 2015, the HCC issued a second decision5 (published on 4 March 2016), on the quantification of the criteria for prioritisation of pending cases. The decision was issued so as to update a previous decision by providing more specific guidance based on the experience gained by the HCC in the three years that had passed since the issue of the first decision. The new decision is largely the same as the old one in terms of the general principles of prioritisation, but does, however, set a three-month time limit (from the filing of a complaint or the commencement of an *ex officio* investigation) within which a case must be ranked using the point system, whereas the previous decision set none. It also introduces a negative point system applicable in cases where the statute of limitations has expired and a fine may no longer be imposed, or where the facts of the case are such that the HCC may reasonably believe that the anticompetitive practices have ceased or altered in ways that mitigate the competition concerns.

---

3 The Competition Act (Law 3959/2011).
4 HCC decision No. 525/VII/2011.
5 HCC decision No. 616/2015.
The point system aims at enhancing the efficiency of investigations, the focus being on important cases with increased estimated impact on the functioning of effective competition or overall systemic effect, or both, while promoting a more coherent and targeted policy of prioritising pending cases.

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

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

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

ii Penalties – leniency policy
In the case of an infringement of Article 1 of Law 3959/2011, fines of up to 10 per cent of the total turnover of the undertaking can be imposed by the HCC.7 The HCC has also adopted the practice of the European Commission according to which, in cases where the violation concerns a specific product or sector, a maximum fine of 30 per cent of the turnover for that sector applies, but this cannot exceed 10 per cent of the overall turnover provided for by law. There could also be criminal liability of the persons who initiated or participated in the formation and implementation of the cartel. In August 2011, the HCC adopted a leniency programme8 based on the European Commission’s programme providing for immunity or

---

7 Article 25, Paragraph 2(a) of Law 3959/2011.
8 HCC decision No. 526/VI/2011.
reduction of fines. In 2017, the programme was applied successfully\(^9\) for the first time in a major cartel case in the constructions sector (as analysed further below); however, that application, only one known application had ever been made,\(^{10}\) which was unsuccessful.

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

In the case of DEPA, the incumbent gas operator in Greece, since the original commitments decision\(^{13}\) (551/VII/2012) was issued in 2012, five more commitments decisions have been issued by the HCC\(^{14}\) The later decisions have updated the commitments undertaken by DEPA, following an examination of the undertaking’s compliance as well as of the effectiveness of the commitments as time progressed. Following a meeting in plenary session in December 2016, the HCC issued in 2017 a decision\(^{15}\) eliminating a commitment concerning the method of formation of the starting price of electronic bids for natural gas, in view of the liberalisation of the natural gas market from 1 January 2018. During 2018, the HCC published decision No. 635/2016, following an \textit{ex officio} investigation of the compliance of DEPA with the commitments that it had originally undertaken by virtue of decision 551/VII/2012.\(^{16}\) The HCC fined DEPA €60,000 for failure to comply with one out of seven commitments (i.e., to offer an unbundled natural gas sales contract without obliging customers to include the provision of services for the transfer of natural gas).

This year saw the HCC accept commitments by Nissan dealer Nik I Theocharakis SA with regard to alleged vertical practices concerning its policy towards independent repairers on the provision of technical information for the repair and maintenance of Nissan vehicles, and the terms of granting discounts during short-term ‘central’ discount programmes for technical services to specific customers.\(^{17}\) On the other hand, the HCC upheld its policy in rejecting commitments for hardcore restrictions in the \textit{Minerva} case, which concerned the imposition of RPM and the prohibition of passive sales in vertical agreements with its distributors in the butter and margarines markets. The HCC proceeded to the full investigation of the case, which led to the imposition of a fine amounting to €384,106.\(^{18}\)

\(^{9}\) See also below, HCC decision No. 642/2017.  
\(^{10}\) In the \textit{Milk} cartel case, HCC decision No. 373/V/2007.  
\(^{11}\) HCC decision No. 408/V/2008 regarding bank interchange fees (DIAS system).  
\(^{12}\) See, e.g., HCC decision No. 538/VII/2012 of the HCC (regarding pay-TV platform NOVA).  
\(^{13}\) HCC decision 551/VII/2012.  
\(^{15}\) HCC decision No. 635/2016.  
\(^{16}\) See also HCC press release of 21 February 2018.  
\(^{17}\) HCC press release of 7 December 2018; HCC decision No 641/2017.  
\(^{18}\) HCC decision No. 657/2018.
Although the law provides that undertakings can be offered commitments after the assessment of a violation, the guidelines provide that these can also be offered at the beginning of the process; this constitutes a useful compromise, which avoids further use of time and resources while achieving a result similar to a consent decree.

iii Settlement procedure

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

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

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

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

Since then, the HCC has been making extensive use of the settlement procedure, by issuing another three settlement decisions in 2018. The increase of the importance of the settlement procedure is apparent from that it is tested in most horizontal cases that the HCC has dealt with since its inception (although not all undertakings involved in those cases wished to settle).

iv Significant cases

Cartels

Enforcement against cartels in 2018 was ‘soft’ compared to 2017 when the HCC imposed fines amounting to €80.702 million in the constructions cartel case, the biggest case ever to be investigated by the Greek competition authority. The fine concerned the companies that entered into the settlement procedure; for the non-settling companies, the HCC has not yet issued its decision.

In 2018, cartel enforcement concerned cases of relatively lower importance and was characterised by the universal application of the settlement procedure for all of them.

Construction companies

On 14 December 2018, the HCC issued a settlement decision against five construction companies for bid rigging in a public tender for the construction of school infrastructure in the Fthiotida region that took place in March 2011, and imposed fines amounting to a total of €245,000. The case concerned a total of 13 construction companies, eight of which decided not to follow the settlement procedure; the HCC’s decision on the latter companies has not yet been issued.

Newspaper distribution

In October 2018, the HCC settled yet another case involving newspaper distributors Argos SA and Europi SA. More particularly, the HCC, following complaints of points of sale for unjustified exclusion from the supply of newspapers, imposed a total fine of €500,000 on the two companies respectively for a horizontal agreement between them, lasting from 2001 until 2017, that included price and agent commission fixing, as well as allocation of territories and customers. Aside from the fixed 15 per cent reduction due to the application of the settlement procedure, the fine was reduced significantly by another 30 per cent because of the major decline of the newspaper industry over the last years.

Dairy products

On 8 October 2018, the HCC issued a settlement decision on a cartel case involving dairy producer Friesland Campina and its wholesaler Mandrekas SA for placing restrictions on the latter’s participation in public tenders for milk supply for the period 2003–2007.

19 HCC decision No. 642/2017.
20 HCC decision No. 674/2018.
21 HCC decision No. 669/2018.
22 HCC decision No. 668/2018.
Although the two companies normally have a vertical relationship (supplier-distributor), the purpose of these restrictions was to prevent the possibility of participation – and therefore, competition – of the two companies (supplying the same brand) in the same tender. The originality of this case lies with the fact that it is the first one where all implicated companies applied for the settlement procedure and, surprisingly, before notification of a statement of objections. These factors were taken into account with the imposition of a small fine of €160,225 for Friesland and €11,328 for Mandrekas.

v Trends, developments and strategies
There are no notable published investigations or pending cartel cases yet for 2019. A decision is still expected for the non-settling companies in the major Construction Companies cartel case.

III ANTI TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases
Vertical agreements, restrictive franchise agreements and abuse of dominant position
While there have been several decisions reached by the HCC on vertical agreements over the years, very few of those have dealt with franchise networks. Thus far, the most comprehensive decisional guidance offered by the HCC on restrictive franchise agreements has been Decision No. 580/VII/2013, pursuant to which one of the largest Greek telecoms retail chains, Germanos SA, was fined €10.2 million for including problematic clauses restricting competition in the standard agreements it concluded with franchisors for over 22 years (from 1990 to 2012).

On appeal, in Decision No. 527/2016 of the Athens Administrative Court of Appeal, the HCC decision was quashed, in part, on grounds that are entirely novel for a competition case. The Court of Appeal, while upholding the infringement in substance, quashed the fine because it had been levied by the HCC as a total sum of €10.2 million when what it should have done – according to the Court – was apportion the fine for each anticompetitive conduct that was separately identified. The decision was remitted to the HCC so that it could correctly apportion the fine for each infringement (RPM, distributor-franchisor supply restrictions and excessive non-competition clauses), which it duly did in October 2016.23

This judgment may have potentially far-reaching (positive) consequences for future appeals of HCC decisions; it forces the HCC to specify the infringements comprising anticompetitive behaviour by quantifying each one separately. Given that, in the past, certain HCC decisions have been somewhat nebulous in setting out a link between violation and fine, this, at the outset, appears to be a welcome jurisprudential development.

Moreover, the recent relative increase over the past years of franchise decisions may be a sign that the HCC intends to place greater focus on such cases in the future. The franchise system is fairly widespread throughout Greece, and covers a wide range of products and services offered at the retail level, so we can potentially expect to see more such cases in the future.

In 2018, however, the HCC turned its eye away from franchise agreements, which had been the focus of 2017, and focused its antitrust enforcement intensively on the food sector.

23 HCC decision No. 625/2016.
In October 2018, the HCC issued a decision against Elais-Unilever on two counts of abuse of dominance (alleged target rebates and prohibition of parallel promotion of competing products) and three counts of vertical restrictions (alleged RPM, market partitioning by territories and customers, and non-compete obligations) in the margarines market, spanning from 1996 until 2017. The HCC fined Elais-Unilever a total of €27,561,704, which is one of the highest fines that the Greek competition enforcer has ever imposed. The case is mostly interesting in the sense that, although it is the first one to follow the ECJ’s Intel case, the HCC eventually followed the ‘traditional’ approach of older EU Court decisions that dealt with retroactive target rebates as ‘presumptively’ anticompetitive, and considered further economic effects analysis as redundant and merely complementary.

Earlier in the same year, again in the same market, the HCC fined Minerva (Unilever’s main competitor) €384,106 for imposing minimum resale price maintenance on its distributors for the period 1997–2010, and rejected as unfounded the rest of the accusations regarding prohibition of passive sales and alleged non-compete obligations.24 The small portion of the market affected by the practices, their scarce application over the years and Minerva’s, albeit unsuccessful, intent to enter into the commitments procedure were deemed to be mitigating factors that contributed to the low amount of the fine.

Finally, in the pharmaceuticals sector, the HCC found, following a referral of the case from the Athens Administrative Court of Appeals, that the companies GlaxoSmithKline AEBE and GlaxoSmithKline PLC abused their dominant position in the market for anti-migraine drugs by refusing to supply to wholesalers engaging in parallel exports of the Imigran and Lamictal drugs, for the years 2000–2004; the fine amounted to €2,919,378.25 The HCC assessed the legality of refusal to supply based on the criterion of ‘ordinary’ orders formulated by the ECJ in joined cases C-468/06 to C-478/06, following a reference for a preliminary ruling by the Athens Administrative Court of Appeals. Refusals to respond to ‘ordinary’ orders were deemed abusive, whereas refusals to supply to orders that were not ordinary (because they were disproportionate to the volumes usually sold by the resellers making the orders) were not abusive. With the same decision, the HCC also found that GlaxoSmithKline failed to comply with the interim measures HCC decision No. 193/III/2001, by virtue of which the company had been ordered not to refuse supplies of the Imigran, Lamictal and Severent drugs irrespective of the volume of the orders.

ii Trends, developments and strategies

Antitrust enforcement in the food sector is bound to continue, since the HCC has also issued a statement of objections against Friesland Campina for alleged abuse of dominant position (due to imposition of exclusivity rebates) and illegal vertical agreements with its distributors, which include RPM and non-compete clauses, for the period 1996–2009.26 The case hearing took place on 4 December 2018 and a decision is awaited. The same company was fined in 2018 for entering into a horizontal agreement with one of its wholesalers to prevent their parallel participation in public tenders for the supply of milk.27

---

24 HCC decision No. 657/2018.
25 HCC press release of 11 July 2018. The text of the decision has not yet been published.
26 HCC press release of 18 October 2018.
27 HCC decision No. 668/2018.
In a completely different context, the HCC, following a hearing on 25 September 2018, is expected to issue a decision on alleged Article 1 vertical violations by companies Gambro Lundia, Iatrika Proionta and Mpaxter Hellas, which include parallel trade restrictions and geographic market allocation in the market for artificial kidney machines and services.28

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

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

The HCC also has the power, under Article 40 of Law 3959/2011, to conduct an investigation into a particular sector of the economy or into types of agreements in certain sectors when it believes that there are indications (such as the level at which prices are set) of a potential restriction or distortion of competition. To this end, it has the power to request companies active in a particular sector to submit any information (including agreements with suppliers or buyers, company policies, etc.) it deems necessary and to conduct searches. It may then issue a report detailing its findings, or further investigate an undertaking if it uncovers potential anticompetitive practices.

In May 2016, the HCC commenced an investigation into the supermarket product retail sector, sending out questionnaires to both leading and smaller market players. Given the continuing consolidation in the supermarket sector (see also Section VI.iii), it is possible that the HCC is attempting to gauge the buying power of large supermarket chains, and whether they are exercising this power in order to promote particular brands that generate the most profit, thus foreclosing smaller competitors. Nearly two years later, there is still no word on the outcome of this sector inquiry.

V STATE AID

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

VI MERGER REVIEW

i Introduction

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

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

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

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

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

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

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

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

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

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

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

**Substantive test**

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

a. structure of the relevant markets;

b. actual or potential competition;

c. barriers to entry;

d. market position of the participating undertakings;

e. available sources of supply and demand;

f. consumers’ interest; and

g. efficiencies.

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

**Procedure**

**Notification form**

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

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

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

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

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

Two-phase examination

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

If the concentration falls within the scope of the Law, the concentration may be examined in one or two phases, in line with the practice defined by EU Regulation No. 139/2004.

Where the HCC finds that the notified concentration does not raise serious doubts as to its compatibility with the competition requirements of the relevant national markets, it issues a decision approving the concentration within a month from the date of notification (i.e., within the same period granted for verifying whether the concentration falls within or outside the scope of the law).

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

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

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

**Modifications and remedies**

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

**Conditions**

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

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

**Derogations**

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

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

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

**Revocation**

In addition to the general rules of the administrative law regulating the revocation of legal or illegal administrative acts, the new Law contains special rules concerning decisions approving the implementation of a concentration. One provision allows revocation of an HCC decision based on inaccurate or misleading data. Revocation in cases where the participating undertakings in the concentration violate any condition or accepted remedy is specifically regulated, thereby allowing the HCC to take any measures to dissolve the concentration, restore prior conditions, split the merged enterprises, or order the sale of the acquired shares or assets. This arrangement also applies in the case of concentrations implemented without approval.
Sanctions
Apart from its authority to revoke any decision approving a concentration and to restore conditions in the relevant national market, the HCC may impose fines, the amount of which depends on the type of violation, as follows:

- **a** at least €30,000 and up to 10 per cent of the aggregate turnover in cases of violation of the obligation of an undertaking to notify a concentration subject to prior notification in a timely manner, regardless of whether such failure was unintentional but rather due to mild negligence;
- **b** at least €30,000 and up to 10 per cent of the aggregate turnover for the implementation of a concentration before approval is granted;
- **c** up to 10 per cent of the aggregate turnover of all participating undertakings that do not comply with the undertaken remedies; or
- **d** up to 10 per cent of the aggregate turnover of all participating undertakings for failure to comply with the conditions of the HCC decision contained within the framework of the approved concentration.

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

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

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

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

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

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

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

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

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

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

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

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

iii Significant cases
Recent HCC decisions on concentrations – overview of mergers and acquisitions (M&A) activity
The past year was characterised by a significant increase of M&A activity across several diverse sectors of the economy, despite the fact that Greece is still affected by the repercussions of the financial crisis and that it has a long way to go until financial recovery.
Retail sector

Consolidation through M&A activity in the retail market for food and household products sold through supermarkets, which was quite strong in 2017 due to the deteriorating circumstances of the Greek economy, continued at a slower pace in 2018.

In this respect, on 27 July 2018, the HCC cleared the acquisition of Promitheftiki by Masoutis SA, the latter being a major supermarket chain in Northern Greece. The HCC also imposed remedies (i.e., the divestment of one store of Promitheftiki in the island of Andros) where the HCC identified competition concerns due to the possible creation of a dominant position by Masoutis.

Furthermore, the HCC accepted the modification of remedies previously undertaken by the Sklavenitis supermarket chain in the context of its acquisition of the Marinopoulos Group in 2017. Sklavenitis had committed to divest 22 of its branches to avoiding gaining a dominant position in certain localities. However, the lack of interest by competitors in acquiring all the branches and the changes in the competitive conditions in those localities led the HCC to reduce the number of branches to be divested to 12 and to order the closing of another two branches in areas where doubts still exist about the local competitive conditions.

Given the financial situation, it is likely that this wave of consolidation in the supermarket sector will continue in the future.

Healthcare

In January 2018, the HCC unconditionally cleared, without raising any competition concerns, the acquisition of 97.23 per cent of Iaso General, which operates four major health clinics in Greece, by Hellenic Healthcare, an intermediary company controlled by the global investment group CVC Capital Partners.

In the same relevant market, in September 2018 the HCC also approved the acquisition of 70.38 per cent of Ygeia A.E, again by Hellenic Healthcare, and did not identify any competition concerns.

Media and telecommunications

On 2 April 2018, the HCC approved the acquisition of commercial trademarks of Pegasus Publishing SA by Dimera Media Investments. The concentration fell under the 35 per cent market share threshold of Law 3592/2007 governing concentrations in the news media sector, and did not raise any anticompetitive concerns. In 2017, the HCC had also approved the acquisition of Radiotileoptiki (operating the channel ‘Epsilon’) by the same company. However, in a separate decision (655/2018), it fined Dimera Media Investments €60,000 (€30,000 per concentration) for gun-jumping, given that both concentrations were effected before the HCC’s approval, and another €50,000 for failing to notify the acquisition of Pegasus Publishing within the prescribed time limits.

29 HCC decision No. 665/2018.
30 HCC decision No. 664/2018.
31 HCC decision No. 637/2017.
32 HCC decision No. 654/2018.
33 HCC press release of 27 September 2018. The text of the decision has not yet been published.
34 HCC press release of 2 April 2018. The text of the decision has not yet been published.
On 19 April 2018, the HCC cleared the acquisition of 100 per cent of CYTA Hellas by Vodafone. The HCC’s review was restricted to the market for the offering of televised content subscription services (where both companies enjoy very limited market power), given that the telecommunications prong of the concentration falls under the exclusive competency of EETT.

Finally, in June 2018, the HCC approved the acquisition of sole control of assets of the Lambrakis Media Group by Alter Ego Media SA. The concentration, which concerned the television, newspaper and radio relevant markets, also fell well under the 35 per cent market share threshold set by Special Law 3592/2007, and therefore it did not raise anticompetitive concerns.

**Natural gas and electricity**

On 16 July 2018, the HCC cleared the acquisition of sole control of Attiki Gas Supply Co and Attiki Natural Gas Distribution Co by the Public Gas Corporation of Greece SA, without identifying any anticompetitive concerns.

Furthermore, on 18 July 2018, the HCC cleared the acquisition of Thessalia Gas Supply Co by Eni SpA (through its subsidiary, ENI gas e luce SpA), without identifying any anticompetitive concerns in the market for the (retail and wholesale) supply and distribution of natural gas, as well as in the market for the retail supply of electricity.

In the electricity sector, the HCC also approved the acquisition of NRG Trading House Energy SA by Motor Oil Hellas SA. Although both companies are active in the production and wholesale supply of electricity and NRG is also active in the retail supply of electricity, their market shares (individually and combined) in all such markets are below 5 per cent, and therefore no anticompetitive effects were identified.

**Sea passenger transport**

The HCC unanimously approved the acquisition of Hellenic Seaways by Attica Group, both companies having a significant presence in the sea passenger transportation market, but imposed several remedies in order to resolve its doubts on the possible anticompetitive effects created given that post-acquisition Attica Group would acquire a dominant position or monopoly in several itineraries. Attica Group committed to facilitate the entry of competitors in ‘port pairs’ (which are connected with itineraries) where it is dominant, not to increase fares and to maintain the current frequency of itineraries.

**Motorways**

The HCC approved, without identifying any anticompetitive concerns, the acquisition of sole control of Nea Odos SA and Central Greece Motorway SA by the GEK Terna construction group through the purchase of the shares of Ferrovial SA in these companies.

---

35 HCC press release of 23 April 2018. The text of the decision has not yet been published.
36 HCC press release of 4 June 2018. The text of the decision has not yet been published.
37 HCC press release of 21 November 2018. The text of the decision has not yet been published.
38 HCC press release of 18 July 2018. The text of the decision has not yet been published.
39 HCC decision No. 666/2018.
40 HCC decision No. 658/2018.
41 HCC press release of 23 November 2018. The text of the decision has not yet been published.
**Hotel services**

In the hotel services sector, the HCC cleared the acquisition of 70 per cent of the share capital of Golf Residencies by Evergolf, controlled by the Vassilakis Group.\(^{42}\) The HCC found that there was joint control between the Vassilakis Group and the other three shareholders of Golf Residencies, due to the joint exercise of voting rights by the latter and the minority – veto rights enshrined in the articles of association of Golf Residencies. The concentration was evaluated based on its effects in the Iraklion city (Crete) area, given that it was the only place where both companies owned hotels; still, the HCC did not identify any competition law concerns given that the market share in the most strictly defined market possible (the city of Iraklion) amounted to a maximum 7.38 per cent.

**Carton production**

In June 2018, the HCC approved the 100 per cent acquisition of carton producer Pako SA by Unipak SA.\(^{43}\) The HCC found that both companies had a market share lower than 15 per cent in the relevant market and failed to identify any competition law concerns, which was not affected by the fact that one person participated in the management of both Pako SA and competitor Boxpath Ltd. This was the case because of the lack of competitive impact of the acquisition whatsoever and the implementation of ‘Chinese wall’ measures to prevent the dissemination of commercially sensitive information between the two companies.

**VII CONCLUSIONS**

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

---

42 HCC decision No. 661/2018.
43 HCC decision No. 660/2018.
I OVERVIEW

The Competition Commission of India (CCI), established under the Competition Act, 2002 (as amended) (CA), has exclusive original jurisdiction to enforce the provisions of the CA. An appeal from a final decision of the CCI lies with the National Company Law Appellate Tribunal (NCLAT), which replaced the erstwhile Competition Appellate Tribunal (COMPAT) in May 2017. The NCLAT now also has original jurisdiction to decide any claim for compensation made under the CA. The final appeal under the CA lies with the Supreme Court of India (Supreme Court), which is the highest court in India. In addition, parties to a proceeding under the CA may approach a High Court, invoking their writ jurisdiction to uphold constitutional guarantees, including issues relating to due process and principles of natural justice. The CCI has not been conferred with any statutory power to review its own orders, nor does it have contempt powers of a court. The NCLAT enjoys both of these powers under the CA.

Sections 3 and 4 of the CA, which deal with anticompetitive agreements and abuse of dominant position, respectively, and the enforcement powers of the CCI came into force on 20 May 2009. The CA became fully operational on 1 June 2011 with the coming into force of the provisions relating to the regulation of certain mergers, acquisitions and amalgamations. Broadly, the CA seeks to prohibit anticompetitive agreements and abuse of dominant position; and regulate acquisitions, mergers and amalgamations of companies that meet the prescribed thresholds (referred to as ‘combinations’ under the CA).
Any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition (AAEC) within India is prohibited and void under Section 3(1) and 3(2) of the CA, respectively. Section 3(3) of the CA deals with practices, decisions and agreements among enterprises, persons, associations of persons or associations of enterprises, engaged in identical or similar trade of goods (horizontal agreements) and Section 3(4) of the CA deals with agreements between entities at different levels of a supply chain (vertical agreements). Horizontal agreements that determine purchase or sale prices, limit or control production, supply, markets, technical development, investment or provision of services, share the market or source of production or provision of services, or result in bid rigging or collusive bidding are presumed to have caused AAEC within India, and are hence prohibited. However, this presumption is rebuttable, with the burden to prove otherwise resting on the defendant. On the other hand, the assessment of vertical agreements is guided by the ‘rule of reason’ test. As such, vertical agreements are prohibited and void only if it is established that such agreements cause or are likely to cause AAEC within India. Contrary to Section 3, which requires establishing an ‘agreement’, thereby necessitating involvement of more than one enterprise or person or an association of enterprises or persons, Section 4 deals with the unilateral conduct of a ‘dominant’ enterprise. Broadly speaking, Section 4 of the CA prohibits certain exclusionary and exploitative conducts by a dominant enterprise.

Finally, Sections 5 and 6 of the CA regulate inorganic expansion or restructuring, such as acquisitions, mergers or amalgamations, which meet the prescribed financial thresholds, in order to ensure that such expansion or restructuring does not cause substantial distortion or lessening of competition in the defined relevant market. These provisions contain an ex ante regime which requires mandatory notice and approval of transactions that meet the prescribed financial thresholds mentioned in the CA and revised by notifications of the Ministry of Corporate Affairs, Government of India from time to time. The merger control regime is a mandatory and suspensory regime, meaning that parties are required to mandatorily notify the CCI if the prescribed financial thresholds are met, and no step towards closing of the transaction can take place before the receipt of approval of the CCI.

i Prioritisation and resource allocation of enforcement authorities

Under the Constitution of India, the government is mandated to adopt a social welfare model of governance. The CCI is a body formed under the Ministry of Corporate Affairs, and its stated focus has been on areas that affect consumers, including impoverished ones. In this endeavour, the CCI has conducted suo motu (or ‘own initiative’) investigations in sectors that affect the ‘common man’ (sugar, agriculture, chemicals, domestic cooking gas, etc.). Further, the CCI has conducted investigations in important lifeline sectors of the economy

---

6 An ‘enterprise’ under the CA has been defined as a person or a department of the government, engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the government relatable to the sovereign functions of the government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.
(cement, steel, tyres, civil aviation, real estate, insurance, pharmaceuticals, etc.). The CCI has also particularly focused on public procurement, which accounts for more than 26 per cent of India’s GDP. According to the Secretary of the Ministry of Corporate Affairs (the nodal ministry for the CCI), competitive procurement in India could result in cost saving to the extent of around 20 to 30 per cent, which would ultimately have a long-term impact on the economy.7 This, among other reasons, has driven the CCI to focus on public procurement cases.

ii Enforcement agenda

In the past year, the CCI’s focus has been on enforcement actions arising out of or involving applications under Section 46 of the CA read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPR). An application under Section 46 of the CA read with the LPR contains a wilful disclosure of a cartel with evidence. In return, an applicant under Section 46 of the CA is afforded the opportunity of being granted a reduced penalty (similar to the Leniency Policy of the European Commission). Up to the beginning of 2018, the CCI had decided only one case involving an application under Section 46 of the CA read with the LPR. However, between January 2018 and December 2018, there was a steady increase in the number of cases arising out of applications under Section 46 of the CA read with the LPR. In fact, the last calendar year saw the CCI close seven such cases. Notably, in the past year, the CCI for the first time also granted a 100 per cent waiver of penalty in at least four cases involving applications under Section 46 of the CA read with the LPR.

II CARTELS

Under the CA, ‘cartels’ constitute a subgroup of horizontal agreements prohibited under Section 3(3) of the CA. The term ‘cartel’ has been defined to include an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in, goods or the provision of services.

As mentioned earlier, horizontal agreements that directly or indirectly determine purchase or sale prices, limit or control production, supply, markets, technical development, investment or provision of services, share the market or source of production or provision of services or lead to rigging of bids or collusive bidding are presumed to have caused AAEC. Hence, a party alleged to be engaged in a cartel must satisfy the CCI that it conducted itself in a manner that did not or would not result in an AAEC within India. The phrase ‘shall presume’ is regarded as a rebuttable presumption, especially because the CCI is mandated to abide by the principles of natural justice, which includes granting an opportunity of being heard to a suspected delinquent or defaulter before an order is passed against it.

As regards assessing what constitutes an AAEC, the CA has provided six factors8 that the CCI has to take into consideration:

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;

---

8 Section 19(3).
accruing benefits to consumers;

improving the production or distribution of goods or the provision of services; and

promoting technical, scientific and economic development by means of production or distribution of goods or the provision of services.

The first three factors relate to anticompetitive effects arising out of the agreements in question and the defendant would be running a potential risk if the agreement in question is causing or is likely to cause the listed effects. On the other hand, the remaining three factors relate to generation of pro-competitive effects by the agreement in question and may provide a safe harbour to a party alleged to be in breach. In the Auto Parts case,9 the CCI has held that whether an agreement restricts the competitive process is always an analysis of the balance between the positive and the negative factors listed above.

The penalties10 in cases of a proven breach of horizontal agreements, including cartels, are substantial. Besides cease-and-desist orders and other directions, the CCI can impose a pecuniary penalty in non-cartel cases of up to 10 per cent of the average of the relevant annual turnovers for the last three preceding financial years upon each member that is a party to the anticompetitive agreement. In the case of proven cartels, the penalty is up to three times the relevant profits for each year of the continuance of such agreement, or 10 per cent of the relevant annual turnover for each year of the continuance of such cartel, whichever is higher. The CCI can also modify an agreement and impose costs. The CCI uses the terms ‘turnover’, ‘income’ and ‘revenue’ seemingly interchangeably, while the CA does not mention ‘income’. When imposing penalties on individuals, the CCI is found to employ the term ‘income’.

On 8 May 2017, the Supreme Court, in a landmark decision, upheld the decision of the appellate tribunal, observing that the penalty for anticompetitive practices found to be in violation of the CA should be based on the ‘relevant turnover’ relating to the infringing product or service and not on the total turnover, particularly for multi-product companies.11 In addition, where the contravention is by companies, the CCI is empowered to penalise individuals who are responsible for the conduct of business of the company or who had consented to or connived in the infringement taking place or whose negligence resulted in the infringing conduct.12 The CCI has applied the provisions under Section 48 to fix the liability of individuals and penalise them in a number of cases. However, a major criticism when invoking Section 48 has been that while the CCI has invoked Section 48 in certain cases, it has omitted to invoke Section 48 in other cases without any objective justification.

In relation to cartels, the Supreme Court in *Competition Commission of India v. Co-Ordination Committee of Artist and Technicians of West Bengal Film and Television Industry* had made certain observations which seemed to indicate that it was necessary for the CCI to define the relevant market in all cases including cartels. However, by way of a clarificatory order dated 7 May 2018, the Supreme Court clarified that delineation of ‘relevant market’ is not a mandatory pre-condition for making assessment of an alleged violation under Section 3(3) of the CA. Defining the relevant market may only be necessary when the presumption of AAEC is being rebutted in terms of Section 19(3) of the CA.

---

9 Case No. 03/2011: *Shamsher Kataria v. Honda Siel Cars India Ltd & Ors.*
10 Section 27(b).
11 Civil Appeal No. 2480 of 2014: *Excel Crop Care Limited v. CCI & Another.*
12 Section 48.
In cases of non-compliance with orders passed by the CCI, where no appeal has been preferred before the NCLAT within the statutory period prescribed under the CA, and where a CCI order has not been stayed by the NCLAT, further penalties over and above the principal penalties may be imposed. In some circumstances where there is repeated non-compliance with a CCI order, the Chief Metropolitan Magistrate of Delhi, upon an application filed by the CCI before it, may order imprisonment against a defaulter for a term of up to three years or a fine of up to 250 million rupees, or both.

Anticompetitive practices, including cartels outside India yet affecting India, are also amenable to the CCI’s jurisdiction by the application of the ‘effects doctrine’. The CA enables the CCI to enter into international cooperation arrangements or memorandums of understanding (MOUs) with the prior approval of the central government with overseas competition agencies, so that each authority may share experiences in their respective jurisdictions and raise the enforcement bar across the globe for the benefit of consumers. To date, the CCI has entered into MOUs with the Russian Anti-Monopoly Authority, the United States Department of Justice and the Federal Trade Commission, the Australian Competition and Consumer Commission, the European Commission, CADE (the Brazilian Antitrust Authority), the National Development and Reform Commission (Chinese regulator) and the Canadian Competition Bureau. It is believed that the CCI has cooperated and exchanged relevant information by invoking these MOUs during its examination of several global mergers.

The statutory safe harbour available to a member of a cartel is the leniency programme. As briefly discussed above, an enterprise or an individual willing to avail itself of the benefit of the leniency programme needs to make an application to the CCI under Section 46 of the CA read with the LPR. Certain amendments to the LPR were notified on 22 August 2017 (Amended LPR), which bring clarity to the existing leniency regime in India and provide incentives for companies and individuals to proactively assist in cartel enforcement. Prior to submission of the investigation report by the Office of the Director General (DG) to the CCI, any member of a cartel or an individual who has been involved in the cartel on behalf of the enterprise may file an application to the CCI under Section 46 of the CA read with the LPR. The basic condition for the success of an application under Section 46 of the CA read with the LPR is that the party claiming such relief must be a party to the cartel, and must provide true and vital information regarding the cartel in question to the CCI. It should also continue to fully cooperate with the CCI until the conclusion of the proceedings. The CCI may grant a fine reduction of up to 100 per cent to the first applicant, up to 50 per cent to the second applicant and up to 30 per cent to the third applicant and subsequent applicants. The Amended LPR provides important clarifications, for instance it clarifies that there is no limit in the number of applicants that can approach the CCI (so long as an applicant can provide ‘significant added value’ to the investigation) and individuals who have been involved in the cartel on behalf of an enterprise can also apply for lesser penalty as stand-alone applicants. Apart from the above, the Amended LPR bring in some other important changes. As per the Amended LPR there is a possibility of a reduction in penalty of up to 100 per cent both

---

13 Sections 42 and 43.
14 Section 32.
15 Proviso to Section 18.
16 Section 46.
17 Clause 4 of the LPR.
before and after the forming of the *prima facie* opinion by the CCI and now names of the individuals who have been involved in the cartel need to be mentioned in the application. It is important to bear in mind that while an applicant under Section 46 of the CA may benefit from reduced penalties, the risk relating to the payment of compensation claims (which arises with the passing of the CCI’s order) still remains.

### Significant cases

The year 2018 was marked with several decisions emanating from applications under Section 46 of the CA read with the LPR. Arguably, the most significant decision of the CCI in relation to cartels was in the *First Zinc Carbon Dry Cell Batteries* case,\(^\text{18}\) which arose out of an application filed by Panasonic Energy India Co Ltd (Panasonic) under Section 46 of the CA read with the LPR. Panasonic disclosed a cartel controlling the distribution and price of zinc-carbon dry cell batteries in India, involving Eveready Industries India Limited (Eveready) and Indo National Limited (Indo), apart from itself. Based on the disclosure made by Panasonic, the CCI ordered an investigation by the DG (the investigative wing of the CCI). During the course of the investigation, the DG conducted simultaneous dawn raids on the premises of all three participants of the cartel. Eveready filed their application under Section 46 of the CA read with the LPR three days after the dawn raid and Indo filed their application several days after Eveready filed their application. After an investigation, the CCI found that there was coordination among the cartel participants to increase maximum retail prices, monitor and control ‘price-competition’ at all levels of the distribution chain, control supply and also allocate markets for zinc-carbon dry cell batteries. Price increases were led by Eveready, which would typically announce price increases through a press release. Without any time lag, Panasonic and Indo would also increase their prices on the pretext of following the market leader, even though ordinarily revision of prices required time due to the requirements of changing price labels and packaging, etc.

The decision of the CCI in the *First Zinc Carbon Dry Cell Batteries* case is an important one because it provides clarity on the factors that the CCI will take into consideration while granting lesser penalties under Section 46 of the CA. The CCI found that the information and evidence provided by Panasonic was ‘full and true’ disclosure, which not only enabled the CCI to order an investigation but also helped in establishing the contravention. Accordingly, the CCI granted a 100 per cent reduction in the penalty for Panasonic. Notably, this marks the first instance of a grant of a 100 per cent reduction in the penalty under Section 46 of the CA. In respect of Eveready and Indo, the CCI found that even though the information and evidence shared by them was already available to the CCI, owing to the continuous and expeditious cooperation extended by these companies, the CCI granted 30 per cent and 20 per cent reductions in the penalties (on the basis of their respective priority status) to Eveready and Indo, respectively, as against the maximum that would have been available under the LPR.

The second significant decision was in the *Broadcasting Services*\(^\text{19}\) case, which also arose out of an application under Section 46 of the CA read with the LPR. The application in this case was filed by Globecast India Private Limited (Globecast) disclosing a cartel with Essel

---

\(^{18}\) Suo Motu Case No. 02 of 2016: *In Re: Cartelization in respect of zinc carbon dry cell batteries market in India.*

\(^{19}\) Suo Motu Case No. 02 of 2013: *In Re: Cartelization by broadcasting service providers by rigging the bids submitted in response to the tenders floated by Sports Broadcasters.*
Shyam Communication Limited (ESCL) to rig tenders for procurement of broadcasting services of various sporting events in India. It was admitted by both Globecast and ESCL that there was exchange of commercially sensitive information in relation to tenders. However, ESCL claimed that the exchange of commercially sensitive information was due to the proposed acquisition of ESCL by Globecast and a teaming arrangement between them. However, Globecast argued that the exchange of commercially sensitive information was due to a consultancy agreement between ESCL and Bharat (an employee of Globecast), a fact that was not known to Globecast. Globecast's position before the CCI was that the entire anticompetitive conduct, involving exchange of commercially sensitive information and subsequent coordination of bids, was the brain child of Bharat and ESCL, and Globecast had no knowledge of the same except for one event in 2012, as all other communications between Bharat and ESCL took place through the personal Gmail ID of Bharat. Bharat, on the other hand, argued that ESCL had placed all bids after discussions with Globecast. The CCI held that as infringement of the CA was accepted by both Globecast and ESCL, contentions pertaining to whether Globecast had knowledge of the infringement were inconsequential to the finding of cartelisation. The CCI clarified that as Bharat was an employee of Globecast at the time of contravention of the provisions of the CA and was responsible for submission of bids on its behalf, Globecast was liable for the conduct that took place through Bharat and which resulted in bid rigging. The CCI granted a 100 per cent waiver of the penalty to Globecast as the information and evidence provided by it was not only crucial in the formation of a *prima facie* opinion by the CCI but it also helped in establishing infringement of the CA. ESCL had also filed an application under Section 46 of the CA read with the LPR but after the formation of *prima facie* opinion by the CCI. Accordingly, the CCI granted ESCL a 30 per cent reduction in the penalty for adding value to the investigation.

Other cartel decisions of the CCI arising out of applications under Section 46 of the CA read with the LPR were the *Solid Waste Management* cases, *Flashlights* case and the *Second Zinc Carbon Dry Cell Batteries* case. In the *Solid Waste Management* cases, the CCI provided an important clarification in respect of grant of confidentiality to the information and evidence disclosed under an application under Section 46 of the CA read with the LPR. The parties in this case alleged that the DG, by disclosing in its investigation report the contents of the statements made before it, had in effect disclosed the contents of their respective applications under Section 46 of the CA read with the LPR. The parties in this case alleged that the DG, by disclosing in its investigation report the contents of the statements made before it, had in effect disclosed the contents of their respective applications under Section 46 of the CA read with the LPR. The parties in this case alleged that the DG, by disclosing in its investigation report the contents of the statements made before it, had in effect disclosed the contents of their respective applications under Section 46 of the CA read with the LPR. However, the CCI clarified that an application under Section 46 of the CA read with the LPR and statements before the DG were separate sets of evidence and the confidential treatment granted under the LPR did not extend to evidence obtained or collected by the DG, even if such an evidence is obtained from an applicant under Section 46 of the CA. Once such information is provided separately before the DG, confidentiality over it would be governed by the Competition Commission of India (General) Regulations, 2009 and not the LPR.

---


21 To claim confidentiality over information provided to the DG the tests laid down in Regulations 35(3) and 35(9) of the General Regulations have to be satisfied.
The Flashlights\textsuperscript{22} case is another interesting case that arose out of an application under Section 46 of the CA read with the LPR filed by Eveready. The CCI in this case was provided with documentary evidence to establish exchange of commercially sensitive information among the alleged cartelists. The CCI, after conducting a review of the relevant emails of the alleged cartelists, concluded that the agreement to raise prices was never implemented (while a draft press release to jointly raise prices was available, there was email exchange which suggested that due to the CCI being active, parties were hesitant to issue the press release and hence there was no implementation), and hence, there was no infringement of the CA. In the CCI’s view the exchange of data relating to production and sales of a product only indicated possibility of collusion and could be only considered as a ‘plus factor’.

The Second Zinc Carbon Dry Cell Batteries\textsuperscript{23} case arose out of a separate application filed by Panasonic Corporation Japan under Section 46 of the CA read with the LPR, disclosing an ‘ancillary’ (the primary cartel being the one in the First Zinc Carbon Dry Cell Batteries case discussed above) and ‘bi-lateral’ cartel between its subsidiary Panasonic and Geep Industries (India) Private Limited (Geep). Panasonic was a contract manufacturer of Geep, and had entered into a product supply agreement containing a clause that obliged Geep to maintain prices agreed between Panasonic and Geep and not to take any steps detrimental to Panasonic’s market interests. The CCI found such a clause to be inherently anticompetitive. The CCI in this case also granted a 100 per cent reduction in the penalty for Panasonic, for providing information and evidence that helped the CCI in forming a \textit{prima facie} opinion and in establishing infringement.

It is manifest that while the cases arising out of applications under Section 46 of the CA read with the LPR outnumbered ordinary course cases, there were a few decisions of significance. One example is the Ethanol case\textsuperscript{24} (which arose from multiple complaints filed before the CCI), in which the CCI penalised 18 sugar mills for cartelising in the supply of ethanol to public sector oil marketing companies in India. The CCI imposed a total penalty of 380 million rupees on the sugar mills and two trade associations of ethanol producers. The finding of contravention by the CCI was based on economic evidence such as bids having identical basic prices and net delivered prices despite varying costs of production, bids having identical freight despite varying distances between the sugar mills and the oil depots, and circumstantial evidence such as an increase in the frequency of trade association meetings and calls between competitors and office bearers of trade association near the date of tender.

The year 2018 also witnessed significant developments at the appellate level. The NCLAT on 25 July 2018 confirmed the finding of cartelisation by the CCI in the Cement Cartel case.\textsuperscript{25} Importantly, the NCLAT, in upholding the finding of infringement by the CCI, confirmed that the correct test to be adopted for proving a cartel under the CA is of ‘balance of probabilities’ and not of ‘beyond reasonable doubt’. At the same time, in a landmark ruling the Supreme Court in the LPG Cylinder case\textsuperscript{26} set aside a judgment of the erstwhile COMPAT, upholding the findings of bid rigging made by the CCI against several

\\textsuperscript{22}Suo Mutu Case No. 01 of 2017: \textit{In Re: Alleged Cartelisation in Flashlights Market in India}.

\textsuperscript{23}Suo Mutu Case No. 02 of 2017: \textit{In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India}.

\textsuperscript{24}Case Nos. 21, 29, 36, 47, 48 & 49 of 2013: \textit{In Re: India Glycols Limited And Indian Sugar Mills Association and Others and other cases}.

\textsuperscript{25}TA (AT) (Comp) No. 22 of 2017: \textit{Ambuja Cements Limited v. Competition Commission of India and Others}.

\textsuperscript{26}Civil Appeal No. 3546 of 2014: \textit{Rajasthan Cylinders and Containers Limited v. Competition Commission of India and Others}. 
manufacturers of liquefied petroleum gas cylinders. The Supreme Court set aside the finding of infringement mainly on the grounds that in this particular case a finding of existence of a cartel was not sustainable as the procurer had control over negotiation of final prices and a possible explanation for quoting a similar price was not the meeting of minds but market conditions leading to a situation of oligopsony. The Supreme Court also noted that the CCI failed to undertake the required and necessary inquiry to gather more evidence.

ii  Trends, developments and strategies
A staggering increase in the number of cases involving applications under Section 46 of the CA was witnessed in 2018. It was also observed that in cartel cases the CCI was willing to provide reductions in the penalty to second and subsequent applicants for cooperation even if the information and evidence provided by them was already available to the CCI. This is a positive trend that should encourage more enterprises to approach the CCI. If in a given case, all cartelists wilfully admit wrongdoing, then the CCI can efficiently and speedily remedy the market. However, the CCI has been imposing ‘higher than usual penalties’ in leniency cases, which may potentially deter second or subsequent applicants from approaching the CCI. Notably, the parties who were applicants under Section 46 of the CA read with the LPR in the First Zinc Carbon Dry Cell Batteries case have preferred an appeal in the NCLAT against the hefty penalties being imposed by the CCI. One must bear in mind that one of the intended objectives of any leniency programme is to avoid protracted litigations.

Following the replacement of the COMPAT with the NCLAT, very few competition appeals have been disposed of. This is a consequence of the NCLAT being overburdened with cases arising out of the Insolvency and Bankruptcy Code, 2016 and various other company cases, which are typically handled as high priority. The Supreme Court’s decision in the LPG case has also ushered in a different outlook towards bid-rigging cartels, particularly in oligopolistic markets. The extent to which defendants in similarly placed markets may rely upon the Supreme Court’s order before the CCI remains to be seen. The decision of the Supreme Court, which is binding on the CCI under Indian law, is bound to have an impact on future decisions of the CCI.

The Supreme Court’s decision in the Telecom Operators case 27 (discussed in detail in Section V of this chapter) is also a noteworthy development. It clears the air in relation to the stage at which the CCI can initiate proceedings in markets where a sectoral regulator is present.

Lastly, it is pertinent to note that the Central Government in India has constituted an expert committee in September 2018 to review the CA and the Rules and Regulations promulgated under it, in view of the changing business environment in India and the international best practices. The committee’s recommendations may include changes to the cartel enforcement regime. It is speculated that the committee may recommend bringing clarifications in law on the concepts of ‘buyer’s cartels’ and ‘hub and spoke cartels’.

iii  Outlook
In future, the CCI needs to adopt a pragmatic approach in levying penalties in cartel cases involving applications under Section 46 of the CA read with LPR. The penalties imposed should not be so high that the reduction under Section 46 seems merely notional. The

---

27 Civil Appeal No. 11843 of 2018: Competition Commission of India v. Bharti Airtel Limited and Others.
controversial *Cement Cartel* case is also before the Supreme Court after being upheld by the NCLAT in July 2018. Lastly, in light of the trend of increase in number of leniency driven cases, the CCI needs to keep in mind the resources available with it to deal with such cases. Until now the CCI has been impressively swift in concluding cases arising out of and involving applications under Section 46 of the CA read with the LPR.

### III ANTI TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

As mentioned above, vertical agreements causing AAEC within India or likely to cause AAEC within India are prohibited under the CA. As per the CA, vertical agreements include:

- *tie-in arrangements*: any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- *exclusive supply agreements*: any agreement restricting in any manner the purchaser in course of his or her trade from acquiring or otherwise dealing in any goods other than those of the seller or of any other person;
- *exclusive distribution agreements*: any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- *refusal to deal*: any agreement that restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought; and
- *resale price maintenance*: any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

As for unilateral conduct, the now repealed Monopolistic and Restrictive Trade Practices Act, 1969 viewed large enterprises negatively. The CA does not view the large size of an enterprise as a negative factor, but it prohibits abuse of a dominant position by an enterprise. The law provides 13 factors listed in the CA that the CCI must examine to conclude whether an enterprise alleged to be abusing its position of dominance is actually a ‘dominant’ enterprise within the ‘relevant market’. The relevant market test includes the examination of statutory factors related to the relevant product market and relevant geographical market tests. The CA provides several factors for assessing the relevant product market and geographical market tests, and the CCI must examine each of the factors, as the case may be, to ascertain whether the dominant enterprise could affect the relevant product or geographical markets.

A dominant position has been explained in the CA as a position of strength enjoyed by an enterprise in the relevant market, in India, that enables it to operate independently of competitive forces prevailing in relevant market or affect its competitors or consumers or the relevant market in its favour. As mentioned above, the CA only prohibits an ‘abuse of a dominant position’. The CA prescribes the following as abuse:

- *directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods and services or prices in the purchase or sale (including predatory pricing) of goods or services*;

---

28 Section 19(4).
29 Section 19(5), (6) and (7) read with Section 2(r), (s), (t).
30 Section 4(2) (a) to (e).

© 2019 Law Business Research Ltd
limiting or restricting production of goods or the provision of services or market therefor or technical or scientific development relating to goods or services to the detriment of customers;

(c) indulging in a practice or practices resulting in the denial of market access in any manner;

(d) making conclusion of contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts; and

(e) using a dominant position in one relevant market to enter into, or protect, another relevant market.

It is generally believed (but not yet decided) that the above list is exhaustive, rather than descriptive.

Significant cases

In the past year, the CCI and the NCLAT have decided certain important cases relating to vertical agreements and abuse of dominant position.

In one of the most important technology market investigations, the CCI in the First Google case investigated allegations of abuse of dominant position by Google Inc and Google India Private Limited (collectively referred to as Google) in relation to the markets for online general web search services and online search advertising services in India.\(^{31}\) To determine whether Google was in a dominant position in the relevant markets, the CCI analysed the market share of Google in the relevant markets and considered the factors mentioned under Section 19(4) of the CA. The CCI held that Google was holding a dominant position in the relevant markets as it consistently held a market share that was exponentially greater than its nearest competitor, was vertically well integrated and had a scale advantage in a market where entry barriers existed. The CCI also took note of high dependence of users and advertisers on Google and lack of countervailing buyer power of an average user or advertiser before Google.

As regards abuse of dominant position, the CCI held that Google:

(a) had violated Section 4(2)(a)(i) of the CA (provision on unfair condition by a dominant enterprise) by predetermining the ‘universal search’ ranking results to trigger at the first, fourth or tenth position on the Google search engine results page;

(b) had violated Section 4(2)(a)(i) of the CA by prominently displaying and placing its commercial flight search box with links to Google’s specialised search options and services, thereby depriving users of additional choices; and

(c) had violated Section 4(2)(a)(i), 4(2)(e) (using a dominant position in the online general web search market to strengthen its position in the market for online syndicate search services) and 4(2)(c) (limiting provision of services) of the CA by imposing prohibitions under the negotiated search intermediation agreements on website owners from using similar services from competing search engines.

It is important to note that two members of the CCI wrote a dissent note to the decision of the majority, as according to them there was no infringement of the CA by Google. Among other things, the dissenting members opined that the Google Flight commercial unit was

---

\(^{31}\) Case No. 07 of 2012: *In Re: Matrimonys.com Limited And Google LLC and Others and another case.*
visually distinguishable and there was no cogent evidence to assess how the mere presence of the commercial unit amounted to imposition of an unfair condition. In the dissenting members’ opinion, user preferences should have been taken into account in the investigation but the same was completely disregarded. Regarding the finding of the majority on search intermediation agreements, the dissenting members found that an infringement was not established because delineation of the relevant market was a legal requirement under the CA and the same was not done by the DG during the investigation. The dissenting members also opined that it was imperative for the DG to obtain a testimony of the direct partners with whom Google had negotiated the search intermediation agreements in India and conduct a competitive analysis of the effect of the impugned clause on competition in India before finding a contravention. Lastly, with regard to the contravention found by the majority in connection with universal results, the dissenting members were of the opinion that as Google brought a change in the system on its own, even before the information was filed, there was no need for any regulatory intervention.

In the past year, the CCI has decided another abuse of dominant position case against Google. The Second Google case dealt with Google AdWords. It was alleged that Google’s User Safety and AdWords Policies and the bidding process for AdWords were extremely arbitrary, vague and one-sided. It was also alleged that Google arbitrarily and without any notice suspended the AdWords account of the complainants with a view to reduce or eliminate competition for its own product, Google Helpout and a close associate, iYogi. The CCI defined the relevant market as the ‘market for online search advertising services in India’ and found Google to be in dominant position due to ‘consistently high market shares’ and ‘Google’s insurmountable scale’. As for abuse of dominant position the CCI did not find any contravention. The CCI, after conducting a thorough investigation of Google’s policies and conduct, came to a conclusion that there was no contravention of the provisions of Section 4 of the CA. The CCI in reaching this conclusion acknowledged that an online advertising platform like AdWords could not be left without any mechanism that ensured safety of end consumers and prevented unscrupulous advertisers from making false and misleading claims and representations. Importantly, in respect of imposition of certain standard terms and conditions by Google, the CCI held that inviting customers to accept standard terms and conditions was a conventional and commercial practice, followed by businesses around the world. According to the CCI, there were certain terms and conditions (such as a clause allowing Google to modify terms at any time) that were uniform among online businesses around the world and could not be practically negotiated with millions of customers. In fact, in the CCI’s view such standard terms and conditions reduced the potential for discrimination and uncertainty among users and businesses. The Second Google case provides valuable guidance to technology companies providing internet-related services in relation to crafting their user safety and other policies. The CCI has clarified that certain seemingly onerous terms and conditions in these policies may in fact be necessary, and hence justified, having regard to the facts and circumstances of the case.

In the Esaote S.p.A. case it was alleged that the Esaote group (Esaote), manufacturer of standing/tilting MRI machines or G-Scan machines, had abused its dominant position by unilaterally modifying terms of contractual conditions and using its dominant position in one relevant market to enter into another relevant market. Having regard to the physical

32 Case No. 06 of 2014: In Re: Shri Vishal Gupta and Google LLC and Others.
33 Case No. 09 of 2016: In Re: House of Diagnostics LLP And Esaote S.p.A.
characteristics, end-use, price and consumer preferences the CCI defined the relevant product market in the instant case as the narrower market for ‘dedicated standing/tilting MRI machines’ as opposed to a broader product market including all types of MRI machines. In view of the majority of members of the CCI, ‘dedicated standing/tilting MRI machines’ had several advantages over conventional MRI machines because of which conventional MRI machines were not a true substitute. The advantages recorded by the CCI were the ability to image the changes that occurred in brain, cerebrospinal fluid, spine and joints when the patient was in a standing position with the effect of gravity on these structures, ability to diagnose ailments of specific portions of body (joints or spine, etc.) pertaining to weight-bearing posture of the body and ability to cause less claustrophobia. As Esaote had patent rights over the technology of G-Scan machines and was the only seller of G-Scan machines in India, the CCI found Esaote to be in a dominant position. As for determination of abuse of dominant position by Esaote, the CCI found several counts of infringement of Section 4 of the CA by Esaote. The CCI found that contrary to the contractual conditions, the machines supplied by Esaote were not new and did not perform to the level assured by Esaote and Esaote also failed to provide head coils and perforated radio frequency cages. These conducts, according to the CCI, constituted a clear contravention of the provisions of Section 4(2)(a)(i) of the CA (unfair condition/business practice). The CCI found contravention of Section 4(2)(a)(ii) of the CA (unfair and discriminatory price) as well, as contrary to contractual conditions Esaote unilaterally provided cheaper alternatives and raised arbitrary and discriminatory charges for maintenance. Lastly, the CCI also found that Esaote had restricted supply services and caused denial of market access, in contravention of Section 4(2)(b) and (c) of the CA, respectively, by giving exclusive rights to its group company for supply of spare parts and providing aftersales services to the consumers of its G-Scan MRI machines. It is pertinent to note that the chairperson of the CCI wrote a dissent note, finding no contravention, as he did not agree with the majority of members on delineation of a narrower relevant market. In the chairperson’s view the relevant product market was the market for MRI machines because, among other things, the demand for G-Scan machines was insignificant in India and weight-bearing imaging features could be added to a conventional MRI machine by adding a device at a fractional cost.

In the GAIL cases, complaints had been filed against GAIL (India) Limited (Gail) by some of its regasified liquified natural gas customers (complainants). Broadly, the allegations pertained to: (1) the terms of the long-term gas supply agreement (GSA) between GAIL and the complainants; and (2) the manner in which GAIL performed its obligations under the GSA. One of the allegations against GAIL was that its GSAs were a standard contract whose minimum duration was 20 years. Such duration was alleged to have resulted in foreclosure of the market for ‘supply and distribution of natural gas to industrial consumers’. The CCI held that projects in the energy sector were characterised by significant and continuous up-front investments made by sellers of energy, and therefore, the duration of the GSA was justified to guarantee sellers a steady stream of revenue and render operations viable. The CCI also observed that existence of such GSAs did not result in the denial of market access to new entrants or competing enterprises, as there was evidence to suggest that competitors of GAIL had entered the market during the subsistence of the GSA and were presently active. The CCI in this case also assessed the manner in which GAIL imposed the ‘take or pay’ liability on its

---

34 Case Nos. 16-20 and 45 of 2016, 02, 59, 62 & 63 of 2017: In Re: Rico Auto Industries Limited Informant And GAIL (India) Ltd. and Other cases.
customers. ‘Take or pay’ liability is an obligation on the buyer to pay for the quantities of gas not taken but agreed to be taken. It was alleged that GAIL failed to make certain ‘nominations’ under the GSA, which made it impossible for the complainants to calculate their ‘take or pay’ liability. The CCI held that when determining abuse arising out of a contract, the conduct of both parties was relevant for examination. Accordingly, the Commission analysed: (1) the degree of adherence to the terms of the GSA by the complainants; and (2) the extent of acquiescence of the complainants. The investigation revealed that neither GAIL nor the complainants had strictly adhered to their obligations to make ‘nominations’ and also that the Complainants had never raised objections in this regard before GAIL. Objections were raised by the complainants only when the ‘take or pay’ liability was imposed on them. The CCI also took into account the fact that GAIL had imposed only a fraction of the ‘take or pay’ liability in order to mitigate the losses it suffered because of reduced offtake of gas by the complainants. In view of the above, the CCI did not find any violation of the CA due to imposition of ‘take or pay’ liability. Importantly, the CCI in these cases has clarified that where a party has consciously negotiated and entered into an agreement with a dominant enterprise then it is not appropriate to impugn such agreements under the CA unless it is evident that the aggrieved party has been considerably prejudiced or the competition in the market has been impeded.

In the AICF case\textsuperscript{35} the CCI was investigating allegations of abuse of dominant position by All India Chess Federation (AICF), a national sports federation for the sport of chess in India, recognised by and affiliated to the Federation Internationale des Echecs (FIDE), the apex international body governing the sport of chess. A preliminary objection was raised by AICF that allegations of abuse of dominant position could not be sustained as Section 4 of the CA applies only to ‘enterprises’\textsuperscript{36} and AICF was not an enterprise because, among other things, it performed its functions without any motive to earn profits. In the CCI’s view a person engaged in economic activity, no matter with or without profit motive, was an enterprise, as such a person interfaces with the market. Having regard to the nature of allegations against AICF and the factors mentioned in Section 19(4) and (5) of the CA, the CCI defined the relevant markets as the ‘market for organisation of professional chess tournaments/events in India’ and ‘market for services of chess players in India’. As regards determination of dominant position, the CCI held that by virtue of having sole regulatory powers in India and being the predominant buyer of the services provided by professional chess players in India, AICF was a dominant enterprise. In its analysis of infringement of the CA, the CCI found that the blanket ban on chess players from participating in tournaments not authorised by AICF was an absolute restriction with very harsh consequences and without any reasonable justification. The CCI found this blanket ban to be in contravention of Section 4(2)(b)(i) (unfair condition), Section (4)(2)(c) (denial of market access), Section 3(4)(c) (exclusive distribution) and Section 3(4)(d) (refusal to deal).

Apart from the decisions of the CCI, 2018 also witnessed two important decisions at the appellate level. The NCLAT set aside a 2017 decision of the CCI penalising Hyundai

\textsuperscript{35} Case No. 79 of 2011: In Re: Hemant Sharma and Others And All India Chess Federation (AICF).

\textsuperscript{36} To qualify as an ‘enterprise’ under the CA, the concerned entity must be engaged in any activity relating to production, storage, supply, distribution, acquisition or control of any article or goods, or provision of services.

© 2019 Law Business Research Ltd
Motor India Limited (Hyundai) for imposing vertical restraints causing AAEC.\(^{37}\) The reasons for setting aside of the decision of the CCI was primarily procedural irregularities rather than substantive legal issues. The setting aside of the CCI decision was mainly on the ground that in imposing a penalty on Hyundai the CCI relied solely upon the report of the DG without conducting any inquiry of its own. Apart from this, the NCLAT decision also pointed out several crucial shortcomings in the decision of the CCI. For instance, the NCLAT found that the CCI in its decision had recorded that Hyundai had appointed mystery shopping agencies for enforcing resale price maintenance which penalised the erring dealers. But in its decision the CCI failed to record any evidence to establish that the erring dealers were in fact penalised. This was the first substantive decision of the CCI relating to the issue of resale price maintenance and it has now been set aside by the NCLAT.

The *Fast Way Transmission* case\(^{38}\) involved allegations of abuse of dominant position against a dominant multi-channel operator (a multi-channel operator is an entity that carries television channels to persons who watch cable television) which terminated its channel placement agreement with a broadcaster using a unilateral clause in the agreement. The CCI found the impugned action to be an abuse of dominant position due to denial of market access but the erstwhile COMPAT set aside the decision of the CCI on the ground that denial of market access can only be caused by one competitor against another. The Supreme Court was hence faced with the question of whether abuse of dominant position by denial of market access in contravention of Section 4(2)(c) of the CA can only be caused by one competitor against another. Section 4(2)(c) of the CA states that ‘There shall be an abuse of dominant position . . . if an enterprise or a group . . . indulges in practice or practices resulting in denial of market access in any manner’. In the Supreme Court’s view, the phrase ‘in any manner’ was one of wide import which must be given its natural meaning. Accordingly, the reasoning that denial of market access in contravention of Section 4(2)(c) of the CA can only be caused by one competitor against another was not sustainable. Surprisingly, despite finding infringement of the CA, the Supreme Court set aside the penalty imposed by the CCI as it found that reasonable justification (very low TRP) was provided by the multi-system operators for terminating its agreement with the complainant broadcaster company.

**ii. Trends, developments and strategies**

In the past year, the CCI has provided the much-needed clarification as regards what types of contractual non-compliances would constitute abuse of dominant position. The test, it appears, is whether contractual non-compliances cause prejudice to the aggrieved party or impedes competition. If no prejudice is caused and the competition is not impeded then a mere contractual or technical non-compliance would not constitute abuse of dominant position.

With the NCLAT decision in the *Hyundai* case, the only stand-alone final decision of the CCI in a Section 3(4) case stands vitiated for largely procedural reasons. A prominent school of thought suggests that if the NCLAT found the CCI’s decision to be deficient for want of separate inquiry, it could have simply remanded the matter for re-adjudication by the CCI instead of simply setting aside the entire order.

\(^{37}\) Competition Appeal (AT) No. 06 of 2017: *Hyundai Motor India Ltd. v. Competition Commission of India & Ors.*

On the Supreme Court front, the landmark cases of DLF Limited and National Stock Exchange of India Limited continue to await final judgment.

iii Outlook
The guidance provided by the Supreme Court on ‘denial of market access’ in the Fast Way Transmission case was an essential clarification. However, the trend of setting aside the penalty, despite a finding of contravention of Section 4 of the CA on the grounds that there was a valid justification to the impugned conduct, has generally not found a place in the CCI’s decisional practice. It needs to be seen whether the CCI will pick up on this trend.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The CA provides for cross-references between sector regulators and the CCI in the event of overlap between jurisdictions. The CA states that the CCI may consult other sectoral regulators.

In an interesting development, the Supreme Court has settled the law on the role of the CCI in the telecoms sector, which has its own specialised regulator called the Telecom Regulatory Authority of India (TRAI). The Telecom Operators case arose out of information filed by a telecoms operator called Reliance Jio Infocomm Limited (Reliance Jio) and two others alleging cartelisation and abuse of dominant position by the incumbent dominant operators (IDO) and the Cellular Operators Association of India (COAI). The CCI found a prima facie case of cartelisation by the IDO and the COAI, and directed the DG to cause an investigation into the matter (prima facie order). However, the IDO and the COAI filed writ petitions before the High Court of Bombay, requesting the quashing of the prima facie order on the grounds that the CCI did not have jurisdiction as the TRAI was already seized of the matter. In a surprising move the High Court of Bombay set aside the prima facie order observing that the TRAI, being the sectoral regulator, had the technical expertise to deal with and decide even competition issues in the telecoms sector. In the view of the High Court, the CCI ought to have waited for the final decision of the TRAI before arriving at a prima facie finding of anticompetitive conduct and ordering an investigation by its investigative arm.

The judgment of the High Court was challenged before the Supreme Court, by both the CCI and Reliance Jio. While the Supreme Court noted that the CCI had exclusive jurisdiction to adjudicate upon issues governed by the CA, it also held that the issue of denial of points of inter-connects was a technical issue pending before the TRAI and that the TRAI was the more appropriate authority and best suited to consider these issues.

The Supreme Court affirmed the findings of the Bombay High Court and held that only when the jurisdictional facts were determined by the TRAI against the IDO, would the issue of any concerted agreement between the IDO and COAI arise. Further, the Supreme Court noted that permitting the CCI to intervene at an early stage would result in it having to decide issues that were best left to TRAI, the sectoral regulator.

Separately, the Supreme Court also held that the CA was a special statute and if there is anticompetitive conduct, then it is within the exclusive domain of the CCI to examine and

39 Section 21 and 21A.
40 Civil Appeal No. 11843 of 2018 in the Supreme Court of India: Competition Commission of India v. Bharti Airtel Limited and Others.
rule upon it. Even if the TRAI finds anticompetitive conduct, its powers would be limited to the action under the Telecom Regulatory Authority of India Act, 1997 alone. In the context of the present matter, it further stated that once the TRAI *prima facie* finds that the IDOs indulged in anticompetitive practices, the CCI can investigate the matter under the CA. Thus, the jurisdiction of the CCI was not barred, but simply pushed to a later stage. The aftermath of this decision was seen in the NSE case, where the CCI dismissed the information after noting that the Securities Exchange Board of India was considering similar issues.

**V MERGER REVIEW**

The merger control provisions of the CA have been in effect in India since 1 June 2011 and the CCI, which has been entrusted with merger control, promulgated the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (Combination Regulations) on 11 May 2011, setting in place procedural and certain substantive aspects of Indian merger control. The Combination Regulations have been amended annually by the CCI in February 2012, April 2013, March 2014, July 2015, January 2016 and most recently on 9 October 2018.

The Indian merger control regime is a mandatory regime; accordingly, pre-merger clearance from the CCI must be obtained before completion of a transaction, and the transaction must be suspended until such clearance occurs. There is no concept of a voluntary notification to the CCI (i.e., if the thresholds tests are not met, no notice can be filed with the CCI). The revised financial thresholds have been prescribed as follows:

<table>
<thead>
<tr>
<th></th>
<th>India (rupees)</th>
<th>Worldwide (US dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Combined assets</td>
<td>Combined turnover</td>
</tr>
<tr>
<td>Parties</td>
<td>20 billion</td>
<td>60 billion</td>
</tr>
<tr>
<td>Group</td>
<td>80 billion</td>
<td>240 billion</td>
</tr>
</tbody>
</table>

The Combination Regulations provide for filing fees ranging between 1.5 and 5 million rupees depending on which form the parties to the combination are required to file with the CCI (respectively, Form I and Form II).

In pure acquisitions, it is the acquirer that is obliged to make the filing and pay the appropriate filing fee. However, in the case of a merger or amalgamation, the parties to the combination are required to jointly make the filing with the CCI and, therefore, jointly remit the filing fee. Further, unless otherwise exempt, combinations that are structured as mergers or amalgamations approved by the boards of directors of the transacting parties on or after 1 June 2011, or that are structured as acquisitions where the definitive acquisition agreement or other binding document is executed on or after 1 June 2011, must be notified to the CCI for its approval. The notified transaction cannot be completed until the CCI gives its approval or 210 calendar days have passed from the date of notification, whichever is earlier. In cases where a transaction is not notified at all, the CCI cannot initiate an enquiry after the passing of one year from the date of completion of the transaction.

---

41 Case No. 47 or 2018: *In Re: Jitech Maheshwari And National Stock Exchange of India Limited.*

42 Section 5 of the CA.
Non-filing of a notifiable transaction (i.e., gun jumping) is punishable by a fine of the higher of 1 per cent of the assets or turnover of the combination.

The October 2018 amendments to the Combination Regulations brought several anticipated changes to the regime. The CA stipulates a deemed approval of a transaction 210 days after filing; the October 2018 amendments clarified that clock stops pursuant to requests for information from parties should be excluded when counting the 210-day period. Further, the earlier regulations were silent on the ability of parties to withdraw notices or refile or propose voluntary modifications before Phase II investigation. The amended Combination Regulations now expressly allow parties to withdraw and refile notices, and propose voluntary modifications in Phase I itself or immediately after a prima facie order is passed by the CCI after Phase I investigation. Now the parties need not wait for a Phase II investigation to begin before they can propose voluntary modifications. The approach iterated in the amended Combination Regulations is a welcome change which is consistent with the approach taken by leading international antitrust regulators.

The Central Government of India, through a notification dated 29 March 2017, revised and updated earlier notifications on the ‘de minimis exemption’ or ‘small target exemption’. The prescribed effect of this March 2017 notification is that acquisitions of a target with Indian assets of up to 3.5 billion rupees or turnover of up to 10 billion rupees in India are granted an exemption from notifying the CCI. Notably, the March 2017 notification expands the scope of the earlier ‘small target exemption’ notifications to include mergers and amalgamations, and also provides the much-needed clarification that only the ‘true target’ in the case of asset acquisitions has to be considered for the purposes of determining the applicability of the asset and turnover thresholds under the CA. The ‘de minimis exemption’ or ‘small target exemption’ is currently available until 28 March 2022, unless otherwise extended.

Apart from the ‘de minimis exemption’ or the ‘small target exemption’, the Ministry of Corporate Affairs, Government of India from time to time, through notifications under the CA, has also exempted certain enterprises from the provisions of Section 5 and 6 of the CA in the public interest. In addition, Schedule I of the Combination Regulations also describes several potential transaction scenarios that ‘need not normally be notified’ to the CCI.

i Significant cases
The year 2018 saw the imposition of hefty penalties for gun jumping and clearance of important global mergers.

The Linde/Praxair case and the Bayer/Monsanto case were global mergers of equals that were sent into Phase II investigation by the CCI. In both of these cases the CCI identified significant overlaps and ordered a conditional approval. In Linde/Praxair, the structural remedies ordered by the CCI were divestment of Linde’s industrial gas plants and cylinder filling stations operating in the eastern and southern regions of India and divestment of Linde’s share in Bellary Oxygen Company Private Limited, a joint venture between Linde and Inox Air Products Limited. In addition to the above structural remedies, the CCI also

---

43 Section 43A.
44 Notice under subsection (2) of Section 6 of CA given by Linde Aktiengesellschaft and Praxair, Inc.; Order of the CCI dated 6 September 2018 under Section 31(7) of the CA.
45 Notice under subsection (2) of Section 6 of CA given by Bayer AG; Order of the CCI dated 14 June 2018 under Section 31(7) of the CA.
ordered the parties to the transaction not to employ, or make offers of employment to, any key personnel of the businesses being divested, for a specified period of time. In *Bayer/Monsanto*, the structural remedies ordered by the CCI were divestment of the NSH-BAC business, vegetable seeds business, and the entire shareholding in Maharashtra Hybrid Seeds Company Limited along with any rights held therein. In addition, the CCI also ordered Bayer to undertake behavioural commitments such as following broad-based, non-exclusive licensing of GM as well as non-GM traits, allowing fair reasonable and non-discriminatory access to certain digital platforms, and a commitment not to bundle any of its products, etc. Hybrid remedies are in vogue internationally and it appears the CCI has followed the trend.

As discussed above, the amendments brought to the Combination Regulations in October 2018 allowed parties to propose voluntary modifications in Phase I of the investigation. This amended provision was used by the parties in the *Northern TK Venture/Fortis Healthcare* case,\(^46\) which was approved in Phase I after the acquirer provided voluntary commitments to the CCI including implementation of an elaborate ‘rule of information control’ between the acquirer and one of its joint ventures operating in a geographic market with a high market share of the acquirer.

In *Adani Transmission Limited*,\(^47\) the acquirer had advanced to the seller loans adjustable with the consideration payable for the transaction and the share purchase agreement envisaged advancement of further loans to the seller which was also adjustable with the consideration payable. In the CCI’s view, in effect the loans were in the nature of advance consideration. The CCI found the act of advancing of loans, by the acquirer to the seller, adjustable with the consideration amount, and the stipulations in the share purchase agreements allowing advancing of similar loans to the seller to be in contravention of the standstill obligation under the CA. However, having regard to mitigating factors such as full cooperation by the parties in furnishing information and establishment of infringement on the basis of information voluntarily provided by the parties, the CCI imposed a nominal penalty of 1 million rupees on the acquirer.

In the *LT Foods Limited* case\(^48\) the parties to the proposed combination had entered into a framework agreement in terms of which the acquirers were to pay before the approval of the CCI an advance of 17 million rupees and undertake measures such as handover of inventories to the acquirers, introduction and interaction with suppliers of the seller, restriction on promotional spending and restriction on the seller entering or exiting territories. The CCI found all of these measures to be in contravention of the standstill obligation under the CA. The CCI reiterated that the standstill obligation under the CA not only prohibited completion or closure of a transaction before the approval of the CCI, but also prohibited coordination between the parties to the transaction. In the CCI’s view, the intention of the parties to acquire, merge or amalgamate should necessarily remain merely a proposal. However, having regard to mitigating factors like full cooperation by the parties in furnishing

\(^{46}\) Notice under subsection (2) of Section 6 of CA given by Nothern TK Venture Pte. Ltd.; Order of the CCI dated 29 October 2018.

\(^{47}\) Notice given by Adani Transmission Limited; Order of the CCI dated 30 July 2018 under Section 43A of the CA.

\(^{48}\) Notice given by LT Foods Limited and LT Foods Middle East DMCC; Order of the CCI dated 11 May 2018 under Section 43A of the CA.
information, establishment of infringement on the basis of information voluntarily provided by the parties and consideration of the proposed transaction being low, the CCI imposed a nominal penalty of 500,000 rupees on the acquirer.

At the appellate level, the Supreme Court of India on 17 April 2018 passed two significant decisions on gun jumping. In CCI v. Thomas Cook India Limited and another, the Supreme Court upheld a CCI decision against Thomas Cook (India) Limited, Thomas Cook Insurance Services (India) Limited and Sterling Holiday Resorts (India) Limited imposing a penalty of 10 million rupees for gun jumping. Similarly, in SCM Soilfert Limited and another v. CCI, the Supreme Court upheld a CCI decision against SCM Soilfert Limited and Deepak Fertilizers and Petrochemicals Corporation Limited imposing a penalty of 20 million rupees for gun jumping. The Supreme Court, in these decisions, has clarified that transactions cannot be structured in a manner to avoid compliance with the mandatory provisions of merger control under the CA. Further, these judgments of the Supreme Court also provide valuable guidance on the factors that need to be considered in determining whether a transaction is independent or interrelated.

ii Trends, developments and strategies

After the removal of the 30-day timeline for filing a CCI notification by way of the June 2017 MCA Notification, there has been a significant decline in the number of gun-jumping cases for belated filing. This is a positive sign since parties are now able to provide a comprehensive notification to the CCI without having to rush the filing due to the erstwhile 30-day deadline.

There has been a string of cases penalising parties for the payment of advance consideration, either directly or through indirect structures. It appears that this trend will continue, given the CCI’s strong stance, considering such advance payments to be partial closure of the transaction.

The recent amendments to the Combination Regulations bring some degree of respite for parties, since they are now allowed to make voluntary proposals for structural modification during Phase I. This amendment is critical as it provides leeway to parties to obviate a Phase II investigation altogether if the remedies proposed voluntarily are adequate to address the CCI’s concerns.

Lastly, the recent rulings of the Supreme Court confirming the CCI’s decisions in certain gun-jumping cases stand testimony to the robustness of the CCI’s merger control jurisprudence. It is also worth mentioning that the CCI shared information with its counterparts in other jurisdictions while reviewing global mergers. This highlights the growing camaraderie between the CCI and other antitrust agencies. Thus far, India has only seen eight Phase II cases, with no transactions being blocked. This reflects the business-friendly outlook of the CCI.

iii Outlook

As mentioned above, the Central Government in India constituted an expert committee in September 2018 to review the entire competition law regime in India. The work of the committee is under way and it is speculated that the committee may recommend important

49 Civil Appeal No.13578 Of 2015: Competition Commission of India v. Thomas Cook (India) Ltd. and Another.
50 Civil Appeal No.10678 Of 2016: SCM Soilfert Limited and Another v. Competition Commission of India.
changes to the merger control regime in India such as removal from the CA of the 30-day time limit from the trigger event to file a notification (at present this provision has been exempted from application by a notification for a period of five years), incorporation of common exemptions into the Act (at present these exemptions are contained in a schedule to the Combination Regulations), and change of the regime to a ‘control regime’, where only transactions involving change of control will be mandatorily notifiable to the CCI.

VI CONCLUSIONS

The CCI’s 10-year anniversary in May 2019 is an opportune occasion for introspection regarding its growth, successes and failures, as well as predictions for the next decade. The CCI’s enforcement interventions have historically been challenged on procedural grounds, particularly with regard to the conduct of its proceedings and the right to be heard by parties before taking action. Having surmounted these objections (and, in some cases, modified its procedures), it is now expected that the CCI and appellate bodies will delve deeper into the merits of the disputes that lie before it. As a result, it is expected that the CCI and the appellate bodies are likely to make larger contributions to the jurisprudential fabric of Indian law in the coming years. The merger control regime, while younger, is fully functional and has already conducted vital interventions in several key sectors. Recent judgments of the Supreme Court affirming the CCI’s stance have also bolstered its reputation as a robust regulator, but several challenges still lurk on the horizon. Foremost among these is the unique, yet seemingly ubiquitous, issue of regulating nascent technology markets, which requires the CCI to strike a fine balance between harming consumers through straitjacketed inaction, and smothering innovative business models through aggressive zeal. The CCI’s track record over the past 10 years seems to indicate that the next decade of Indian competition law ought to be met, ideally, with guarded optimism.
I OVERVIEW

Law No. 5 of 1999 concerning Prohibition of Monopolistic and Unfair Business Competition Practices (the Indonesian Competition Law (ICL)) is the primary legislation regulating business competition in Indonesia. Besides being the basis for the prohibition of anticompetitive agreements and conducts, the ICL is also the basis for the establishment of the Commission for the Supervision of Business Competition (or Komisi Pengawas Persaingan Usaha (KPPU)). As the only authority responsible for the enforcement of the ICL, KPPU may initiate investigations and examinations as well as issue decisions and impose administrative sanctions for any violation of the ICL.

Since its establishment in 2000, KPPU has actively enforced the ICL and conducted investigations and examinations in various industries. Up to 2018, KPPU has issued 307 decisions regarding alleged violation of the ICL. Among those, 223 decisions were related to bid rigging.

In 2018, KPPU went through a major change in its leadership. In April 2018, the House of Representatives appointed nine new KPPU Commissioners for the 2018–2023 period. Such appointment concluded the lengthy selection process that began in mid 2017, which should have been completed in December 2017. This process has affected the enforcement of the ICL by KPPU in 2017 and 2018, which can be seen in the number of cases that were handled by KPPU in those years. In 2017, KPPU handled 10 cases followed by four cases in 2018. In comparison, in 2015 and 2016, KPPU handled 22 and 21 cases, respectively.

Immediately after their appointment, the new KPPU Commissioners emphasised in media releases that they would prioritise the enforcement of the ICL in several sectors: food commodities, automotives, the digital economy, banking, property, and the hospitality industry. Notwithstanding such statement, reflecting on the developments as at March 2019 it is likely that KPPU will focus its enforcement efforts in the airline industry following alleged cartel practice by several airlines.

---

1 Farid Fauzi Nasution is a partner, Anastasia Pritahayu RD is a senior economist and Berla Wahyu Pratama is an associate at Assegaf Hamzah and Partners.
2 The authors’ own calculation based on the KPPU’s website.
3 http://eng.kppu.go.id/board-of-commissioners/.
4 The authors’ own calculation based on the KPPU’s website.
5 The authors’ own calculation based on the KPPU’s website.
II CARTELS

The prohibition under the ICL covers several forms of cartel behaviour, including price fixing, production arrangements, market allocation, boycotts, bid rigging, and other horizontal arrangements that may restrict competition or harm consumers.

The prohibition of cartels, as well as other stipulations under the ICL, applies to an undertaking, which is defined as any individual or business enterprise, whether incorporated or otherwise, established and domiciled or conducting activities within the territory of the Republic of Indonesia, whether individually or jointly through agreement, in the form of various operations in the economic sector. Although KPPU has included individuals as reported parties in several cases, there is still some debate over whether the ICL applies to individuals.

Violation of the ICL is subject to several forms of administrative sanctions. Should KPPU conclude that a violation has occurred it has the power to:

\( a \) annul the agreement that is in violation of the ICL;
\( b \) impose a fine in the amount of 1 billion rupiah up to 25 billion rupiah; and
\( c \) award compensatory damages incurred as a result of anticompetitive conduct.

Even though the ICL also stipulates criminal sanctions in the form of imprisonment and criminal fines, such sanctions are only applicable when an undertaking has obstructed the investigation or examination carried by KPPU or did not comply with a legally binding KPPU decision. The enforcement of criminal sanctions is under the jurisdiction of the National Police and not KPPU, since KPPU is only authorised to impose administrative sanctions. To date there has been no official guideline on how to carry out this criminal sanction procedure.

There is no stipulation regarding formal leniency programmes, an ‘immunity plus’ policy, ‘plea bargains’ or other forms of binding settlement, or programmes aimed at detecting cartels under the current ICL. KPPU in its decision might consider the cooperation offered by the reported party as a mitigating factor in determining the imposed fine.

There have been discussions and attempts to implement a leniency programme through amendments of the ICL. Based on the latest draft of the amendment that is available to the public, KPPU will have the authority to grant a reduction in the fine to undertakings that admit and report certain anticompetitive agreements. The details regarding the procedure for such leniency programme are still unclear, since the latest draft only stipulates that further provision on the leniency programme will be stipulated in a KPPU Regulation.

i Significant cases

There are no cartel cases that can be considered as ‘significant’ in 2017 and 2018 owing to the small number of cases handled by KPPU in the past two years. The only cartel case in 2018 related to alleged bid-rigging practice, while in 2017, there were only five cartel cases and all of them related to alleged bid-rigging practice.

However, the Supreme Court in September 2018 annulled the KPPU’s decision in the day-old-chick cartel case and many considered this as a ground-breaking one. KPPU initially launched its formal examination in 2016 following the rise of the price for live bird products since 2013. Since the fourth quarter of 2013, the poultry industry in Indonesia has been dealing with oversupply of day-old-chick final stocks (DOC FS), which led to the decline of the price for live bird products in the market. Such price decline has caused significant loss for breeders since the selling price of live bird products has gone below the
production cost. In 2015, a high-ranking official in the Directorate General of Livestock and Veterinary Health Services of the Ministry of Agriculture stepped in to attempt to overcome this issue and delivered written and verbal instructions to poultry producers that were aimed to stabilise the market. One of the instructions required poultry producers to dispose a portion of their parent stocks in order to lower the production of DOC FS. In this matter, KPPU ordered all 12 poultry producers to fix the output together and fined them a total of 119,670,012,000 rupiah.

In 2017, the West Jakarta District Court overturned the KPPU’s decision, stating that written and verbal instruction from a high-ranking official in the Directorate General of Livestock can be considered as a government policy. Therefore, the disposal of parent stocks by the poultry producers must be considered as a form of compliance with a government policy. In 2018, the Supreme Court upheld the West Jakarta District Court decision, which acknowledged that actions made by undertakings pertaining to instruction from government officials are exempted from the provisions in the ICL. The Supreme Court decision is unprecedented since such consideration has never been adopted in any previous decisions from the Supreme Court.

As of 2019, we can still expect developments on the chicken cartel case, as KPPU has filed a civil review against the Supreme Court decision.

ii Trends, developments and strategies
According to KPPU’s official media releases, KPPU is currently examining four shipping liner companies offering freight services from Surabaya to Makassar over alleged cartel activity. KPPU is also focusing on its investigation of an alleged cartel among airlines in several aspects of the industry, among others, the alleged fixing of ticket prices and the paid baggage service.

iii Outlook
Reflecting on the close coordination between the government and the House of Representatives as of the end of 2018 and the beginning of 2019, there is a possibility that the amendment of the ICL could be enacted in 2019. The enactment of the amendment will bring major changes to cartel enforcement by KPPU, through the introduction of the leniency programme, which is expected to provide an efficient tool for KPPU in detecting cartels and is in line with competition law enforcement best practices in other jurisdictions. The leniency programme will be a very attractive option for undertakings that are involved in an anticompetitive agreement, considering the amendment will likely introduce higher fines compared to the current ICL. The latest draft sets the maximum fine at 25 per cent of an undertaking’s total turnover in the relevant market during the period of violation.

However, there is also a possibility that the enactment of the amendment will be postponed following numerous criticisms that consider the provisions in the draft amendment to be incriminating towards undertakings.

7 West Jakarta District Court Decision No. 01/PDT.SUS-KPPU/2017/PN.JKT.BRT.
III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Chapters 3 and 4 of the ICL regulate provisions prohibiting vertical restraint. In addition to the above, KPPU has issued several regulations serving as guidelines for interpreting provisions under the ICL.

The ICL stipulates the following specific prohibitions related to vertical restraints:

a resale price maintenance: any agreement with distributors or other undertakings obliging distributors to refrain from reselling or resupplying goods or services below the set minimum price, creating an unfair business competition;

b vertical integration: any agreements between businesses at different levels of the production chain with the intention of one business controlling the production of the other business’s products, in which the latter’s products are used as the part(s) of inputs for the former business;

c exclusive distribution agreement: any agreement requiring distributors to only supply or not supply such goods or services to certain parties or in particular places;

d tying arrangement: any agreement requiring customers who purchase one product or service to purchase another different product or service (the tied product or service);

e discount or rebate: any agreement offering certain prices or lower prices on goods or services that requires customers to purchase other goods or services from suppliers or not to purchase suppliers’ competing goods or services; and

f market control: any agreement requiring suppliers to engage in discriminatory practices against certain undertakings.

There are no industry-specific provisions or rules applicable under the ICL in general or even more specifically for provisions related to prohibitions of vertical restraint.

When assessing vertical restraint under the ICL, KPPU should undertake an analysis of whether all the elements of the related ICL article have been fulfilled. KPPU should know the facts concerning the vertical restraint background and also the implications of the agreement for all parties. Further, the KPPU should stress its analysis of market structure and whether a dominant undertaking has the ability to abuse its market power. KPPU may also consider whether there are any restrictions on an undertaking’s strategy that forecloses access for potential entrants into upstream and downstream markets. Vertical restraint provisions under the ICL adopt the rule of reason approach, which means in order to declare a violation of such articles, the vertical restraint must be proved by (1) the emergence of a negative impact on the market and (2) the motive and economic benefits gained by the undertaking in doing such restraint.

Significant cases

Since the enactment of the ICL, KPPU has rarely initiated an investigation for cases related to vertical restraint prohibitions. Based on KPPU’s official website, during 2018 there were only four cases resolved by KPPU and none of these cases related to restrictive business practices or dominance issues.

In 2017, KPPU issued Decision No. 22 of 2016 on an alleged vertical restraint in the bottled water industry. The reported party in the case was a distributor of bottled mineral water named Aqua. KPPU was of the view that Aqua was the largest brand of bottled mineral water in Indonesia with insignificant competitors.
KPPU found that Aqua had allegedly instructed its sub-distributor, which was the second reported party in the case, to impede the market by prohibiting its wholesalers from selling its competitors’ products.

Despite claiming that it never issued the prohibition instruction, Aqua argued that unlike a principal-agent relationship, its distributor was naturally independent and could not in any way be influenced by Aqua’s decision. KPPU disregarded the distributorship agreement between Aqua and its sub-distributor and concluded that their relationship was that of an agency.

In this case, KPPU also emphasised that an act of a corporate’s employee can be considered as a corporate action, despite the absence of instruction from authorised officials of the company to such employee.

Aqua and its sub-distributor were found guilty and imposed with fines of 13.8 billion and 6.2 billion rupiah, respectively.

ii Trends, developments and strategies
As there are hardly any decisions that relate to vertical restraint prohibition in recent years, there have been no significant developments on the enforcement of the provisions by KPPU.

iii Outlook
With the rise of digital business in Indonesia, we can expect more enforcement of the provisions by KPPU towards companies in digital markets.

For vertical restraint prohibitions, one of the challenges of enforcement would be defining the relevant market. Since vertical restraint prohibitions are closely related to abuse of dominance conducts, the challenges in this respect also include the determination of the market shares in order to accurately conclude the relevant parties’ dominance in the market.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
In 2017, KPPU published a report regarding digital economies issues in Indonesia. The report was made as part of the Technical Cooperation Agreement with the Australia Indonesia Partnership for Economic Governance (AIPEG) to promote Effective Competition Policy. KPPU also conducted some consultations with several stakeholders that have an interest in Indonesia’s digital economy, such as the Indonesian Ministry of Trade, the Financial Services Authority (Otoritas Jasa Keuangan), among others.

The report explains that digital technology is quite disruptive and is transforming the traditional markets and business models. In this era, the relevant stakeholders, such as the government as well as the competition authorities, should be able to protect and empower consumers in a complex and rapidly developing online environment. However, at the same time, the government should be able to maintain the growth of the economy and business, including the growth of digital technology-related businesses.8

Furthermore, the report explains that most of the challenges faced by the government involve the competition between the traditional and digital services providers. Since

8 See http://eng.kppu.go.id/report/.
the governing regulations related to the digital business operations are not similar to the traditional ones, the traditional service providers often face an uneven playing field in the market.

The report also describes that the regulation of digital services is considered challenging as regulators must determine whether there is a basis for regulation; whether the regulation will restrict the market entry; and whether the regulation is practical and enforceable. If regulation is too strict, it can hamper innovation and increase costs, as well as restrict the growth of the Indonesian economy in the future. From a competition perspective, the issue that arises is whether the entry barriers can prevent the competition, and whether they are natural or induced (e.g., by anticompetitive practices or exclusive licences). As such, any regulatory framework on digital technology aspects must be flexible in order to keep pace with and benefit from technological advances. The new framework should also be able to reduce the entry barriers while at the same time maintaining consumer protection and the certainty of rules.9

Further, the report also recommends that to underpin the digital economy and enhance trust from the consumers, a coherent data framework is required. Any data protection must be flexible to further enable innovation. The economic and social benefits of data flows, including increased market access, investment, innovation, development and growth, as well as increased productivity, are best realised when there are no data residency restrictions.10

V STATE AID

Under the current regime, there is no specific provision under the ICL regarding state aid. KPPU currently does not have any focus on state aid control, therefore state aid control is not applicable in Indonesia.

VI MERGER REVIEW

The Indonesian merger control regime adopts a mandatory post-merger notification system whereby all mergers that satisfy the statutory threshold and certain criteria shall be notified to KPPU within 30 working days of the transaction becoming legally effective.11 KPPU outlines three transactions that are subject to the Indonesian merger control rules: mergers, consolidation, and the acquisition of shares (hereinafter collectively referred to as ‘mergers’).12

In general, the criteria for notifiable mergers under Indonesian merger control are as follows:

a) The transaction satisfies the statutory threshold, which is:
   • the combined sales value in Indonesia of the merging parties (buyer and target) exceeds 5 trillion rupiah; or

10 See the Digital Economy in Indonesia Report.
11 See Indonesian Government Regulation No. 57 of 2010 on Merger or Consolidation of Business Entities and Acquisition of Shares that may result in Monopolistic and/or Unfair Business Competition Practices (GR No. 57/2010), Article 5(1).
12 See GR No.57/2010, Article 1.
• the combined assets value in Indonesia of the merging parties (buyer and target) exceeds 2.5 trillion rupiah. If both of the merging parties are banks, the combined assets values shall exceed 20 trillion rupiah. If only one of the merging parties is a bank, it shall adhere to the asset value threshold of 2.5 trillion rupiah.13

The transaction is performed by and between non-affiliated parties.14

The transaction results in a change of control through shares or equivalent transactions.15

As for foreign mergers, two additional criteria need to be satisfied:16

The target company in the transaction is a foreign company.

The transaction has a direct impact on the Indonesian market. The Indonesian merger control rule provides alternative schemes that may indicate potential direct impact:

• all the merging parties have business activities in Indonesia either directly or indirectly, for instance, through a subsidiary or subsidiaries in Indonesia;
• one of the merging parties has business activities in Indonesia while the other party or parties have sales to Indonesia; or
• one of the merging parties (target company) has business activities in Indonesia and the other party or parties (acquiring company) have no business activities in Indonesia but have a sister company or companies that have business activities in Indonesia.

Significant cases

Since the enactment of the regulation of Indonesian merger control in 2010, KPPU has never issued any opinion with objections. An opinion will be issued only if there is any alleged potential of anticompetitive impact resulting from the merger. To date, KPPU has only issued no objection opinions with or without remedies. Based on publicly available opinions, to date KPPU has issued around nine no objection opinions with remedies. One of the recent high-profile conditional no objection opinions is the acquisition of shares of Vinythai Public Company Ltd (Vinythai) by Asahi Glass Company Ltd (Asahi). Asahi is a Japanese company that engages in the production of glass, electronic chemicals and ceramics. Meanwhile Vinythai as the target company is domiciled in Thailand and engages in the manufacture of polyvinyl chloride (PVC) and epichlorohydrin which are mostly used in the plastic industries.

In its assessment, KPPU only focuses on one type of PVC product sold by Vinythai in Indonesia, namely suspension PVC (S-PVC). S-PVC is used for the production of pipes, film and sheets, floors, bottles, cables, etc. In its opinion, KPPU found that one of Asahi’s subsidiaries in Indonesia was the market leader in PVC with a market share of more than 50

13 See GR No.57/2010, Article 5(2).
14 See the Commission Regulation No. 2 of 2013 on the third Amendment of the Commission Regulation No. 13 of 2010 on the Guidelines for Mergers or Consolidation of Business Entities and Acquisition of Shares of Other Companies (Merger Guidelines 2013).
15 See Merger Guidelines 2013.
16 See Merger Guidelines 2013.
per cent. This resulted in a significant increase in the Hirschman-Herfindahl Index (HHI) for this transaction particularly on the S-PVC market. KPPU then continued the assessment on this transaction to Phase II (comprehensive assessment) as the HHI was higher than 1,800.\textsuperscript{17}

Based on KPPU’s Phase II assessment, there was a significant structural barrier for the S-PVC market in Indonesia. KPPU also found that based on upward pricing pressure (UPP) analysis, this transaction could put significant pressure on the domestic price of S-PVC. The result from the efficiency test also showed that the potential efficiency of this transaction may not lead to a price decrease to one of the merging party.

Considering the above analysis, KPPU decided to issue a no objection opinion towards this transaction with the following conditions:

- Asahi should report their production, sales and price of S-PVC in Indonesia to KPPU on a quarterly basis for the next three years; and
- Vinythai should report its export and price of S-PVC to Indonesia on a quarterly basis for the next three years.

The above conditions were imposed by KPPU on the merging parties to prevent the acquisition from resulting in anticompetitive effects.

In addition, to date there have been 16 decisions issued by KPPU related to the failure to notify mergers. Among these 16 cases, KPPU imposed penalties on 14 transactions. As for the remaining two cases, KPPU decided that the merging parties in those transactions were not proven guilty for the failure to notify allegation. Thus far there is only one foreign transaction that has been sanctioned by KPPU due to failure to notify, which is the share acquisition of Woongjin Chemical Co by Toray Advanced Material Korea Inc.

In 2016, KPPU imposed the highest fine ever in a failure to notify case in the amount of 8 billion rupiah on LG International Corp for submitting the notification of the share acquisition of PT Binsar Natorang Energi 20 working days past the deadline.

Currently KPPU is quite active in carrying out merger control investigations in Indonesia. During 2018, KPPU issued eight decisions or half of the total number of all decisions on the failure to notify cases. All of the issued decisions relate to domestic transactions.

One of the significant cases on merger control enforcement in 2018 is the decision of the late notification of PT Erajaya Swasembada, Tbk (Erajaya), an Indonesian company engaged in the mobile phone import industry. Erajaya was alleged to have notified its acquisition of PT Axioo International Indonesia (Axioo), an Indonesian company in the mobile phone manufacturing industry, 145 working days late. Even though Erajaya was found to have notified the transaction late, KPPU did not impose any sanction on Erajaya, considering that its acquisition over Axioo was conducted in order to comply with the requirement under the Ministry of Trade Regulation which obliges mobile phone distributors to have a manufacturing facility in Indonesia.

ii Trends, developments and strategies

In 2018, KPPU received 74 notifications of mergers.\(^{18}\) There was a decrease in the number of mergers notified to KPPU in 2018 compared with 2017, which amounted to 90 transactions.\(^{19}\) According to KPPU, this might be for two reasons: the lack of awareness of the undertaking to submit the notification to KPPU; and a significant decrease in the number of corporate actions, especially merger transactions.\(^{20}\)

Furthermore, 97.3 per cent of the notified transactions in 2018 were share acquisitions. The remaining 2.7 per cent of notified transactions were merger transactions. However, there were no consolidation transactions submitted to KPPU during 2018.\(^{21}\)

Based on KPPU’s website, 14 out of 74 notifications were foreign-to-foreign transactions. Japan, Singapore and United States are listed as the top three countries that notified the most transactions to KPPU in 2018.\(^{22}\)

In general, the most notified mergers related to the manufacturing industry (35.4 per cent), the energy sector (17 per cent), and the property sector (14 per cent). There were several mega transactions whose values exceeded 1,000 trillion rupiah notified to KPPU in 2018, among others, include:\(^{23}\)

a the acquisition of PT Freeport Indonesia by PT Inalum;
b the merger between KWA Investment Co and Monsanto Company;
c the acquisition of PT Bank Danamon, Tbk by MUFG Bank Ltd; and
d the acquisition of TMF Orange Holding BV by Saphire Bidco BV.

iii Outlook

One of the key points in the amendment of the ICL related to the merger control issue is the change from a mandatory post-merger notification to a pre-merger notification regime.\(^{24}\) Based on certain publicly available sources, there is also a proposal to increase the notification threshold as well as increase the penalties imposed for any breaches of the Indonesian merger control rules. Furthermore, there is also a discussion related to the deadline of KPPU assessment. Some sources have confirmed that the assessment period for any notified transactions to KPPU will be changed from 90 working days to 25 working days. The discussion on such amendments is still ongoing between the government and the parliament to date. Unfortunately, there has been no clear deadline set by the parliament on when the amendment to the ICL will be enacted.

---


© 2019 Law Business Research Ltd
VII CONCLUSIONS

KPPU focused more on merger control enforcement during 2017 and 2018. In the coming year, we can expect KPPU to put more effort into cartel enforcement compared to that in 2017 and 2018, particularly in industries that are closely related to the interest of the general public, such as food commodities, airlines, the digital economy, etc.

KPPU will surely benefit from the amendment to the ICL, which is likely to be enacted in 2019, both in its cartel and merger control enforcement. The implementation of the extraterritoriality principle through the amendment will provide KPPU with the power to review and supervise cross-border agreements, activities, and transactions that potentially affect the Indonesian market. This may be necessary to address the developing competition issues entailing the rise of the digital economy that by nature are likely to involve markets in different jurisdictions.
I OVERVIEW

The Italian Competition Authority (ICA) enforces EU and national competition rules in Italy.

Each of the ICA’s five directorates deals with mergers, abuses and restrictive practices in their assigned business sectors. The ICA also has advocacy powers. It reports to the parliament and the government on any laws, regulations or general administrative acts that give rise to competition concerns and are not justified by general interest considerations. The ICA may also challenge in court decisions of public administrations that are deemed incompatible with competition law. Finally, the ICA is empowered to address abuses of economic dependence, unfair commercial practices and conflicts of interest of government officials.

Case teams in each directorate conduct the investigations, while the opening and final decisions, as well the decisions to notify the statements of objections, are taken by a college of three members appointed by the presidents of the two branches of the parliament.

As recently confirmed by the Constitutional Court, the ICA is not an impartial judicial body. Its decisions are subject to judicial review by administrative courts (i.e., the Regional Administrative Tribunal (TAR) of Rome and, on second and final appeal, the Council of State).

On 20 December 2018, Roberto Rustichelli was appointed as President of the ICA, even though at the time of writing he has not yet taken office. Mr Rustichelli is a civil judge and panel president within the Tribunal of Naples’ special section for business law. Former President Giovanni Pitruzzella has taken over the post of Advocate General at the EU Court of Justice.

---

1 Giuseppe Scassellati-Sforzolini and Marco D’Ostuni are partners, Luciana Bellia is a senior attorney, Fabio Chiovini is an associate, and Michael Tagliavini is a trainee lawyer at Cleary Gottlieb Steen & Hamilton LLP.

2 A table summarising the ICA’s activities from 2011 to 2018 is available at http://www.agcm.it/dotcmsDOC/come-funziona/e27_file.pdf.

3 Constitutional Court, Judgment No. 13 of 31 January 2019.
II CARTELS

i Significant cases

ICA imposes largest ever fine on captive banks and their trade associations

On 20 December 2018, the ICA imposed its largest ever overall fine in a cartel case (over €678 million) on captive banks belonging to automotive groups.\(^4\) The ICA found that the captive banks had exchanged sensitive information – directly among themselves and through trade associations – including about interest rates, sales volumes, costs, etc.

The parties argued that captive banks are not in competition with each other in the market for consumer credit or lease contracts for cars, because they exclusively serve their own brand. The ICA, however, rebutted that financing by captive banks affects competition between car manufacturers in the sale of vehicles. In fact, the ICA held that the relevant product market is the sale of cars financed by captive banks.

The ICA imputed the infringement also to the captive banks’ parent companies, based on the parental liability doctrine. The ICA held liable not only parent companies holding 100 per cent (or almost all of the shares) of their subsidiary, but, for the first time, it also held jointly controlling parents of a joint venture liable. In the latter case, however, the ICA did not impose on them joint and several liability for the joint venture’s fine, due to the novelty of its approach.

Although the ICA concluded that the infringement was particularly serious, it found that the application of a correspondingly high gravity multiplier would result in excessive fines, also in light of the financial crisis affecting the automotive industry during the period of the infringement. The gravity multiplier was therefore reduced to only 4 per cent.

Council of State quashes TAR judgment on exchange of information about television post-production services

In 2015, the ICA found that 21 companies and their trade association had been exchanging sensitive information and coordinating prices in the tenders for post-production services provided to the national TV broadcaster RAI.\(^5\) The decision was quashed by the TAR.\(^6\) On 21 March 2018, the Council of State overruled that judgment and confirmed the ICA’s findings.\(^7\)

Following previous case law, the Council of State criticised the TAR for indulging in piecemeal analysis of the evidence, instead of weighing it as a whole. In the absence of plausible alternative explanations, the Council of State found that the price increases’ unusual timing and magnitude was sufficient proof of collusive conduct.

According to the Council of State, the trade association contributed to disseminating sensitive information and even the exchange of historic data, which each company could autonomously gather, might infringe antitrust rules.

\(^4\) Case I811 – Finanziamenti auto.

\(^5\) Case I771 – Servizi di post-produzione di programmi televisivi Rai.

\(^6\) TAR Lazio, judgment of 6 June 2016, New Italian Broadcasting Association (NIBA) and ICA (Judgment No. 6475).

\(^7\) Council of State, judgment of 21 March 2018, ICA and NIBA (Judgment No. 1822).
Trends, developments and strategies

Council of State and TAR clarify criteria for antitrust fines in cartel cases

In 2018, the case law on the quantification of antitrust fines was enriched by a new string of precedents.

In a case concerning a cartel between model management agencies, the TAR clarified the notion of relevant turnover for fining purposes. Payments made to agencies and passed on to models do not accrue to the agencies, because these transactions are financially neutral. Therefore, these amounts should not be included in the agencies’ value of sales for the purpose of calculating the base amount of the fine.8

In a case concerning a cartel in the cement industry, the Council of State confirmed that the 10 per cent maximum threshold for fines applies to the company’s turnover in the last entire financial year prior to the final decision. This principle applies even if this turnover is much lower than in the previous year due to the divestment of certain entities of the group.9

Finally, the Council of State confirmed that, for serious infringements, a fine equal to 15 per cent of the cartelised products’ annual sales can apply. If a company only supplies cartelised products (so-called mono-product companies), that multiplier will always result in a fine exceeding the 10 per cent maximum threshold of that company’s overall turnover – and will have to be reduced accordingly. However, according to the Council of State, this inevitable application of the maximum possible fine to mono-product companies does not in itself imply an unfair discrimination towards those companies.10

TAR clarifies the scope of right of access to the ICA’s internal documents in cartel cases

In a judgment of 5 November 2018,11 the TAR provided guidance on the scope of the ICA’s duty to disclose documents in the context of antitrust investigations.

According to the TAR, the ICA may delay third-party access to documents attached to a complaint until it has assessed whether they have any relevance with respect to the proceedings (and, in any event, no later than the adoption of a statement of objections). This assessment is necessary to strike the right balance between the complainant’s right to confidentiality and the investigated party’s defence rights.

The TAR also annulled the ICA’s refusal to disclose an internal communication on organisational matters between the case team and the college of the ICA. This document cannot be classified as a preliminary draft or report relating to the content of an act to be adopted by the ICA, which are explicitly exempted from disclosure under applicable legislation.

Importantly, the TAR affirmed that in principle the ICA cannot deny disclosure arguing that a given document is not relevant to the party’s defence: the assessment of the relevance of a document for the purpose of defence is an exclusive prerogative of the party requesting disclosure.

8 TAR Lazio, judgment of 20 April 2018, Why Not S.r.l. and ICA (Judgment No. 4405).
9 Council of State, judgment of 31 December 2018, Italcementi and ICA (Judgment No. 7320).
10 Council of State, judgment of 21 March 2018, Olmo and ICA (Judgment No. 1821).
11 TAR Lazio, judgment of 5 November 2018, Sintesi and ICA (Judgment No. 10643).
iii  Outlook

In the coming months, the ICA will continue to focus its enforcement efforts on public
tenders, particularly for integrated management of health and safety conditions on
workplaces and private security.\(^\text{12}\) The ICA also launched an investigation into an alleged
coordination among the main telecommunications operators on retail mobile and fixed
telecommunications services.\(^\text{13}\)

Moreover, the Council of State is expected to adopt a final judgment on the alleged
collusion between Roche and Novartis. The two pharmaceutical companies are accused of
favouring the commercialisation of the drug Lucentis – sold by Novartis under Roche’s
licence – to the detriment of the cheaper drug Avastin. The Court of Justice of the European
Union issued a preliminary ruling on the same case on 23 January 2018, clarifying that
an agreement on the dissemination of misleading information with a view to reducing the
competitive pressure of a pharmaceutical product might amount to an infringement ‘by
object’ of Article 101 TFEU.\(^\text{14}\)

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

**Enel and Acea fined for abusive conduct hindering the liberalisation of the electricity market**

With decisions dated 20 December 2018,\(^\text{15}\) the ICA found that the national incumbent Enel
and the local supplier Acea abused their dominant positions in the Italian markets for the
supply of electricity.

After the liberalisation of the Italian energy sector, electricity is sold on an open market
at the prevailing prices. However, until 2020 residential customers and small enterprises may
opt to buy electricity at regulated tariffs, set by the Italian energy authority. The ICA found
that Enel and Acea used contact details and other information on customers in the regulated
market – where they hold a dominant position – to address tailored commercial offers for
the provision of services in the open market. The ICA held that this information was not
available and could not be replicated by other competitors outside the regulated market.

In addition, Acea used detailed information on the competitors’ market shares and
market positions obtained from its branch active in the downstream market of electricity
distribution. The ICA found that a similar competitive advantage could not be replicated by
other non-integrated suppliers.

When calculating the fines, the ICA took into account the volume of sales achieved in
both the regulated and open markets. However, since the abusive conduct only affected the
open market, the ICA granted a substantial reduction on the final amount of the fines.

\(^\text{12}\) Case I822 – Consip/Gara sicurezza e salute 4; Case I821 – Affidamenti vari di servizi di vigilanza privata.
\(^\text{13}\) Case I820 – Fatturazione mensile con rimodulazione tariffaria.
\(^\text{14}\) Court of Justice, Case C-179/16 F. Hoffmann-La Roche and Others, judgment of 23 January 2018.
\(^\text{15}\) Case A511 – Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica, case A512 –
A2A/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica, case A513 – Acea/Condotte
anticoncorrenziali nel mercato della vendita di energia elettrica.
**Trends, developments and strategies**

*ICA closes the investigation against Aspen for alleged non-compliance with its decision on excessive pricing*

On 5 July 2018, the ICA closed an investigation against Aspen for alleged non-compliance with its previous decision finding an abuse of dominance in the market of oncological drugs. In 2016, the ICA found that Aspen had adopted an aggressive negotiation strategy to force the Italian Medicines Agency (AIFA) to authorise excessive and unjustified price increases of between 300 and 1,500 per cent. Following Aspen’s appeal, the ICA’s decision was upheld by the TAR Lazio.

The ICA reopened proceedings on 1 March 2017, as it considered that Aspen was not complying with its previous decision. Proceedings were dismissed after a lengthy negotiation between Aspen and AIFA, resulting in a redefinition of drugs prices in line with the relevant sector-specific regulation and the retroactive application of those prices as from the date of ICA’s initial decision.

An investigation against Aspen for excessive prices is still ongoing at the European level.

**Outlook**

In 2018, the ICA initiated proceedings for alleged infringements of Article 102 TFEU affecting the markets for post-trading services, event ticketing, rail transport services, and diagnostic medical devices. The ICA is also scrutinising the compliance of Poste Italiane with its previous decision on the exclusionary rebates applied by the dominant postal services operator.

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

i **Significant cases**

*The Italian Communications Authority publishes preliminary results of the market investigation into big data*

On 8 June 2018, the Italian Communications Authority (AGCom) published the preliminary results of its market investigation into big data.

AGCom’s interim report first analyses the structure of big data markets and the players active in the sector. These include first and foremost all consumers using the internet, often trading data on their own online activities as an implicit payment for free internet services, such as mobile apps and social network websites. On the other end of the value chain are a very diversified category of private and public players, interested in extracting added value from the analysis of big data. Between these two categories of players, specialised companies

---

16 Case A480B – Incremento prezzo farmaci Aspen-inottemperanza.
17 Case A480 – Incremento prezzo farmaci Aspen.
18 Case AT.40394 – Aspen.
20 Case A493B – Poste Italiane/Prezzi recapito.
provide technological support for data management, data brokers market sets of data collected from different sources, research agencies develop new technologies and algorithms for the analysis of raw data. Without providing a conclusive market definition, the AGCom found that these segments are characterised by high barriers to entry and expansion, few big vertically integrated operators, and a number of small specialised companies.

Based on this analysis, AGCom pinpointed some of the main risks related to the development of the data-driven economy: strengthening of market power in concentrated areas of the market, asymmetry of information to the detriment of consumers, distortions in the development of the public opinion, and potential discrimination also as a result of the application of price-setting algorithms.

In order to tackle these problems, AGCom concluded that the adoption of *ex ante* regulation (possibly including regulation of algorithm use) is necessary, particularly when the citizens’ political and social rights are at issue. According to the AGCom, the amount of data stored, the context in which they are analysed, and the technologies used no longer allow for a categorisation of data according to traditional labels (such as ‘personal’ or ‘sensitive’ data). Therefore, new data regulation should simply refer to data ‘*per se*’.

The ICA is carrying out a parallel market investigation on big data, and its report is expected over the next months.

### Trends, developments and strategies

The ICA enforces national legislation on unfair practices. These are commercial, promotional and communication strategies that – while not amounting to antitrust infringements – result in an unfair prejudice to the consumers’ rights. In 2018, smartphones and social networks were the ICA’s main area of focus.

On 25 September 2018, the ICA imposed fines on Samsung and Apple for releasing software updates causing malfunctions and early obsolescence of smartphones. The ICA also found that Samsung had charged high repair costs for out-of-warranty repairs of those malfunctions.21

On 29 November 2018, the ICA fined Facebook €10 million for using its subscribers’ data for commercial purposes. The ICA found that Facebook did not adequately inform customers, upon their registration on the platform, that their data would be used for commercial purposes. Moreover, Facebook transferred personal data to third-party websites and apps without the consumers’ express and prior consent.22

On 21 February 2019, the ICA fined Ryanair and Wizz Air for applying an extra charge for the transport of one large cabin bag on their flights. The investigation showed that almost all passengers need to carry at least one large bag in the cabin. Therefore the exclusion of this service from the base price would provide a misleading representation of the ticket’s real value.23

---

22 Case PS11112 – *Facebook-Condivisione dati con terzi*.
23 Case PS11272 and PS11237 – *Modifica policy bagagli*.
Outlook

At the end of an exceptionally long and burdensome parliamentary procedure, the bill aimed at developing and supporting competition and protecting consumers was finally approved and entered into force on 29 August 2017. The new law introduced a number of significant reforms in a wide range of sectors.

In 2018, ministerial decrees have implemented the provisions of the bill concerning (1) the simplification of the procedures to gather and transport ferrous and non-ferrous metals; (2) the simplification of the procedures to allow customers migration among mobile telecommunication operators; and (3) the creation of a passport for artworks to simplify their export outside the national territory.

However, crucial aspects of the bill still need to be implemented. In particular, the government still has to adopt a decree on transportation services through online platforms, such as Uber, while a decree increasing the number of notaries public has yet to be enacted.

STATE AID

Significant cases

European Commission finds that non-refundable financial support constitutes state aid, but the delayed collection of fees by a state entity does not

Maritime transport services are a perpetually hot topic in Italian antitrust enforcement, given their pivotal role in the national economy, the high barriers to entry in the sector and the significant involvement of state resources. 2018 made no exception: the Commission declared state aid granted to the Port Authority of Naples and the shipbuilder Cantieri del Mediterraneo (CAMED) incompatible with EU rules.

The Port Authority had received non-refundable financial support at no cost for the refurbishment of local dry-docks, while CAMED was granted below-market price use of those facilities without open tender. The Commission took the view that such an advantage could not be justified by the performance of public service obligations.

Nonetheless, the Commission did not take issue with the delayed collection of fees due to the Port Authority by other ship repairers, terminal operators and transport companies. Since the Port Authority acted as a diligent market operator would do – requiring interest payments, setting up instalment plans, and terminating concession contracts – no undue benefit was granted to the debtors.
**Trends, developments and strategies**

*Direct actions for annulment brought by competitors of state aid beneficiaries are admissible*

The Court of Justice for the first time affirmed that competitors of the beneficiary of a contested measure have legal standing to bring an action for annulment against the Commission decision assessing that measure.\(^{26}\)

The appeal was brought by a school and a bed and breakfast competing against certain educational and accommodation businesses controlled by ecclesiastical institutions, which had been granted a tax exemption from the Italian state.

Although the Commission had found that the tax exemption constituted state aid, it concluded that the aid was impossible to recover because the necessary information could not be retrieved from the Italian land register and tax databases. The Court of Justice was not satisfied with the Commission’s argument: absent any assessment of other alternative ways to achieve at least a partial recovery of the unlawful aid, the Commission could not conclude that such recovery was absolutely impossible.

**Outlook**

In 2019, the Council of State is expected to decide whether the system of green certificates in place in Italy until 2014 constituted state aid.\(^{27}\) The claimant argued that the system breached EU rules because it imposed an obligation to buy green certificates on imported green electricity, while domestic green electricity was exempted. This litigation has been closely followed by the Commission, which also intervened to support the claimant in the proceedings before the Council of State.\(^{28}\)

In the following months, the EU Court of Justice will also address the request for preliminary ruling submitted by the Council of State in the litigation between the Italian Ministry of Transport and some local railway operators. The Council of State asked the Court to clarify whether the grant of financial support to a distressed rail transport operator and its subsequent sale to a third party without a competitive tender procedure (and for no consideration) constitute state aid.\(^{29}\)

**VI MERGER REVIEW**

**i Significant cases**

In 2018, the ICA made merger clearance conditional upon remedies in four cases.

Luxottica, global leader in the production of eyewear, filed a notification for the acquisition of Barberini, active in the production of glass blanks and finished glass lenses. After reviewing the companies’ market shares post-merger, the ICA noted that no alternative supplier of high quality lenses would be in a position to effectively meet the requirements of the main customers in this sector. The ICA also raised concerns in relation to Luxottica’s

---


28 The intervention of the Commission before national courts in state aid cases is allowed by Article 29 of Regulation 2015/1589 laying down detailed rules for the application of Article 108 TFEU.

significant market power and vertical integration in the segment of glass blanks, as well as in the downstream segment of glass lenses. Finally, the ICA took into account Barberini’s competitive advantage resulting from considerable R&D resources and ability to innovate. The acquisition was cleared subject to Luxottica’s obligation not to impose minimum purchase requirements in the supply of glass blanks and to allow customers to access certain innovative products covered by Barberini’s intellectual property rights.30

The ICA also reviewed the proposed acquisition of Nedgia by 2i Rete Gas, both active in the operation of gas distribution networks. The ICA raised concerns about certain territorial districts, particularly in Sicily and Puglia, where the two companies are the main (if not the only) participants in tenders for distribution networks operation. The ICA made the acquisition conditional upon divestment of 2i Rete Gas’ assets in some of those districts. The ICA also imposed behavioural measures to be implemented in the event no suitable buyer can be found for the acquisition of the divested assets.31

Structural remedies were also required to obtain the ICA’s greenlight to the acquisition of Gardenia-Limoni by Douglas, both active in the selective retail distribution of luxury perfumes,32 and the acquisition of Modial Pet by Noah 2, two distributors of pet food.33

ii  Trends, developments and strategies
Law No. 124 of 4 August 2017 revised the two cumulative turnover thresholds for the notification of concentrations to the ICA. The first threshold, applying to the combined aggregate domestic turnover of all undertakings concerned by the concentration, has been slightly lowered from €499 million to €492 million. The second threshold has been lowered from €50 million to €30 million and now applies to each of at least two of the undertakings concerned, and no longer to the acquired undertaking alone.

Since the first threshold remains extraordinarily high, the ICA’s ability to review proposed transactions continues to be very limited. Only 73 concentrations were notified in 2018, slightly more than the 64 transactions notified in 2017. By comparison, more than 400 transactions a year were notified before 2013, when the application of just one of the two turnover thresholds was sufficient to trigger a filing obligation.

iii  Outlook
The old EU law distinction between cooperative and concentrative joint ventures remains applicable under Italian competition rules. Accordingly, all joint ventures (including full-function ones) whose main object or effect is the coordination of their parent companies’ behaviour do not constitute a ‘concentration’ within the meaning of Article 5 of Law No. 287/1990. These joint ventures must be assessed under the restrictive agreements or market dominance provisions, or both. The ICA presented a reform proposal to the Italian government through Recommendation No. AS988 of 2 October 2012, suggesting to add into Article 5 an explicit reference to the applicability of merger control rules also to full-function cooperative joint ventures. However, the proposal has not yet become law.

30 Case C12183 – Luxottica/Barberini.
31 Case C12125 – 2i Rete Gas/Nedgia.
33 Case C12139 – Noah 2/Mondial Pet Distribution.
VII CONCLUSIONS

The ICA has continued to pursue its approach in terms of both advocacy and enforcement, particularly in regulated sectors. Its investigations remain focused on infringements affecting the public finances, such as bid rigging in public tenders or commercialisation of drugs supplied by the healthcare system. Merger control is the area in which amendments continue to be most desirable, both in terms of filing thresholds (which are now excessively high) and substantive test analysis (moving away from the dominance test to the significant impediment to effective competition test). Moreover, in line with EU rules, efficiencies should formally become part of the ICA's assessment.
I OVERVIEW

The past year has been busy for the Japan Fair Trade Commission (JFTC). Cartel enforcement under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (AMA) has been an important part of the JFTC’s enforcement actions. Aggressive enforcement actions were taken against domestic cartels (which mainly consisted of bid rigging in various industry sectors including the construction sector) as well as against an international cartel involving price fixing of hard disc drive suspensions.

While the JFTC has recently been focusing on various industry sectors including IT and the public utility industry (e.g., energy and agriculture), it is the enforcement in the IT industry that was remarkable in the previous year. In a number of these cases the investigations were closed following voluntary remedial measures taken by the relevant IT business operators.

The JFTC maintained a steady level of merger control cases. This is evident from the number of notifications filed overall and of those involving transactions with foreign companies, as well by the limited number of cases reviewed in Phase II. Having said that, in the past year, the JFTC imposed remedies in several cases cleared. It was notable in the previous year that the JFTC issued a clearance decision with conditions in a long-running case regarding the integration between regional banks in the Kyushu area (Fukuoka Financial Group’s share acquisition of Eighteenth Bank).

In addition, the JFTC was particularly active in the actions or advocacy developed in specific policy areas. In addition to reports that may influence future enforcement (such as the report on human resources and the competition policy by the Competition Policy Research Centre (CPRC)), the JFTC has shown a particularly strong interest in digital platforms and their market power. In this context, the JFTC is intending to consider possible rules that could be established in collaboration with other ministries of the Japanese government and through conducting market inquiries. Another important focus of the JFTC has been its preparation of a draft legislation to reform the surcharge system.

II CARTELS

The JFTC may issue a cease-and-desist order or a surcharge payment order, or both, by way of administrative sanctions for violations of the AMA.

---

1 Junya Ae is a partner, Michio Suzuki is a senior associate and Ryo Yamaguchi is an associate at Baker & McKenzie (Gaikokuho Joint Enterprise).
Cease-and-desist orders aim to stop illegal acts, restore an appropriate competitive environment, and prevent a recurrence of such violations of the AMA by ordering the relevant party or parties to cease the actions in question and to take preventive measures. In addition to cease-and-desist orders, surcharges may be imposed in cases involving cartels and bid rigging. In 2018, the JFTC issued cease-and-desist orders for 15 cartel or bid-rigging cases and the total amount of surcharges imposed for 14 cases in 2018 was approximately ¥2.2 billion, which is significantly lower than the total surcharges of ¥7.5 billion in the preceding year. The highest surcharge (¥1.1 billion) in 2018 was imposed in the price-fixing cartel concerning hard disc drive suspensions.

Moreover, the JFTC has a policy to seek criminal penalties in the following cases: (1) in serious cases, which are considered to have widespread impact on people’s welfare; and (2) when firms or industries are repeat offenders, or have not complied with administrative measures issued by the JFTC. In 2018, the JFTC made a criminal accusation against construction companies involved in a bid-rigging case related to a magnetic-levitation train project.

**i Significant cases**

**Cartel for suspensions used in hard disc drives**

On 9 February 2018, the JFTC issued cease-and-desist orders and imposed surcharges (¥1,076 million in total) on two manufacturers of suspensions used in hard disc drives for participating in a cartel.

From at least 2013 to 2016, NHK Spring Co, Ltd and its Hong Kong-based subsidiary (NAT) exchanged competitively sensitive information such as sales prices of suspensions and market shares, and agreed with TDK Corporation and its Hong Kong (SAE) and Thai (MPT) subsidiaries to maintain sales prices. The coordination took place with a view to obtaining and maintaining market shares and profits in relation to suspensions for hard disc drives sold to Toshiba Corporation, which was the only hard disc drives manufacturer in Japan at that time.

NHK Spring had collaborated closely with TDK. For instance, SAE purchased suspensions from NHK Springs, and SAE made an investment in NAT. However, NHK Spring and TDK competed with each other in the market for hard disc drive suspensions due to TDK’s acquisition of MPT. NHK Spring and TDK decided to cooperate with one another in order to better compete with overseas suspension manufacturers. Under this mutual cooperation, from 2009 Toshiba started to purchase suspensions from NHK Spring and TDK. Since around 2013, the two company groups supplied to Toshiba most of its suspension purchase volume requirements.

While in addition to the price-fixing agreement, an effect of restricting competition needs to also be established in order to find an infringement of the AMA, the JFTC concluded that competition was restricted through the agreement to maintain prices and that this took place from at least 2013 when the two-company group covered most of Toshiba’s demand for suspensions even though they had reached the price-fixing agreement around 2007 when TDK started to plan the acquisition of MPT.

---


BDK and its subsidiaries were exempted from surcharges and NHK Spring was granted a 30 per cent reduction in surcharges as they applied for leniency.

**Bid-rigging case related to a magnetic-levitation train project**

In December 2017, the JFTC in cooperation with Japanese prosecutors conducted inspections of four construction companies over alleged bid rigging related to a magnetic-levitation train project. These four companies were suspected to have coordinated bids to win 15 out of 22 contracts for a magnetic-levitation train project and each won three or four contracts. Two of the four companies (Obayashi Corporation and Shimizu Corporation) applied for leniency after the JFTC’s dawn raids. On 23 March 2018, the JFTC made a criminal accusation against the four construction companies and two executives from Taisei Corporation and Kajima Corporation.4 This case was considered a serious case that would have a broad impact on people’s welfare since (1) the magnetic-levitation train project was conducted on a large scale and involved certain public aspects including financial support from the government, and (2) the relevant construction companies had already previously received criminal and administrative penalties for bid rigging.

In October 2018, the Tokyo District Court imposed fines of ¥200 million and ¥180 million on Obayashi and Shimizu, respectively. Obayashi and Shimizu reported to the JFTC their involvement in the bid-rigging conduct and admitted the same during the trials. Taisei and Kajima as well as their two executives, on the other hand, denied their involvement in the conduct, and their court hearings started in February 2019 and have continued for several months.

### ii Trends, developments and strategies

Cartel enforcement continues to be a top priority for the JFTC. While cartel or bid-rigging cases for which cease-and-desist orders and surcharge payment orders were issued by the JFTC in 2018 related to domestic markets in Japan (other than the above cartel case for hard disc drive suspensions), the JFTC maintains a close relationship with authorities in other jurisdictions dealing with international cartels.

### iii Outlook

**Reform of the surcharge system**

The surcharge system in Japan, introduced in 1977 as an administrative sanction, aims to prevent violations of the AMA by imposing financial penalties for violations. While it has been amended several times since its introduction, increasing globalisation and complexity of business structures has led the JFTC to conduct a further review of the current surcharge system.

The JFTC therefore established a Study Group on the AMA in 2016 with the objective of re-evaluating the surcharge system and addressing problems with the current system. The Study Group issued its report5 in April 2017, identifying problems with the current system, and proposing future revisions of the surcharge system.

The main problems of the current system that the Study Group has identified are that the surcharge calculation methods are not flexible and that there are insufficient incentives for

---


businesses to cooperate in investigations conducted by the authority. In order to resolve these problems, the report makes several proposals for reform, including revisions of the method for calculating surcharges, and amendments to the leniency policy in order to increase incentives to cooperate in investigations.

Between April and June 2017 the JFTC carried out a public consultation on the issues raised in the report. The JFTC then started preparing the submission of a bill to amend the AMA in 2018. However, the governing political party, the Liberal Democratic Party (LDP) pointed out the necessity of having discussions on the legalisation of attorney-client privilege, and the JFTC therefore decided to postpone the submission of the bill at that time.

Since January 2018, the JFTC continued to have discussions on attorney-client privilege with the relevant parties including the LDP, and it appears that a certain consensus has been reached on this. The JFTC is preparing to submit the bill to the Diet of Japan in 2019. The draft amendment of the AMA includes a new leniency programme and a new surcharge calculation method based on the level of a company’s cooperation with a JFTC investigation. The attorney–client privilege is planned to be introduced in the rules under the provisions of the AMA for the purpose of making the new leniency programme more effective.

**Bargaining system**

In June 2018, a bargaining system was introduced in the Japanese criminal procedure, which is applied to certain types of crimes including violations of the AMA, such as cartels and bid rigging. Under the bargaining system, a prosecutor and an accused entity or individual may enter into an agreement under which the accused entity or individual cooperates to prove a third party’s infringement by providing evidence or giving a statement and, in exchange for this cooperation, the prosecutor drops the case or imposes a lighter sentence on the cooperating entity or individual. While the first to apply for the leniency before the commencement of an investigation by the JFTC will be exempted from criminal prosecution, other companies or individuals who are suspected of antitrust infringements will need to consider the merits of participating in the new bargaining system.

**III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE**

The JFTC has also conducted investigations and enforced the law proactively in non-cartel cases (i.e., involving unfair trade practices such as abuse of superior bargaining position, especially in the IT and digital sectors). A contact hotline was set up in 2016 in such sectors, as well as in the agricultural and electricity and gas sectors, in order to gather information on conduct that may raise competition law issues. More than 100 contacts were received during the fiscal year ending March 2018. In 2018, the JFTC issued cease-and-desist orders in three non-cartel cases (relating to discriminatory treatments in a trade association and an agricultural cooperative association, and interference with a competitor’s transaction). The JFTC also expressed strong concerns about major companies in the IT sector, as well as online platforms’ activities, and probed several activities of such companies or platforms including Amazon, Airbnb and Apple on suspicion of infringing the AMA by abusing a superior bargaining position and exclusive dealing.
Significant cases

Amazon case

According to the media, the JFTC raided Amazon Japan in March 2018, as it was suspected of having abused its superior bargaining position by requiring suppliers to bear the ‘cooperation fees’, which included a part of the discounting cost as well as the cost of updating the system. It would be difficult for the suppliers to refuse the requests from Amazon Japan, which has a strong position in the online retail market, and, as such, it may be considered as abusive conduct.

Previously, Amazon Japan was investigated from 2016 to 2017 on suspicion of restricting the business activities of sellers on the Amazon Marketplace by enforcing price parity clauses and selection parity clauses (‘most favoured nation’ clauses) in contracts. The JFTC closed the case in response to Amazon Japan’s commitments to take prompt voluntary measures, including removing the clauses in question from the relevant contract to avoid a violation of the AMA.6

The investigation concerning the abuse of superior bargaining position started within one year of the case relating to MFN clauses being closed and it is ongoing.

Airbnb case

In October 2017, the JFTC raided Airbnb Japan, a Japanese subsidiary of a home-sharing platform, on the suspicion that it has restricted home management companies from doing business with Airbnb’s competitors. These home management companies provide home lenders with a number of services such as communications with renters, management of reservations, or room cleaning.

Given the JFTC was concerned that such conduct might result in the exclusion of competitors from the market, during the JFTC’s investigation, Airbnb Ireland UC and Airbnb Japan proposed a commitment to waive its rights to enforce these provisions. The JFTC determined that the proposed measures would address its concerns and decided in October 2018 to close its investigation in this case after confirming that such measures were complied with.7

Similar to the Airbnb case, the JFTC probed a Japanese online pet shop for dogs and cats, ‘Minnano Pet Online’, for suspected infringement of the AMA by restricting certain breeders from posting advertisement on other online pet shops. Minnano Pet Online reported to the JFTC the termination of these restrictions, and, as a result of this, the JFTC decided to close the investigation in May 2018.8

Apple case

In July 2018, the JFTC decided to close an investigation against Apple, which it had been conducting since 2016.9

Apple was suspected of restricting business activities of three domestic mobile network operators (MNOs), NTT Docomo, KDDI and SoftBank. This was allegedly done through the following clauses included in a sales agreement with the MNOs called ‘the iPhone

---

Agreement': (1) restrictions on the quantity of iPhones that the MNOs should place orders for with Apple Japan; (2) restrictions on the telecommunication service plan that the MNOs provided to iPhone users; (3) restrictions on the distribution in Japan of used iPhones that users traded with the MNOs; and (4) an obligation to provide subsidies that the MNOs and their sales agencies offered users purchasing iPhones. With regard to the above (1) through (3), the JFTC concluded that these provisions did not restrict MNOs’ business activities since the relevant clauses were not compulsory and there was no penalty mechanism for failure to comply with the clauses. For the above (4), the MNOs and their sales agencies were required to provide subsidies to iPhone purchasers under the iPhone Agreement. The JFTC considered that such provision would have an effect of lessening competition between mobile telecommunication businesses by restricting the price reduction of telecommunication services and others.

Responding to the JFTC’s concerns, Apple proposed to amend the iPhone Agreement to allow MNOs to offer iPhone purchasers a pricing plan for telecommunication services either with subsidies or without subsidies. After reviewing Apple’s proposal, the JFTC determined that the proposed amendment would address the suspected violation of the AMA and decided to close the case.

Further, the media reported in August 2018 that the JFTC was investigating Apple on suspicion of hampering a competitor’s dealing. In particular, in July 2017 Yahoo! Japan started a new online gaming service, which allowed users to play without downloading apps and would thus compete with Apple’s App Store. Last autumn, however, Yahoo! suddenly cut its budget and ceased promotions for such services and, according to the media, this was due to pressure from Apple. It was said that Apple threatened Yahoo! Japan with a refusal to deal if it continued to expand the gaming service while Yahoo! Japan provides its apps through Apple’s App Store. It appears the investigation is ongoing, although the JFTC has not made any announcements in respect of this case.

### ii Trends, developments and strategies

#### Introduction of the Commitment Procedures

The amendment of the AMA introducing the Commitment Procedures came into effect on 30 December 2018 when the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) became effective. Under the CPTPP, member countries are required to ‘authorise [their] national competition authorities to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action’. The Commitment Procedures allow the JFTC to close an investigation into suspected violations of the AMA following a commitment provided by the relevant party to the JFTC.

The JFTC issued guidelines on Commitment Procedures (Policies Concerning Commitment Procedures) on 26 September 2018. These were finalised after a public consultation conducted from July to August 2018. The guidelines include the basic framework for the Commitment Procedures, such as the scope of application and requirements of commitment measures to be submitted for approval, including typical examples such as cessation of the suspected violation, development of a compliance programme and amendments to contracts. The guidelines also clarify that Commitment Procedures are not to be applied to (1) hardcore cartels, including bid rigging and price fixing; (2) repeated suspected violations by the same entities within the previous 10 years; and (3) other vicious and serious suspected violation which would be subject to criminal prosecution.
Commitment Procedures enable competition law concerns to be solved swiftly and a potential anticompetitive conduct to be terminated. When the proposed commitment measures are approved by the JFTC, neither a cease-and-desist order nor a surcharge payment order will be issued to the suspected party.

Recently, the JFTC closed some of its investigations after the relevant suspected parties proposed voluntary remedies, such as the cases against Amazon in 2017, Airbnb and Apple as mentioned above. The Commitment Procedures may be applied to similar cases, such as private monopolisation or abuse of a superior bargaining position.

iii Outlook

Trade environment for digital platforms

The Japanese government intends to establish rules to deal with the rise of online platform businesses from a competition, information protection and consumer law perspective. In July 2018, three government agencies, the JFTC, the Ministry of Economy, Trade and Industry (METI), and the Ministry of Internal Affairs and Communications (MIC), established a panel consisting of academics and practitioners specialised in competition, information protection and consumer law in order to consult on this matter. On 12 December 2018, following a public consultation, the panel published an interim report.10

The interim report first determined that digital platforms are likely to have a dominant or oligopolistic position due to concentration of data through network effects and scale of economy. It then reviewed several issues from each perspective. With regard to competition law, two issues were primarily addressed: (1) creating transparency to maintain fairness; and (2) implementing free and fair competition in the digital market. For the first point, as unclear transactional situations between digital platforms and their users might lead to anticompetitive practices, the interim report suggested that a large-scale comprehensive survey should be conducted to understand the current situation of digital platform businesses, and that a special unit should be established to perform research and analysis in this sector on a continuing basis. In relation to the second point, several matters were listed as needing further consideration, such as how network effects in multilateral markets or data accumulation would affect competition, and how mergers and acquisitions conducted by digital platforms should be assessed.

Following the framework11 announced by the JFTC, METI and MIC in accordance with the above interim report, the JFTC decided to launch a survey to analyse the current situation of digital platform businesses. In addition to a hotline set up in January 2019 to collect information relating to platforms’ conduct, the JFTC plans to request information from users of digital platforms, by issuing an order under Article 40 of the AMA to gather information if necessary (this would be protected by non-disclosure agreements).

Survey on e-commerce

In January 2018, the JFTC launched a survey on consumer e-commerce to consider competition law issues arising out of business practices in this sector and their pro- and anticompetitive effects. A questionnaire was sent to around 4,000 online retailers, consumer goods manufacturers and distributors in order to gather information about online sales

---

According to the report issued in January 2019, three major online mall operators have a leading position in the online mall market since 50 to 70 per cent of retailers sell their products on these websites and 60 to 85 per cent of consumers shopped on the websites of these three malls. It is also said that they may have a superior bargaining position vis-à-vis business partners. The JFTC stated that it is highly likely that competition law issues may arise if they exclude other online mall operators from the market or unfairly change transaction terms with retailers. Further, the survey found certain cases where about one in four retailers had received requests relating to sales prices from manufacturers, and where manufacturers somehow restricted online sales in order to maintain a brand image, which might be regarded as a violation of the AMA such as resale price maintenance and dealing on restrictive terms, respectively. The JFTC will continue to gather information in this sector and take strict enforcement measures for breaches of the AMA, particularly focusing on conduct of online mall operators.

Study group on business tie-up/collaboration
In December 2018 the CPRC, a research centre for the JFTC, established a study group on business tie-up/collaboration and started an analysis considering (1) systematic theories under the AMA surrounding business tie-up/collaborations reflecting recent practices; (2) individual or concrete considerations as per the categories of tie-up and collaboration (e.g., joint production, joint marketing, joint purchase, collaboration in logistics, joint R&D, collaboration in technologies, collaboration in standardisation); and (3) such types of tie-up or collaboration that have not been usual practice so far but are becoming more and more widely utilised. The study group is expected to publish a report in summer 2019.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Mobile phone market
The JFTC conducted a research study on competition law issues in the mobile phone market and announced the report in August 2016. In this report the JFTC indicated antitrust concerns in the markets for mobile phone devices, communication services and mobile apps.

In 2018, the JFTC carried out follow-up research and reviewed the activities of MNOs (i.e., NTT Docomo, KDDI and SoftBank) as well as the competition conditions for mobile virtual network operators (MVNOs) by interviewing the relevant parties such as MNOs, MVNOs, sales agencies, and mobile phone device manufacturers. The report of this follow-up research was issued on 28 June and found that some methods or programmes conducted by MNOs may be problematic since they could result in an increase in switching costs for consumers or the difficulty of entry into the market of other mobile operators such as MVNOs, and thus impede competition in the mobile phone market. Such activities include the sales of handsets with telecommunication services and high cancellation fees.

With respect to a programme on the premise of trade-ins for handsets and re-entry of the same programme, called the ‘four-year restriction’, users who upgrade their mobiles after two years will be exempted from paying the remainder of their old mobile’s price on
the condition that they trade in their old mobiles and sign up for the same programme. The report stated that this would likely result in an increase of switching cost and lead to users’ reluctance to change their mobile phone operators.

In addition, the JFTC showed its concerns over fees incurred by MVNOs for connecting to MNOs’ networks. While MVNOs provide their communication services by utilising radio waves allocated to MNOs, the report said that it would be necessary to develop a system that induces MNOs to reduce connecting fees in order for MVNOs to build their position as competitors of MNOs in the mobile phone market.

ii Study group on human resources and competition policy
Given that people increasingly do freelance work or have a second job as well as working as a permanent employee, and that the types of employment agreements or work arrangements have been varied, the JFTC and the CPRC established a study group on human resources and competition policy in 2017 and issued a report in February 201812 to consider whether it is necessary and reasonable to deal with competition in labour markets under the AMA. The study group consisted of the experts in competition law, labour law, and labour economics and had held six meetings in order to compile the report.

While the AMA would play a significant role in promoting free and fair competition in the human resources market particularly in circumstances where there is declining labour force in addition to the diversity of work style, the application of the AMA to the labour market had not been discussed in detail before. This report concluded that the AMA should be applied to workers who are not protected under labour law such as freelance workers and that several concerted practices by multiple employers, such as ‘no-poach’ agreements and wage fixing, and unilateral actions by a single employer, including the non-compete obligation and restriction of the use of output produced by a freelance worker, may give rise to concerns under the AMA.

The JFTC takes the position that it would apply the AMA to the human resource market in accordance with the report, and from December 2018 it has been conducting research on restrictions of transfers of players in the sports sector to determine whether the conduct raises any competition law concerns.

V MERGER REVIEW
The number of merger filings with the JFTC has been relatively stable with a slight decrease compared to the immediately preceding year. From April 2017 to March 2018 (FY 2018), the JFTC accepted 306 notifications, of which 299 were cleared in Phase I, one was brought into Phase II and six were voluntarily withdrawn by the parties. From the standpoint of the competitive landscape between the parties, 179 involved a horizontal overlap and 121 involved a vertical relationship.

Likely supported by the parties’ effective use of pre-notification consultation with the JFTC, the rate of Phase I clearance continues to be high. Informal discussion between the authority and the parties during the pre-notification phase often extends to substantive

---

competition issues, and sometimes remedies may also be agreed. While the JFTC only publishes a limited number of its decisions, it published three Phase I clearances with conditions in FY 2018.

i Significant cases

**Fukuoka Financial Group (FFG)/Eighteenth Bank**
The JFTC scrutinised FFG’s acquisition of Eighteenth Bank with a focus on the parties’ horizontal overlap in corporate loans for small and medium-sized enterprises (SMEs) in Nagasaki Prefecture and three sub-regions, where the combined market share would be 70 to 75 per cent. After an in-depth review of more than two years, the transaction was approved on the condition that the parties divest loan receivables valued approximately ¥100 billion, accounting for 5 to 10 per cent of the above-mentioned relevant markets.

**Oji Holdings/Mitsubishi Paper Mills**
Oji Holdings’ acquisition of 33 per cent voting rights in Mitsubishi Paper Mills involved the parties’ substantive horizontal overlap in art paper, base paper for wallpaper, and press board markets in Japan. Upon Phase II scrutiny, the JFTC unconditionally approved the transaction taking into account the competitive pressure from customers, competitors and neighbouring markets.

**Nippon Steel & Sumitomo Metal (NSSMC)/Sanyo Special Steel (SSS)**
Reviewing NSSMC’s acquisition of 51.5 per cent voting rights in SSS, the JFTC focused on the Japanese market of small diameter seamless steel pipes for bearings, where the parties are the only two players SSS holding a 70 per cent market share and the remaining 30 per cent held by NSSMC. Given the absence of competitive pressure from competitors, imports and new entrants, as well as the limited presence of competitive pressure from customers and neighbouring markets, the JFTC considered that the transaction would substantially restrain competition. The transaction was approved during Phase II on the condition that SSS assigns a certain portion of right of use for its manufacturing facility and associated business to Kobe Steel, as well as the relevant firewall, so that sensitive information of Kobe Steel may not be shared, and monitoring undertakings.

ii Trends, developments and strategies

The JFTC has reviewed and approved 16 mergers and acquisitions between Japanese regional banks over the past 10 years, of which two recent cases (*Daishi Bank/Hokuetsu Bank, FFG/Eighteenth Bank*) were subject to Phase II. With the expected decrease in the Japanese population and other economic circumstances as a backdrop, mergers and acquisitions are considered important and effective options for regional players to survive, but their relatively high market share in specific regions may lead transactions to an in-depth review by the JFTC. In order to facilitate such momentum, the Japanese government is considering new legislation that provides a temporary exception to the current merger control regime under the AMA for a period of five to 10 years.

iii Outlook

The Growth Strategy Council, which is the government’s initiative to promote growth of the Japanese economy in the prospective sectors, suggests an amendment to the JFTC’s merger
control guidelines with an aim to facilitate merger review that involves digital platforms. New factors such as data, R&D investments, human resources, and accumulation of know-how are proposed additions to the traditional factors of substantive competition assessment.

VI CONCLUSIONS

Under the continuous leadership of Commissioner Kazuyuki Sugimoto, in the coming year it is expected that the focus on cartel enforcement, on merger control and on various industry sectors, will be maintained. Also for policy advocacy aspects it is expected that important reports will continue to be issued. Among other things, there will be a specific focus on the framework of rules that are to apply to digital platforms based on market inquiries. Also in relation to potential amendments to the AMA reflecting reforms of the surcharge system, which is an important challenge for the JFTC, it should be observed whether and when such amendments will pass the Diet as well as the details of newly introduced attorney–client privilege (a requirement put forward by the business community) going forward.
Antitrust enforcement is a relatively young and constantly evolving field in Mexico. Although the 1857 and 1917 Federal Constitutions already included provisions against monopolies, it was not until 1993 when the first Federal Economic Competition Law entered into force and an authority was created, embracing internationally accepted antitrust concepts and tools, such as: merger control, per se prohibition of cartel behaviour, and a rule of reason type of approach for abuse of dominance.

It was not long, however, before it became evident that the powers invested in the former competition agency were insufficient. Initial attempts to address this problem were rounded up by a major constitutional amendment taking place in 2013. As a result, the constitutional framework was updated and better adapted to fit actual competition enforcement needs while overall competition policy was strengthened by the creation of a constitutionally autonomous enforcer, the Federal Economic Competition Commission (COFECE) holding jurisdiction over all economic markets except for the broadcasting and telecoms sectors in which competition enforcement is entrusted to another autonomous regulator, the Federal Telecommunications Institute (IFT).

In 2014 a new Federal Economic Competition Law was enacted and harmonised the legal framework to the updated constitutional regime, following the trend to provide effective tools to investigate and deter anticompetitive behaviour in Mexico. This new Law embraced the traditional tools introduced in the previous Law, with certain additions and updates, while complementing competition enforcement powers with so-called incremental tools, such as the power to conduct market investigations to restore effective competition conditions in the markets.

---

1 Luis Gerardo García Santos Coy and Carlos Mena-Labarthe are partners, and Sara Gutiérrez Ruiz de Chávez is a counsel at Creel, García-Cuéllar, Aiza y Enríquez.
2 The 1992 Law was subject to different amendments, the most significant ones in 2006 (mainly increasing fines and including additional conduct in the abuse of dominance catalogue) and 2011 (again increasing fines as well as investigative tools and powers).
While competition enforcement is one of the scopes (albeit an important one) that the IFT needs to cover, COFECE has a constitutional mandate to procure the application of the Law in all other economic areas, subject of course to resources constraints, calling for efficient prioritisation.

Within this context, and pursuant to COFECE’s Strategic Plan for 2018–2021, resources are being allocated and enforcement efforts are focused in markets likely to produce the highest impact in terms of economic growth and welfare, considering six indicators: 

- contribution to economic growth – pursuant to market size and growth rate; generalised consumption; impact in related or downstream markets (e.g., intermediate goods and services or inputs); harm to the lower-income population; regulated sectors; and markets prone to anticompetitive behaviour.

Pursuant to these indicators, COFECE is targeting the financial, agrifood, energy, transport and health sectors, along with public procurement, for enforcement in the 2018–2021 term. Many of the relevant cases and developments that will be further addressed below are indeed consistent with this criterion as well as advocacy efforts.

II CARTELS

Consistent with international practice, in Mexico, agreements among competitors that reduce or soften competition will be considered illegal per se and penalised as an absolute monopolistic practice. One particularity of the Mexican system is that firms and individuals can incur an infringement without reaching an actual agreement, since the mere exchange of information between competitors with an anticompetitive impact is forbidden per se and may be criminally sanctioned.

While not every interaction among competitors will update this infringement, an absolute monopolistic practice will take place in the face of hardcore collusion (i.e., agreements and information exchanges with the object or effect to fix or manipulate prices or their components; restrict output or input; allocate markets; or rig bids).

Note that violations may arise either by object or effect, implying that the enforcer will not need to prove actual market effects to ground an infringement. Absolute monopolistic practices are, by law, null and void. Administrative fines for firms involved in cartel conduct can reach up to 10 per cent of the wrongdoer’s annual accruable income. Firms can also be subject to private litigation claims (including collective actions) to recover damages or losses arising from conduct updating an infringement declared by the enforcer.

Furthermore, individuals executing the practice on behalf of a company will be personally liable and subject to both criminal and administrative penalties, including fines.


8 Still, the enforcer is empowered to order the parties to cease or correct any actions related to the practice and to restore competition, if applicable.
of up to US$884,249, a five-year debarment from carrying out director or counsel functions, and five to 10 years’ criminal imprisonment. Facilitators (whether companies or individuals) can also be fined up to US$795,824.

While commitments and remedies are not legally available to settle cartel cases, as of 2006 the Law introduced a leniency programme that has increasingly become a cornerstone for cartel enforcement in Mexico, although some critics say that in the past two years leniency applications have been declining rapidly. The benefit is available for first and also for subsequent applicants, all of which will be required to acknowledge – and terminate – their participation in the collusive agreement (or information exchange), as well as provide enough evidence to ground or strengthen the agency’s case. In exchange, applicants will be released from criminal liability and administrative penalties will be reduced proportionally to the marker.

To keep this benefit, the applicant is bound to maintain full and continuous cooperation with the agency throughout the proceeding; failure to meet the cooperation standard expected by the agency will lead to COFECE withdrawing the leniency benefits. As in any other jurisdiction, the success of this programme will be subject to the confidence that economic agents and private practitioners have in the agency. Unfortunately, recent revocations to the benefits granted have jeopardised this confidence.

### Significant cases

During 2018, COFECE resolved two major cartel cases in the following markets:

a. Investigation on public procurement of condoms and latex catheters. COFECE found that five companies and seven individuals engaged in collusive agreements affecting several public tenders from 2011 to 2013. Pursuant to public procurement laws, public bids are capped by a maximum accepted price set through market research. COFECE found that the conspirators had manipulated the maximum price through such market research and engaged in bid rigging. Aggregated fines amounted to 112 million pesos.

b. Investigation on cash-in-transit services. COFECE found that seven companies and 10 individuals engaged in price fixing and market allocation by jointly setting a common fee to enter each other’s facilities, setting minimum prices and not competing for each other’s clients during price adjustment terms. Agreements took place between 2005 and 2011 and led to the imposition of aggregated fines of approximately 123.5 million pesos.

---

9. All exchange rates in this document were calculated at 19.11 pesos per US dollar. Fines were calculated based on the 2019 reference unit UMA.

10. Unfortunately, updated leniency statistics are not available. However, by 2016 about 16 per cent of all ex officio investigations in cartel cases had been triggered by leniency. COFECE (2016), 10 years since the implementation of the Federal Economic Competition Commission’s Leniency Program: what has been its impact, Retrieved from: https://www.cofece.mx/wp-content/uploads/2017/11/Impacto10AnosProgramaInmunidad.pdf#pdf.


The following are recent important court precedents on this subject:

\(a\) Supreme Court non-binding decision on leniency. The Supreme Court analysed the leniency obligation to fully and continuously cooperate with the agency; this was considered consistent with the legal certainty principle and understood as the need to cooperate totally (i.e., without obstacles or interruptions of any kind). 15

\(b\) Specialised Court’s non-binding decision on firm liability. The Court decided that the competition agency must analyse whether the firm charged with an infringement was not capable of behaving in a different manner (e.g., when facing possible threats to its patrimony or the integrity of its employees), when deciding on the firm’s liability for antitrust infringements. 16

ii Trends, developments and strategies

The fight against cartels remains a priority for COFECE. Furthermore, according to COFECE’s 2018–2021 Strategic Plan, the agency continues to aim to promote leniency applications as a cornerstone of cartel enforcement. The IFT, in turn, has requested comments on the draft guidelines for the IFT leniency programme and applications within the telecoms and broadcasting market.

Although COFECE made it a policy objective to criminally prosecute cartel cases, and made some referrals for criminal prosecution in 2017, there is no public record of criminal liability being pursued in any of the cases from 2018. 17 Also, there is no public information on how the 2017 referrals have evolved.

One of COFECE’s most recently launched investigations in cartel enforcement refers to collusive agreements in the recruitment process for professional soccer players. This investigation is not only relevant in terms of substance but also in the media attention it has brought to COFECE. It could therefore be expected that COFECE will further use the public’s interest in this matter, to further promote competition enforcement and principles.

iii Outlook

In 2019 COFECE’s investigative authority is actively using investigation tools (requests for written information, depositions and possibly dawn raids) in the nine cartel investigation cases announced in the past year (markets for liquefied petroleum gas, public procurement of iron, corn tortillas in different cities, ground passenger transportation services, cellulose based hygiene products, highway maintenance, production and marketing of sugar, and recruitment of soccer players). 18 These, in addition to previously published and still ongoing investigations in other relevant markets such as air transportation passenger services, production and marketing of medicines, laboratory studies and blood-banks, among others.

---

15 First Chamber of the Supreme Court. A.R. 106/2018. Note that assessment was made in the context of the previous Law, but criteria – although not binding – are indicative also regarding cases handled with the new Law, recapturing the same concept.


COFECE has announced its intention to conclude the investigation stage in at least five of these files.\(^\text{19}\) At that moment, the Investigative Authority will assess whether to close the file or to formally charge alleged wrongdoers with a probable infringement, to proceed to a second – trial-like – phase to be resolved by the Plenary. Other cartel investigations at such second-level stage during the upcoming year include:\(^\text{20}\)

\(\begin{align*}
\text{a} & \text{ alleged agreements to set base prices for air transportation services;} \\
\text{b} & \text{ alleged information exchange between producers of eggs;} \\
\text{c} & \text{ alleged bid rigging in the market of public procurement of dental brushes for the health sector;} \\
\text{d} & \text{ alleged price fixing and output restriction in the corn tortilla market in different municipalities.}
\end{align*}\)

\section{III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE}

Consistently with international trends and best practices, the Law provides for a catalogue of vertical restrictions and abuse of dominance situations that, under specific market circumstances, may raise anticompetitive concerns, namely:

\(\begin{align*}
\text{a} & \text{ vertical non-compete agreements;} \\
\text{b} & \text{ resale price maintenance and imposition of resale conditions;} \\
\text{c} & \text{ tied sales;} \\
\text{d} & \text{ exclusivities including territorial or customer allocation among non-competing parties;} \\
\text{e} & \text{ refusal to sell available and regularly offered goods;} \\
\text{f} & \text{ boycott (i.e., joint pressure to force third-party action or inaction or to penalise it);} \\
\text{g} & \text{ predatory pricing and cross-subsidies;} \\
\text{h} & \text{ discriminatory pricing;} \\
\text{i} & \text{ raising rivals’ costs; hindering third parties’ production processes or artificially reducing demand;} \\
\text{j} & \text{ anticompetitive use of essential inputs through discriminatory sale, refusal to sell, or margin squeeze.}\(^\text{26}\)
\end{align*}\)

The Law acknowledges that conduct falling within any of the above descriptions may cause both positive and negative effects in the marketplace. As a result, relative monopolistic practices will only be illegal if (1) parties hold – joint or individual – substantial market power; (2) the object or effect of the conduct is foreclosing or blocking third-party access to


\(^\text{21}\) COFECE File IO-002-2015.

\(^\text{22}\) COFECE File IO-004-2015.

\(^\text{23}\) COFECE File IO-005-2016.


\(^\text{25}\) Allocation among competitors would update an absolute monopolistic practice.

\(^\text{26}\) The action consisting in reducing rivals’ margin by increasing the cost of an essential input, while lowering the price of the downstream good.
the relevant or related markets or creating exclusive advantages; and (3) efficiencies arising from the conduct are not enough to counterweigh possible market harm, to the benefit of the competition process and creating overall consumer welfare.

In the presence of all three of these conditions, the practice will be illegal and may be fined with up to 8 per cent of the wrongdoer’s annual accruable income. As is the case in absolute monopolistic practices, the agency will order the practice to cease while the affected parties may recover damages or losses through private litigation. Individuals acting on behalf of the dominant firm or facilitating the conduct may also be subject to civil fines and disablement, although not to criminal liability, which is reserved for cartel conduct.

Conversely to cartel cases, settlements for relative monopolistic practice cases are available and a relatively common path to terminate an investigation. Applicants must show commitment to cease the investigated practice and restore the competition process. If offered remedies are viable and effective, the agency will either waive or reduce the fine. This process, however, will not exclude private enforcement by affected parties.

i  **Significant cases**

During the past year COFECE concluded two relative monopolistic cases through settlements and remedies:

a  Investigation on exclusivity restrictions in the oxygen, nitrogen and argon markets. Three suppliers agreed to settle the investigation by eliminating or restricting exclusivity clauses ruling the provision of their services as well as restricting automatic agreement renewal for one year.27

b  Investigation on exclusivity restrictions in the market for live events, entertainment centres and automated ticket sales. Six companies of the same economic group requested early termination of the investigation. COFECE granted this benefit subject to the elimination of existing exclusivity rights with promoters and operators and for the following 10 years, and the commitment not to increase rights over premises with specific capacities.28

In terms of penalties, COFECE fined Pemex Tri US$21,889,551 for breaching the remedies approved by COFECE to settle file DE-002-2015, in which Pemex Tri was being investigated for discriminatory pricing and sale conditions to special marine diesel distributors.29 Additionally, pursuant to a court order COFECE re-evaluated file DE-015-2013 and fined Mexico City International Airport US$3,301,413 for imposing discriminatory conditions in the provision of ground transportation services for passengers to and from the airport.30

---

IFT, in turn, fined Telcel US$5,066,763 for relative monopolistic practices in the market of airtime distribution. The IFT Plenary found that between 2012 and 2014, América Móvil and Telcel restricted competition through an exclusive agreement by means of which Blue Label would receive economic incentives for the exclusive distribution of Telcel airtime.

ii Trends, developments and strategies

Pursuant to COFECE’s 2018–2021 Strategic Plan, COFECE plans to achieve effective law enforcement by promoting founded claims and referring to market intelligence and screening to directly detect anticompetitive practices.\(^{31}\)

In practice, COFECE holds a significantly high standard to process a claim. During 2018, nine claims were dismissed and another seven were not processed.\(^{32}\) In this regard, the Supreme Court issued a recent non-binding decision related to the claimant’s nature and rights in a competition investigation; overall it was concluded that the claimant has a legal right to demand from the agency a decision to its case.\(^{33}\) COFECE should revise its own standards for dismissing claims to be able to improve enforcement results.

COFECE has made public its intention to settle cases where remedies are sufficient to correct the market failure. However, the question remains regarding the possibility of claims for damages from private parties affected by the practice. COFECE can claim damages and file class actions, but this has not happened to date.

iii Outlook

One of the most relevant new investigations in which COFECE will be focusing its investigative efforts involves possible relative monopolistic practices in e-commerce platform services in Mexico. This *ex officio* investigation is the first of its kind, as the digital market has never previously been investigated by COFECE. At this stage, however, the proceeding is strictly confidential, thus it is not possible to access information on investigated parties or lines of investigation. Another recently launched investigation relates to marketing, storage and transportation of oil and related markets.

COFECE intends to conclude at least three investigations in the upcoming year.\(^{34}\) In terms of charged vertical infringements, the COFECE Plenary will be dealing with highly relevant cases such as:

\(a\) refusal to sell and price discrimination in the generation, processing and marketing of credit information;

\(b\) refusal to provide ground transportation passenger services to and from Cancun International Airport;\(^{35}\) and

\(c\) refusal to sell in the wholesale salt market.\(^{36}\)

---


32 Note that public information does not show the type of infringement that was covered by these claims and thus, unprocessed claims could relate to either absolute, relative monopolistic practices or unlawful concentrations. There is also no information currently available on the number of claims that were actually accepted and processed.

33 Second Chamber of the Supreme Court. A.R. 413/2014.


35 COFECE Files DE-008-2016 and DE-08-2007.

In terms of judicial interpretation, the Specialised Courts have issued non-binding criteria related to the investigation proceeding, considering that COFECE may validly use the information that was obtained through any of its preventive or corrective files to open a different infringement investigation if necessary. COFECE may also continue to gather information internally after the investigation term elapses, but will not be able to continue investigative actions with third parties. Finally, the Courts revised the nature of commitments reached to achieve early termination of infringement investigations, concluding that these constitute unilateral declarations of will which, consistent with civil law, become binding for the firm offering them.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

As anticipated in Section I, the 2013 and 2014 structural changes to the competition framework led to the provision of incremental tools for competition enforcement, including the power to conduct market investigations.

While many jurisdictions (Mexico included) allow for advocacy tools, such as market studies, to generally assess market conditions in a given industry, market investigations in Mexico resemble the UK tool in the sense that the competition enforcer will be entitled not only to assess competition in the investigated market and locate the sources of the competition problems but also to impose remedies.

These powers allow COFECE not only to assess competition conditions in each market but also to detect and correct the conditions leading to such problems – so-called barriers to competition or essential input access restrictions, whether structural, regulatory or behavioural.

This tool is intended for markets in which anticompetitive conditions arise from a series of factors that would not easily be captured through traditional competition enforcement tools, calling for overall correction.

At least seven market investigations have been initiated to date, most of which relate in some way to anticompetitive regulation or public actions. Consistently, COFECE intends to keep using this tool along with advocacy instruments, to prevent and correct the anticompetitive impact of governmental decisions.

In terms of regulated markets, COFECE has additional preventive powers, for example, to revise and authorise *ex ante* participation in certain bids or procurement processes, mainly in the transport sector. Of course, one of the main topics connecting competition and regulation is carried out in the telecoms arena, by the IFT.

39 Market investigations will target (1) barriers to competition whether structural, regulatory or behavioural and (2) essential input access problems, both restricting effective competition to flourish in the marketplace.
Mexico

i  Significant cases

In terms of market investigations carried out by COFECE, the latest cases include:

a  Initiation of a market investigation into card payment systems. The opening of a file implies an absence of effective competition conditions in the investigated market, and the need for corrective measures to restore the competition process.\(^{41}\)

b  Preliminary decision indicating the existence of regulatory barriers to competition in the supply of raw milk to the dairy industry in Chihuahua. After the conclusion of the investigation phase, the Investigative Authority has concluded that the absence of effective competition conditions in the investigated market may be due to anticompetitive regulation, creating undue advantages for local suppliers and excluding alternate supply from other states, and deriving in surcharges to the detriment of consumers. The Plenary will revise the suggestions along with the arguments put forward by the affected parties, to assess whether definite correction (in this case a recommendation to the local Congress to change legal provisions) is in order.\(^{42}\)

At the judiciary level, the first relevant decisions regarding market investigation proceedings is expected to be issued soon. Specifically, the Supreme Court will be analysing (and probably deciding on) the scope of the market investigation remedies imposed by COFECE and whether COFECE holds ‘primary jurisdiction’ once it has issued recommendations over a certain market, superseding the original regulatory authority of the Executive Branch. This will be a landmark resolution for future cases.

ii  Trends, developments and strategies

As anticipated, COFECE has, for some time now, focused heavily on preventing and correcting anticompetitive impacts arising from government actions. In addition to market investigation tools, COFECE has made use of its advocacy tools to raise awareness on how uneven public policy may deeply affect market structures.

In this regard, COFECE has analysed and publicly discussed the competitive impact of some laws and drafts (e.g., the Tabasco Procurement Law, the Draft Transparency of Financial Services Law) including recommendations aimed at protecting or enhancing competition. These advocacy tools have produced practical effects, for example, the elimination of ASA exclusive rights for the supply of fuel for planes in Mexican airports.

iii  Outlook

In the upcoming months, COFECE may resolve the dairy market investigation and intends to conclude two of the ongoing market investigations.\(^{43}\)

On the IFT side, there are at least four ongoing relative monopolistic practices investigations. Relevant markets include advertising spots on open and restricted television nationwide; public telephony; production and marketing of online content; marketing

\(^{41}\) COFECE File IEBC-005-2018.


of equipment to reproduce online content and restricted television and audio services, all nationwide; along with two investigations for possible unlawful concentrations in audio broadcasting, fixed and mobile telephony and fixed and mobile internet access.

In terms of special proceedings, the IFT is processing two market investigations to locate possible barriers to competition in fixed telecom services at a regional level (Estado de Mexico and Guanajuato). The IFT will also issue *ex ante* opinions enabling participation in bidding proceedings.

V MERGER REVIEW

The merger control regime in Mexico is structured based on *ex ante* review of relevant transactions. The Law sets forth specific economic thresholds to determine which transactions will require mandatory notification and approval before closing.

The process will start by filing a notification of concentration; the agency is empowered to request basic and additional information before the staff submits its recommendation to the Plenary, who may reject, authorise or impose remedies to the transaction. Once a concentration has been approved, it cannot be challenged again for its competitive effects in the marketplace, except if approved based on false information. Note that the Law does not provide for an ordinary appeal process; the only available means to challenge a decision made under the Law is a constitutional *amparo* trial, which based on expected timings is usually not used for these purposes.44

*Ex ante* assessment, however, will not cover all merger control enforcement needs, as transactions lying below the notification thresholds may also raise anticompetitive concerns that need to be addressed.45 Additionally, since the Mexican regime is suspensory, there may also be gun-jumping cases – whether involving firms that notified in time but did not wait for clearance, or companies simply not filing at all. These infringements will be addressed by *ex post* enforcement, usually involving fines that can reach 8 per cent of the parties’ annual accruable income in case of unlawful concentrations, or up to 5 per cent of such income as a penalty for closing before receiving clearance (for mandatory notice cases). Cases involving the latter have been increasingly common in recent years.

i Significant cases

In terms of *ex ante* tools, the most relevant transactions recently revised include:

- **a AT&T/Time Warner.** Filed before both agencies, this transaction set landmark criteria on cases involving concurring jurisdiction of the IFT and COFECE over the same transaction, concluding that the IFT should assess transactions ‘substantially’ related to the telecom and broadcasting services, while COFECE should decide on any other matters, even within one single transaction. As a result, both agencies cleared the transaction although it was the IFT that imposed behavioural remedies.46

- **b The Walt Disney Company/Twenty-First Century Fox.** The parties filed notice before both COFECE and the IFT showing a new example47 of possible overlap between

---

44 Explaining the absence of judicial precedents in the topic.
45 This is the reason why particularly complex cases may be voluntarily filed, to increase parties’ certainty even when economic thresholds are not triggered.
47 Following AT&T/Time Warner.
both agencies. COFECE authorised the transaction with regard to film distribution for cinemas, home entertainment licensing (audio/video), non-digital music licensing; live entertainment and general licensing. The IFT has not resolved the matter to date, but a remedy negotiation process is ongoing. This transaction has gained significant attention as the President of Mexico has discussed the case during his daily press conferences (which may result in a game changer for competition policy in Mexico).

c Monsanto/Bayer concentration. International transaction approved by COFECE subject to conditions related to the supply of genetically modified cotton seeds and vegetable seeds for several crops and non-selective herbicides. Remedies involve the divestiture of such businesses to Basf.48
d Rheem/Grupo Industrial Saltillo (Calorex) transaction was blocked, based on the absence of market participants that could pose a counterbalance to the resulting company, and the existence of entry and expansion barriers. Overlaps referred mainly to different types of water heaters.49
e Arauco/Masisa. This transaction was accepted under structural remedies, which were presented as a modification to the notified transaction. Such modification follows COFECE’s identification of risk derived from the laminated particleboard market share of the resulting entity (approximately 60 per cent), important barriers to entry, difficulties associated with potential competition based on imports from other jurisdictions and the elimination of the main competitive constraint faced by Masisa as the leading player (pre-transaction).

Regarding unlawful concentrations, COFECE opened and settled an investigation in the pharmaceutical market. The parties agreed to offer measures to restore competition and eliminate COFECE concerns pointing at possible scenarios in which a relevant pharmaceutical distributor could acquire control over a competitor.50

The IFT, in turn, closed ex officio investigations arising from post-closing investigations in markets related to the leasing of dedicated links, internet access and telecom locations,51 as well as advertising radio slots in certain municipalities.52

In terms of penalties, most COFECE cases refer to failure to notify a concentration:

a In BorgWarner/Remy Holdings International: parties were fined a total of US$152,883.
b In Alsea/Axo: following a court order, COFECE re-evaluated the matter and imposed the parties aggregated fines for US$1,625,459. In Banco Ve por Mas/Bankaool parties were fined US$79,006 overall, a reduced fine based on the fact that the parties accepted their responsibility for not notifying the transaction.

Finally, Villacero & Savoy were also fined US$3,555,259 for breaching clearance conditions that imposed restrictions on how members of the board should be appointed.

52 IFT File AI/DC-004-2018. The IFT concluded that Grupo Multimedios could not gain substantial market power as a result of the reported transaction.
Regarding court cases, the specialised courts issued non-binding criteria stating that: (1) merger guidelines are not binding but COFECE may refer to them, as these adds to legal certainty; and (2) legal thresholds set forth in the Law refer to different scenarios without being exclusive.53

ii Trends, developments and strategies
COFECE will be carrying out an assessment of ex ante impact during 2019. Enforcement and penalties arising from failure to notify or gain pre-merger clearance are becoming more common. Companies are advised to duly analyse competition thresholds in the jurisdiction to avoid unnecessary risk.

iii Outlook
COFECE has been clear in its interpretation that merger control needs to be addressed in an ex ante manner, owing to the difficulties in restoring competition once a concentration has been completed. In this sense, we can expect to see COFECE further penalising any breaches to the obligation to secure clearance before closing.

In terms of substantive enforcement, the only public ongoing investigation by COFECE for possible unlawful concentration is related to the marketing, distribution and public sale of gasoline and diesel; the investigation is still at a confidential stage.54

VI CONCLUSIONS
As noted, competition enforcement in Mexico has evolved significantly and the agencies are becoming more sophisticated and aggressive in their enforcement efforts. The Law provides for tools of different scopes, nature and objectives to reach different enforcement needs.

Given recent budget cuts, enforcers are tending to be more strategic and careful with the use of their powers. Recent ex ante and ex post evaluations of their work as well as general studies of market conditions in Mexico are shedding more light on planning and strategic interventions.

Budget cuts can also create a problem in terms of specialisation and technical capability for the agencies, as very technical officers are leaving the regulators because of salary reductions in government.

In terms of COFECE, enforcement still appears to be highly focused on cartel conduct, although vertical restraints and market investigations are gradually getting more attention. In the merger control arena, COFECE has been showing a more aggressive approach to formal infringements (i.e., failure to obtain pre-merger clearance) as shown by recurrent fines.

COFECE has also become more technical in its analysis of mergers, using more sophisticated economic tools and taking more time in complex cases, but also trying to reduce time frames in less complex cases. The use of electronic notifications systems has also helped in the reduction of the time it takes from notification to final resolution.

The IFT has been receiving some political pressure to decide some of its merger cases such as the Disney/Fox case, something that has not been common in Mexico to date. If this trend continues, it can create a very different dynamic to the competition practice and how cases are approached by practitioners and firms.

Despite the interest shown in preventing and correcting anticompetitive effects arising from regulation or governmental decisions, the available tools in the law are not quite effective. Strengthening COFECE’s powers or incorporating further processes in this regard would be desirable. Important decisions pending in the judiciary in this regard will help shed light on the limits of the regulators’ powers.

Competition enforcement outside of the administrative arena (e.g., criminal prosecution and private litigation) has not shown significant developments, except for the creation last year of the Unitary Civil and Administrative Courts Specialised in Competition, Broadcasting and Telecom Matters for the First Circuit, for the attention of private litigation to recover damages caused by anticompetitive behaviour. With some important traditionally claimant firms setting their eyes in the Mexican market, this trend could be reversed very quickly.

Overall, competition enforcement is becoming more mature, increasingly dealing with more challenges and complex cases. This will likely allow for other competition areas to flourish and become effective complements for government action in this matter.

---

I OVERVIEW

The present-day competition regime in the Netherlands came into force with the enactment of the Competition Act on 1 January 1998. The substantive provisions of the Competition Act mirror those of the Treaty on the Functioning of the European Union (TFEU). The Competition Act prohibits anticompetitive agreements and the abuse of a dominant position. In addition, the Competition Act has a system of domestic merger control. The Competition Act established the Netherlands Competition Authority (NMa) as the domestic body responsible for the enforcement of competition law.

On 1 April 2013, the NMa merged with the independent Post and Telecommunication Authority and the Consumer Authority into a single regulator, the Consumer and Market Authority (ACM). The ACM is responsible for the enforcement of competition law, consumer protection law as well as sector-specific regulation in the energy, transport, postal and telecoms sectors.

The enforcement procedure in the Netherlands is typically administrative in nature. If the ACM finds that an undertaking has violated the Competition Act, it may take a decision imposing a (substantial) administrative fine. In addition, the ACM may impose fines on individuals to the extent that such individuals were in charge of the prohibited conduct. Recently, the ACM published guidelines for the simplified resolution of cases involving a fine. According to these guidelines, the ACM may apply a simplified procedure to resolve a case if the undertaking or individual in question is prepared to acknowledge the violation and accept the fine for that violation. The party involved will be granted a reduction of 10 per cent on the fine for cooperating with the ACM. These guidelines are similar to the European Commission's settlement procedure, which requires the party in question to acknowledge, *inter alia*, liability for the infringement.

As a standard element of Dutch administrative law, an internal appeal may be lodged against the first ACM decision imposing a sanction, after which the ACM must reconsider and take a second decision. The latter decision is open to appeal before the District Court in Rotterdam. A second and final appeal may be brought before the Trade and Industry Appeals Tribunal in The Hague.

---

1 Iradj Nazaryar is an associate and Tjarda van der Vijver is a senior associate at Allen & Overy LLP. With the kind permission of previous contributors, parts of the previous edition's chapter have remained intact in this edition's chapter.

Apart from public enforcement by the ACM, competition law cases in the private courts are starting to become more common. This includes not only follow-on actions for damages, but also cases in areas where the ACM is unlikely to act, such as in the field of vertical restraints and abuse of dominance (as explained in more detail below).

Early in 2018, the ACM identified four strategic themes on which it would focus in 2018 and 2019:

- the digital economy;
- energy markets in transition;
- ports and transport; and
- medicine prices.

II CARTELS

Article 6(1) of the Competition Act provides the prohibition on anticompetitive agreements. Its wording is similar to that of Article 101 TFEU. The provision prohibits agreements between undertakings, decisions of trade associations and concerted practices between undertakings to the extent that they have an anticompetitive object or effect on the Dutch market. Differing from Article 101 TFEU, the Dutch prohibition does not require an effect on interstate trade.

Article 6(3) of the Competition Act provides an exception to Article 6(1) of the Competition Act and is similar to the exception laid down in Article 101(3) TFEU. Article 6(3) of the Competition Act holds that the prohibition does not apply to agreements, decisions and concerted practices that (1) contribute to improving the production or distribution of goods, or to promoting technical or economic progress, while (2) allowing customers a fair share of the resulting benefit, and that do not (3) impose restrictions that are not indispensable to attain these objectives, and (4) that do not eliminate competition in respect of a substantial part of the relevant products and services.

Article 7 of the Competition Act seeks to exempt agreements between small and medium-sized enterprises that would otherwise be prohibited under Article 6(1) of the Competition Act. Article 7(1) of the Competition Act provides that undertakings are allowed to make (otherwise anticompetitive) agreements if not more than eight undertakings are involved, and the joint year turnover amounts to a maximum of €5.5 million for goods and €1.1 million for services. Article 7(2) of the Competition Act contains the second exemption. It provides that the cartel prohibition does not apply if the aggregate market share of the parties is below 10 per cent. However, this exemption is not applicable if the concerned agreement falls within the scope of Article 101(1) TFEU.

The competition rules before the Competition Act did provide for criminal sanctions, even though in actual practice there was little, if any, enforcement. By contrast, the current Competition Act does not contain a criminal sanction regime. Notwithstanding the above, an administrative fine may still be considered as a ‘criminal charge’ within the meaning of the European Convention of Human Rights.

Since 1 July 2016, the fine for cartel infringements may be up to 10 per cent of the turnover of all the years of the infringement, up to a maximum of four years (i.e., 40 per cent of the annual turnover). The fine for repeat offenders will be doubled, which can lead to a maximum fine of 80 per cent of the undertaking’s turnover in the preceding business year.

The Netherlands has a leniency regime for both companies and individuals. The leniency guidelines grant complete immunity from fines to the first company that presents information
to the ACM about a cartel prior to the start of an investigation. Leniency applications must be submitted to the ACM’s leniency office. The leniency applicant must provide the ACM with information that has significant added value, and has to fully cooperate with the ACM’s investigation. Apart from complete immunity for the first successful leniency applicant, three other categories of fine reductions exist, largely depending on timing and the added value of the leniency applicant’s information for the investigation.

The ACM may choose to accept commitments in lieu of further investigating a case. Such a commitment decision needs to ensure that an infringement is either prevented or seized. The ACM may thus take such a decision even where it has found no definitive evidence of an infringement. If the ACM decides to take this route, it must make clear, *inter alia*, why a commitment decision is more effective from an enforcement perspective. In the case of breach of the commitments, the ACM may impose a fine.

In December 2017, the ACM successfully concluded its first investigation as part of its campaign to improve competition law compliance in the ports and transport sector. After a joint investigation with the German Federal Cartel Office into cartel agreements by harbour towage service providers, the Federal Cartel Office imposed fines on three undertakings as part of a settlement procedure amounting to approximately €13 million. According to the ACM, the Federal Cartel Office was the most appropriate authority to conclude the investigation. The ACM thus decided to close its own investigation after the cartelists reached a settlement with the German authority. In addition to the harbour towage service decision, the departing president of the board of the ACM confirmed various investigations in the harbour sector are currently ongoing, including an announced investigation in the bunker sector.

In June 2017, the AMC issued fines in one of the three BWMT investigations, resulting in €13 million in fines, concerning price agreements relating to a surcharge for lead in the sale of (imported) traction batteries, which amounted to 10 to 30 per cent of the total sale price of those batteries. In addition to the importers, the ACM also fined the BMWT trade association because it had ‘participated in the collusion with an active supporting role’, citing the *Cement* and *Treuhand* criteria. In this regard, the ACM notes that:

- the BMWT offered the meeting space;
- the president of the trade association was present during the relevant meetings;
- the association had allowed the topic of the lead surcharge to return on the agenda various times;
- the association had circulated the lead-surcharge lists to the participants; and
- the association had provided secretarial support.

The ACM also reproached the BMWT for not intervening the moment that the agreements were made, and that it had actively followed up on these agreements in the period thereafter.

---


In July 2017, the ACM closed the other two BMWT investigations relating to an information exchange concerning service costs of construction machinery and material handling trucks without finding an infringement. These therefore closed without any fines, despite almost five years of investigation. The Competition Department concluded in its report that there was an ‘inherent interplay’ between the costs of after-sales services (on the secondary market) and the purchase of the product (on the primary market). The ACM’s Legal Department, however, concluded that the investigation report did not demonstrate such an inherent connection between the primary and secondary markets. In particular, the investigation report did not show that the costs of services constituted an important factor in the selection choice of customers, and thereby in the competitive process between the importers of the machinery and trucks (on the primary market). The Legal Department concluded that the (factual) context provided by the investigation team, which formed the basis for the assessment of the behaviour as being anticompetitive, had not been proven. The implicit grounds for not finding an infringement on the secondary after-sales market appears to be the brand-specific nature of the after-sales services, which means that there was no competitive process between the parties.

A few cartel decisions of the ACM were appealed at the District Court of Rotterdam and the Dutch Trade and Industry Appeals Tribunal (CBb) respectively in 2018.

In April 2018, the District Court of Rotterdam annulled four fines the ACM imposed on two undertakings, H&S (€694,000) and Samskip (€901,000), and a de facto executive (two fines of €50,000) for violating the cartel prohibition. The undertakings are active in the cold store sector and had exchanged commercially sensitive information with each other, such as price and capacity, according to the ACM. The District Court of Rotterdam upheld the appeals of the two undertakings and the de facto executive. The court considered that the ACM did not interrupt the expiry period of the power to impose a fine in time in relation to the fine imposed on Samskip and one of the fines imposed on the de facto executive. As a result, the limitation period had already expired at the time of the imposition of the fines. Regarding the fine imposed on H&S and the second fine imposed on the de facto executive, the court referred to two key points. First, the ACM had provided insufficient evidence that the investigated contacts were part of an overall plan constituting a single and continuous infringement. Second, the ACM’s investigation did not sufficiently support its conclusion that the relevant geographic market is national in scope.

In October 2018, the CBb reduced fines imposed in relation to an industrial-laundry cartel. Four cooperating laundries had entered into franchise agreements (as franchisees) with their joint subsidiary (as franchisor), in which they allegedly divided the market into territories and agreed not to acquire customers outside their own territory. On appeal, the CBb held that the existence of the franchise agreements is without prejudice to the fact that the arrangement is predominantly horizontal in nature and came down to a by object restriction of competition on the market. Nevertheless, the CBb considered that in determining the

---


9 Pursuant to Article 64 of the Competition Act, the authority to impose a fine lapses five years after the infringement has taken place.
gravity of the violation, the ACM did not give sufficient weight to, inter alia, the fact that the cooperation between the laundries bears a certain resemblance to a franchise organisation. The CBb therefore reduced the fines imposed by the ACM.

In October 2018, the CBb upheld the fines imposed by the ACM on three collectors of sea-going ships’ waste in the Rotterdam port area for distributing orders among them. This was evident from intercepted telephone conversations, the reports of which had been made available to ACM by the former Ministry of Housing, Spatial Planning and the Environment. On appeal, the District Court of Rotterdam had held that the infringement lasted four months shorter than assumed by the ACM and therefore reduced one of the fines imposed. However, this decision was overturned by the CBb, considering that the ACM had sufficiently substantiated the duration of the infringement. The CBb recalled that as follows from settled case law, it is for the competition authority to adduce precise and consistent evidence to prove the existence of the infringement. However, not every means of proof adduced necessarily has to fulfil these criteria for each part of the infringement. It is sufficient that the collection of evidence adduced by it, taken as a whole, satisfies that requirement. The CBb concluded that the ACM had satisfied this requirement.

In March 2018, the ACM declared binding commitments offered in the case of KLM/Schiphol in 2017. According to the ACM’s (preliminary) research, KLM Royal Dutch Airlines (KLM) and Amsterdam Airport Schiphol (Schiphol) had frequent contact with each other regarding the utilisation of airport capacity, and regarding Schiphol’s plans for airport facilities, its investments and marketing strategy, and airport charges. The ACM feared that due to these interactions, Schiphol would not set its strategy independently, but would change it to accommodate KLM’s wishes. The parties involved committed themselves not to have any contact about growth opportunities of other airlines, and to Schiphol independently developing its own plans for investments, charges and its marketing strategy.

III ABUSE OF DOMINANCE

Article 24(1) of the Competition Act prohibits the abuse of a dominant position. The Dutch prohibition is substantively the same as that found in EU competition law (with the exception that the Dutch prohibition does not require an effect on trade between Member States). A dominant position exists where an undertaking can exert market power. As in EU competition law, a rebuttable presumption of dominance exists where the market share of an undertaking exceeds 50 per cent.

In June 2017, the ACM published its decision of 22 May 2017 to impose a fine of nearly €41 million on the Dutch passenger rail transport incumbent, the NS. According to the ACM, the NS abused its dominant position on the main railway network during a public tender for public transport services in a region of the Netherlands. According to the decision, the abuse took place on markets adjacent to the market on which the NS has a dominant position, and the two infringements were predatory pricing in the form of submitting a loss-making bid for the regional tender and a combination of impediments that cumulatively constitute abuse of dominance.

The ACM concluded that the loss-making bid submitted by the NS constitutes predatory pricing. The ACM performed an *ex ante* assessment of the bid, and used the NS’ internal investment manual to assess whether the submitted bid was considered as a positive business case. According to the decision, the investment manual prescribes that a business case is considered positive if the internal rate of return is higher than the weighted average cost of capital. The ACM considered that a bid with an internal rate of return lower than the weighted average cost of capital set by the NS constitutes predatory pricing. It also considered that the business case presented in NS’ bid was too positive, *inter alia*, because NS’ expectation of the growth of revenue from passengers was too high. The ACM argued that the internal rate of return would be below the weighted average cost of capital if the NS used a more realistic prognosis in its business case.

According to the decision, the second infringement consisted of hiring a director from a competitor and acquiring confidential information from that director; sharing requests for access by competitors with the NS’ own bidding team, and delaying and providing incomplete answers to those requests; and favouring the NS’ own bidding team by only providing them with important information on revenue from travellers.

In March 2018, the ACM dismissed the NS’ internal appeal against the ACM’s decision.

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

The ACM is the regulatory authority in the telecoms, energy, post and transport sectors. These sectors often involve natural monopolies (due to the existence of a network that cannot easily be replicated) or include a former incumbent that still holds an important market position. The regulatory regime typically seeks to replicate the conditions of effective competition as much as possible. For example, where a market party is found to have significant market power (SMP) – the regulatory equivalent of dominance – on an upstream wholesale market while its competitors rely on wholesale access to compete on the retail market, the ACM may impose obligations, often including rules on cost orientation and non-discrimination.

As a final remark, the ACM also has various regulatory powers that are unrelated to market power and that apply to all companies active in the sector, as will be shown in the following paragraphs.

In terms of the telecoms sector, the ACM has various tasks such as:

- the registration of telecom companies;
- the allocation of phone numbers;
- ensuring that mobile number portability can take place;
- the protection of various consumer protection clauses; and
- dispute settlement.

The ACM’s tasks also include enforcing internet-related legislation, such as Dutch cookie and net-neutrality rules.

The ACM also functions as the national regulatory authority within the meaning of the European telecom directives. Every three years, the ACM conducts a market analysis to assess whether a company holds SMP in a given telecom market. In practice, these market analysis decisions usually focus on the position of KPN (the incumbent telecoms operator in the Netherlands), although these decisions may also relate to a wider group. For instance,
the decision on fixed and mobile call termination applies to every phone operator in the Netherlands, as each operator is considered a monopolist for the traffic terminating on its network.

If the ACM concludes that a telecom company holds SMP, it may impose regulatory measures on the wholesale level to ensure competition at the retail level. For example, if the ACM sees a risk of excessive tariffs or margin squeeze (Article 6a.7(1) of the Telecommunications Act), it may require that the wholesale tariffs be cost-oriented (Article 6a.7(2) of the Telecommunications Act). The ACM's market analysis decisions usually have a great impact on the telecom companies that are concerned, and as a result are highly litigious.

The ACM also serves as the key regulator for the energy sector. One of its main tasks relates to the transport of energy. The ACM regulates the tariffs of transmission and distribution network operators for provision of access to their network.

The ACM is the competent authority for most of the regulatory rules in the postal sector. As of 1 January 2014, the Postal Act enables the ACM to conduct a market analysis comparable to those performed in the telecoms sector. If the ACM finds that a specific operator has SMP on any given postal market in the Netherlands, it may impose specific obligations (Article 13e-13k of the Postal Act). On 27 July 2017, the ACM found PostNL to be dominant in the markets for small, medium and large users of bulk mail and imposed stringent access regulation and related obligations. This decision was annulled by the CBB on 3 September 2018. According to the tribunal, the ACM had not sufficiently demonstrated that digital communication is not part of the relevant market. Following this judgment, the ACM issued a draft decision finding PostNL to be dominant on the newly defined market for 24-hour business bulk mail (excluding digital communication). The ACM is expected to finalise the decision after reviewing comments on the draft decision it received during a public consultation.

Finally, the ACM is also active in the transport sector. In terms of rail transport, the ACM examines whether network operators comply with the principle of non-discrimination as to capacity allocation and applicable fees. The most important operators are Prorail, the operator of all major railways, and Keyrail, the operator of a specific railway route for goods linking the port of Rotterdam with Germany.

In terms of aviation, the ACM is active in the regulation of Dutch airports, such as Schiphol (Amsterdam’s international airport). The ACM examines whether airports apply reasonable and non-discriminatory tariffs and conditions for airlines (Article 8.25d(2) of the Aviation Act). Tariffs also need to be cost-oriented (Article 8.25d(4) of the Aviation Act), which means that airports may only charge costs to the extent that they actually relate to aviation or security. The ACM confirmed this principle that Schiphol is not allowed to pass on to airlines the costs of the public-transport card readers and ticket machines located on its premises.

As a final part of transport regulation, Dutch law requires sea vessels calling at a Dutch port to take on a maritime pilot for navigation through that port. The Dutch pilotage

---


company Loodswezen has a statutory monopoly on providing these services. As a result of this market position, the ACM determines a cost allocation system and sets the tariffs that maritime pilots are allowed to charge, thereby ensuring that no excessive fees apply.

V STATE AID

The European state aid rules directly apply in the Netherlands. Articles 107 to 109 TFEU provide substantive and procedural rules on distortions of competition as a result of state measures involving aid to undertakings, irrespective of the precise form in which the aid is provided.

State aid law is thus a matter for European Commission enforcement rather than enforcement by the ACM. However, the Competition Act does contain specific rules that seek to ensure that governmental bodies themselves do not distort competition. These rules, embodied in Article 25g to 25ma of the Competition Act, are also known as the Act on Government and Free Markets. Both central and decentralised public bodies are subject to the Act on Government and Free Markets.

A key part of the Act on Government and Free Markets is that a public body that enters into economic activities must at least charge the integral costs of that activity (Article 25i(1) of the Competition Act). That provision seeks to prevent activities by public bodies leading to unfair competition with private undertakings where a public body cross-subsidises its economic activities from other public tasks. Another important part of the Act on Government and Free Markets is that governmental bodies may not favour businesses in which they have a say or participate compared to privately owned competitors.

The educational sector and public broadcasters are largely exempt from the rules of the Act on Government and Free Markets. In addition, an exemption applies where the government conducts activities in the public interest or where the European rules on state aid apply.

In October 2017, the ACM published its decision that between 1 January 2017 and 1 November 2017, the municipality of Deventer competed unfairly with private parties by offering its service of protective guardianship free of charge. Specifically, the municipality reimbursed only its own service through general funds, while this funding was not available to private parties. This created an uneven playing field between the municipality and private parties. By not charging the integral costs for its service of protective guardianship, the municipality of Deventer violated Article 25i(1) of the Competition Act.

In December 2018, the ACM found that the municipality of Harlingen competed unfairly in its exploitation of commercial trailer slipways. The municipality offered its services free of charge, while using public financial resources to cover the costs of its services. In other words, the municipality did not charge the integral costs of its activity to its customers, which is a violation of Article 25i(1) of the Competition Act.

VI MERGER REVIEW

Chapter 5 of the Competition Act provides the rules of merger control in the Netherlands. Similar to other parts of competition law, the Dutch merger control rules are similar (and complementary) to those of EU merger control. The concepts of a merger (or ‘concentration’) and ‘control’ are equal to those at the EU level. The ACM also conducts its substantive analysis of mergers in line with the Commission’s guidelines. The Dutch and EU merger control systems are also very similar from a procedural perspective, although not identical. A procedural difference is that, unlike a notification at the EU level, Dutch competition rules do not contain a formal requirement of a pre-notification phase. However, in practice, pre-notification talks are often held in cases that are likely to receive more scrutiny. Another feature of the Dutch system is that the waiting period is suspended from the moment that the ACM sends formal questions to the notifying party until the moment that those questions have been answered.

The Dutch thresholds are met in the case of a concentration where the combined turnover of the undertakings involved exceeded €150 million in the previous calendar year. In addition, at least two of the undertakings involved must each achieve a turnover of at least €30 million in the Netherlands. Mergers that meet these thresholds require mandatory prior notification to the ACM. In line with the ‘one-stop shop’ principle of EU merger control, no notification needs to take place in the Netherlands once a merger has an EU dimension and thus has to be notified with the Commission.

The rules on merger control provide for a two-phase investigation procedure, starting upon notification. The ACM clears most cases in the first phase by deciding that no licence is required for the notified transaction. Where the ACM considers that a more in-depth investigation is necessary, it takes a Phase I decision holding that a licence is required. Phase II starts as of the moment the merging parties file a separate application asking for a licence. It seems that, in practice, the ACM uses a somewhat lower threshold to take a case into Phase II, opting for a more in-depth analysis as soon as it cannot exclude competition issues arising from the merger, rather than the ‘serious concerns’ test of the Commission.

The basic test under Dutch merger control is the same as the one under EU merger control (i.e., whether the concentration will significantly impede effective competition). Similar to the analysis of the Commission, the ACM examines not only the combined market share, but also factors such as the number of competitors and their respective market shares, the existence of countervailing power from suppliers or customers, entry barriers, etc.

Dutch law prohibits the implementation of the anticipated merger concentration before a notification is made and the waiting period has lapsed or, where a licence is required, before an application is submitted and the ACM has granted the licence.

An exception to the obligation to respect the waiting period is the exemption of Article 40 of the Competition Act. This exemption will only be granted in cases of overriding reasons and on the request of the party that has made the notification. Overriding reasons are deemed to exist if applying the waiting period would cause irreparable damage to the concentration. Of course, such an exemption does not prejudice the outcome of the ACM’s substantive analysis. The risk is upon the parties if the ACM does, after its examination, find that the – by now already implemented concentration – represents a significant impediment to effective competition. The ACM has recently granted several exemption requests, especially in the field of retail where many bankruptcies have taken place. In those cases, the ACM seems to see ample reason to grant an exemption to ensure business continuity of retail stores.
Both Phase I and Phase II decisions can be made subject to conditions or restrictions. The purpose of such conditions or restrictions is to remedy any adverse effects on competition that result from the concentration. Remedies can either be suggested by the parties or by the ACM on its own initiative. There are written guidelines indicating the types of commitments that the ACM deems acceptable and the procedure to follow.

In September 2017, the ACM granted a licence for a merger between the two Amsterdam-based academic hospitals, Academic Medical Centre and VU University Medical Centre. The decision came after heavy scrutiny by, *inter alia*, the Dutch Healthcare Authority and parliament, which heralded tighter reviews by the ACM of healthcare mergers. In late 2017, the proposed merger between the hospitals Stichting Catharina Ziekenhuis and Stichting St Anna Zorggroep was abandoned by the merging parties, after the ACM expressed concerns in its Phase I decision. The parties considered that the chances are too high that the ACM would disapprove of the merger in Phase II now that it has started to monitor hospital concentrations more stringently.

As in 2017, the ACM worked on several healthcare mergers in 2018. In December 2018, the ACM granted a licence for a joint venture of two independent treatment centres, Bergman Clinics and NL Healthcare Clinics. Both parties provide certain forms of specialised medical care, such as dermatology, orthopaedics and ophthalmology. In its Phase I decision, the ACM observed that Bergman Clinics and NL Healthcare Clinics are the largest independent treatment centres in the Netherlands. They both offer approximately half of the total care offered by independent treatment centres in the Netherlands in the fields of orthopaedics and ophthalmology. Consequently, the ACM found that the proposed joint venture may deteriorate the bargaining position of healthcare insurers vis-à-vis that of the merging parties. This could allow the merging parties to charge higher prices after the concentration, thereby raising the possibility that the insured could face higher premiums. Following its in-depth investigation in Phase II, the ACM concluded that the proposed joint venture will not have any negative effect on choice for consumers. Based on its research into patient flows, the ACM concluded that the parties’ activities overlap in a few regions only. In those regions where there is overlap, patients will continue to have sufficient alternatives to choose from, such as neighbouring hospitals. Moreover, the ACM considered that the parties are not each other’s closest competitors, following an analysis of patient diversion ratios. Consequently, the ACM does not foresee any significant impediment of competition on the relevant market or any deterioration in the bargaining position of healthcare insurers.

In December 2018, the ACM conditionally approved the proposed merger between two pharmaceutical companies, Apothex Nederland BV and Aurobindo Pharma BV. The ACM assessed the potential consequences of the proposed merger in terms of sales of pharmaceutical products, pipeline products, active pharmaceutical substances, production on behalf of third parties and the licensing of files. In the context of pharmaceutical products, the ACM assessed the transaction per individual product, taking the molecular level as the starting point. Where appropriate, the ACM also considered the impact on a possible market at higher levels of aggregation based on Anatomical Therapeutic Classification (ATC) of the medicinal products. Furthermore, the ACM assumes separate markets for the Rx and OTC segments, and within the OTC segment for the retail and pharmacy channels. The scope of the geographic market was defined as national. Following its investigation, the ACM expressed concerns regarding the proposed merger’s effects on the sale of dizepam enemas. The ACM considered that the merging parties are currently the only suppliers of dizepam...
enemas in the Netherlands. Therefore, the merging parties offered to divest Apotex’ diazepam enemas business in the Netherlands to a third party. The ACM accepted this remedy and conditionally approved the merger.

VII CONCLUSIONS

The ACM had a relatively low level of enforcement activity in 2018. The ACM’s cartel work mainly consisted of litigation on cartels that have been uncovered in earlier years, rather than newly found cartels being fined. In terms of the abuse of dominance, the ongoing case against the publicly owned national railway operator NS still stands out. Merger activity was relatively stable, with the ACM seemingly acting upon its earlier commitments to step up its merger review in the healthcare sector in particular.
I OVERVIEW

i Statutory provisions and public enforcers

The main statutory provisions in Norway are enshrined in the Competition Act of 2004 (CA). The substantive provisions of the CA mirror Articles 101 and 102 TFEU and Articles 53 and 54 EEA Agreement by, first, prohibiting cartels and anticompetitive agreements, and secondly, abuse of a dominant position. Norway is not a member of the European Union, but it is party to the EEA Agreement. Thus, Norway has implemented the EU and EEA competition rules and internal market rules, and has a state aid regime similar to that of EU Member States (Article 61 EEA Agreement mirrors Article 107 TFEU).

The main public enforcer of the CA is the Norwegian Competition Authority (NCA). Decisions adopted by the NCA can be appealed to the Competition Appeals Tribunal prior to being brought before the Norwegian appellate courts. The NCA is not a formal member of the European Competition Network, although it has informal points of contact.

The public enforcers of the provisions of the EEA Agreement are, in addition to the NCA, the European Commission and the EFTA Surveillance Authority (ESA). ESA is particularly important in relation to enforcement of the state aid provisions and Article 59 EEA Agreement (the award of special or exclusive rights – mirroring Article 106 TFEU). Decisions adopted by ESA can be challenged before the EFTA Court. Due to the case allocation rules of the EEA Agreement, ESA does not deal with merger cases or cartel cases affecting EU Member States.

ii NCA enforcement: 2018 overview and 2019 outlook

In 2018, the NCA adopted three substantive decisions, of which two decisions related to merger cases (approvals subject to conditions). The NCA also adopted one abuse case decision in a case against Telenor, the incumbent company in the Norwegian telecoms sector. The Competition Appeals Tribunal adopted one substantive decision in a complaint case related to a cartel decision of the NCA.

Odd Stemsrud is a partner at Advokatfirmaet Grette AS.
Public enforcement of the NCA 2014–2018

<table>
<thead>
<tr>
<th></th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mergers – notifications</td>
<td>89</td>
<td>96</td>
<td>97</td>
<td>99</td>
<td>111</td>
</tr>
<tr>
<td>Mergers – interventions</td>
<td>3</td>
<td>5</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Mergers – breach of standstill</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Section 10 decisions (cartel provision)</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Section 11 decisions (abuse of dominance)</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Section 9e (challenges of public regulations)</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Dawn raids (publicly known)</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

According to the Norwegian government’s policy instructions in the 2019 budget letter, the NCA’s 2019 enforcement focus will particularly target competition in the grocery sector. The reason is that the Norwegian grocery sector is allocated among a few large chains. Moreover, due to the Norwegian customs regime for foodstuffs, it has proven challenging for foreign grocery chains to penetrate the Norwegian market. This focus on the groceries sector has continued from 2018, and one of the NCA’s two 2018 dawn raids was indeed in the groceries sector.

**ESA enforcement: 2018 overview**

The EFTA Surveillance Authority (ESA) adopted six state aid decisions related to Norway in 2018; four ‘no objection’ decisions and two ‘no aid’ decisions. The number of aid measures reviewed by ESA has drastically decreased since the entry into force of the GBER with 31 GBER information sheets related to Norway in 2018. With regard to enforcement priorities, it should be noted that Regulation 2015/1589, establishing a possibility to prioritise state aid complaint cases, has yet to be incorporated into the EEA Agreement.

ESA adopted no competition law decisions in 2018. However, it issued one statement of objections and it is currently undertaking two major investigations:

(a) in parallel to the NCA, ESA has one major pending abuse of dominance case against Telenor in the telecoms sector pursuant to Article 54 EEA;
(b) ESA issued a statement of objections against Widerøe, a regional air carrier in Norway, for abusing its dominant position; and
(c) ESA opened antitrust proceedings pursuant to Article 53 of the EEA Agreement in the Norwegian financial sector in October 2016, including against the major banks and the key trade organisation (Finance Norway). It has been indicated that ESA could close this investigation in 2019.

ESA is in practical terms to some extent ‘a second NCA’ for Norway; that is, the EFTA and EEA states are Iceland and Liechtenstein, in addition to Norway. Thus, ESA’s focal point is often (markets in) Norway, in contrast to the European or global competition scope of the European Commission.

**iii Global public enforcement against Norwegian entities**

In the global arena one Norway-linked case has stood out in recent years: the *Maritime Car Carrier* case. In this case, relating to the pure car truck carrier shipping sector, investigations have been opened in all major global jurisdictions, including the EU, the US and Japan. Two Norwegian shipping companies, Wilh Wilhelmsen Logistics (WWL) and Höegh Autoliners,
have been subject to the investigations. The former company has filed for leniency and been fined in several jurisdictions. The latter has, to date, only been fined in the United States. The European Commission adopted its decision on 21 February 2018, imposing a fine of €207 million on WWL (there was no finding of wrongdoing against Höegh Autoliners). This is the largest ongoing cartel case with Norwegian addressees.

iv Private enforcement

On the legislative side, Directive 2014/104/EU on antitrust damages actions has yet to be incorporated into the EEA Agreement and implemented into Norwegian law. This is due to institutional issues that are unlikely to be solved in the near future. However, existing general Norwegian law mirrors roughly the provisions of the Directive.

The key private enforcement case currently pending in Norwegian courts is the Kristoffersen case. In this case, the world-renowned slalom skier Henrik Kristoffersen is challenging the sporting community framework in relation to the scope of an athlete’s economic rights pursuant to EU and EEA law. The key novel issue is that the EFTA Court, in its judgment in Case E-8/16 of 16 November 2018, acknowledged that a restriction on an athlete’s marketing rights is only lawful if that restriction pursues a legitimate aim, and such a legitimate aim can only be the principle of solidarity aiming at channelling economic means also to recruitment, education, children’s and recreational sports. If a sports system does not channel means to such purposes, the entire system may be rendered illegal.

The most interesting ongoing damages action case in Norway is the case between Nye Kystlink and Color Group, currently pending before the Appellate Court with a reference to the EFTA Court in Case E-10/17 on certain questions related to limitation and the principles of equivalence and effectiveness. The litigation case has surfaced in the wake of the EFTA Surveillance Authority’s decision in Case 59120 of 14 December 2011. The decision identified an infringement by Color Group and Stroemstad municipality of Articles 53 and 54 EEA related to long-term exclusive harbouring rights. The EFTA Court provided its guidance on EEA law in a judgment of 17 September 2018, and the national Appellate Court’s decision is expected in 2019.

II CARTELS

The substantive cartel provision in Section 10 of the CA mirrors Article 101 TFEU and Article 53 EEA Agreement, except for the criterion related to effect on trade between EEA States. Thus, Section 10 CA prohibits agreements and concerted practices that have an anticompetitive object or actual or potential restrictive effect on competition. Judgments of the European Union Court of Justice (EUCJ) and the EFTA Court are directly relevant legal sources in the interpretation and application of the provision.

The leniency policy pursuant to the CA is similar to that of Regulation 1/2003 in the EU, including the possibility of obtaining a marker:

- the first applicant may be granted full immunity from administrative fines;
- the second company may be granted a 30 to 50 per cent reduction;
- the third company may be granted a 20 to 30 per cent reduction; and
- subsequent companies may be granted a reduction in fines of up to 20 per cent.

In contrast to the EEA Agreement provisions, cartel behaviour in breach of the CA can also trigger criminal sanctions, including fines and ultimately imprisonment of individuals,
in theory of a duration of up to six years in aggravating circumstances. On the one hand, criminal sanctions have yet to be applied in a cartel case in Norway, not to mention criminal sanctions against individuals. On the other, the NCA adopted specific guidelines in 2016 on criteria when they will consider reporting an individual offence to the Public Prosecution’s office, and the instructing ministry has requested the NCA to consider imposing criminal sanctions on individuals in future cases. The leniency programme is not available to individuals. However, it is possible to anonymously enquire at the NCA whether they will request criminal sanctions against individuals as a prejudgment decision.

There is a settlement procedure available pursuant to the CA mirroring that of Regulation 1/2003, possibly reducing an administrative fine by 10 per cent. The provision entered into force in 2016 and has yet to be applied.

i Significant cases

The NCA adopted no cartel decisions in 2018. The NCA adopted two cartel decisions in 2017, which were upheld on appeal in 2018, albeit with a reduction in the fines.

Publisher case – exclusionary conduct

In a judgment of 21 June 2018 the Oslo City Court upheld the NCA’s decision of 22 March 2017, in which the NCA fined four publishers for illegal collusion with fines totalling 32 million Norwegian kroner. However, the Oslo City Court reduced the fines. The four publishers account for the majority of books supplied to Norwegian consumers. The NCA found that the cooperation between the publishers had the purpose of restricting competition in the mass market for books. This market includes retail outlets for books that are not traditional bookstores, such as kiosks, grocery stores and petrol stations. There are only two main distributors in this market in Norway, Interpress and Bladcentralen, the latter distributor being jointly owned by the four publishers. The publishers boycotted Interpress, with the effect that books were supplied only to Bladcentralen, the distributor owned by the publishers. Three of the four publishers have initiated a court review of the decision. The NCA conducted a new dawn raid on the said publishers in January 2018 in a case concerning a possible illegal exchange of sensitive information related to the joint venture Bokbasen AS. The joint venture is a distribution platform for e-books in Norway. The EFTA Surveillance Authority is in parallel investigating the Norwegian exemption from the CA related to the possibility to set fixed prices for books for an initial period after publication.

El Proffen case – bid rigging

The collusion in this case took place in the spring of 2014 and was related to a public tender for the maintenance of electrical installations in public schools. Five members of El Proffen, a large chain of independent electricians, cooperated on the tender by submitting a joint bid on the invitation from the chain office, irrespective of the fact that each member could have offered on the tender. Thus, the (independent) members agreed on prices instead of competing to submit the best offer. In a decision of 4 September 2017, the NCA imposed fines totalling approximately 18 million Norwegian kroner on the chain – El Proffen – and the five

---

3 NCA decision V2017-21 of 7 September 2017.
members that participated in the joint bid. The decision was appealed to the Competition Appeals Tribunal, which upheld the NCA decision on 31 August 2018. However, the fines were reduced to 4.7 million Norwegian kroner.

**Dawn raids**

The NCA carried out two cartel dawn raids in 2018. In January 2018, the NCA conducted a dawn raid at certain publishers (see the Publishers case above) concerning a possible illegal exchange of sensitive information related to the joint venture Bokbasen AS. The joint venture is a distribution platform for e-books in Norway. In April the NCA conducted dawn raids in the grocery sector. Moreover, the NCA carried out two cartel dawn raids in 2017, in June in the market for alarm and security services, and in December in the market for waste and waste treatment in Mid-Norway. These investigations are ongoing. There is no information in the public domain on additional ongoing cartel cases in Norway enforced by the NCA (i.e., cases where a statement of objection has been published or cases where public information on dawn raids have been conveyed). Neither the European Commission nor ESA carried out any cartel dawn raids in Norway in 2018.

**ii Trends and outlook**

For several years, the NCA’s enforcement resources have to a large degree focused on merger control. However, cartel enforcement has not been limited to leniency cases. On the contrary, most recent cartel cases in Norway have been complaint cases related to collusion by way of bid rigging in local markets.

**III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE**

Section 10 of the CA mirrors Article 101 TFEU and Article 53 of the EEA Agreement. Moreover, Section 11 of the CA mirrors Article 102 TFEU and Article 54 of the EEA Agreement. Thus, Section 11 CA prohibits a company’s unilateral abuse of a dominant position.\(^4\) Judgments of the EUCJ and the EFTA Court are directly relevant legal sources in the interpretation and application of the provisions.

Regarding public enforcement tools, the CA includes the possibility of commitment decisions mirroring that of Regulation 1/2003 in the EU.

**i Significant cases**

Four (ongoing or decided) cases merit mention.

**NCA cases**

**Telenor abuse case – telecoms**

On 21 June 2018, the NCA adopted an abuse case (Article 54 EEA/Section 11 CA) decision to fine the Norwegian telecoms incumbent Telenor 788 million Norwegian kroner.\(^5\) This is the highest competition law fine ever imposed by the NCA. The case relates, in essence, to an alleged abuse by Telenor of its dominant position by engaging in conduct that impeded

---

\(^4\) The provision also prohibits abuse of collective dominance as that concept is enshrined in EU and EEA competition law.

\(^5\) NCA decision V2018-20.
the entry of a third mobile network in Norway. Norway has been one of very few countries in Europe with only two mobile operators with their own nationwide mobile networks, with Telenor as the dominant player. Mobile operators without their own network have to rent access to either Telenor’s or Telia’s network. Owing to the lack of effective competition, Norwegian authorities still regulate the Norwegian mobile wholesale market. Therefore, the development of a third mobile network was key to achieving increased competition in this market. In 2007, Network Norway started the construction of a third mobile network together with Tele2. During the rollout of the network, Network Norway bought access to Telenor’s network in the areas where the third mobile network did not yet have coverage. In 2010, Telenor changed the conditions in its network access agreement with Network Norway. It is in this regard that the NCA has found that Telenor abused its dominant position. Through the new agreement Telenor reduced the cost for the actual use of Telenor’s network, but at the same time introduced a fee that increased with the number of Network Norway’s end users. This fee was a cost that Network Norway could not avoid by increasing the use of its own network. This reduced Network Norway’s incentives to continue the rollout of the third mobile network. The NCA decision has been appealed by Telenor to the Competition Appeals Tribunal.

**ESA cases**

**Widerøe case – aviation**

On 2 May 2018, ESA adopted a statement of objections informing Widerøe’s Flyveselskap AS (Widerøe) of its preliminary conclusion that Widerøe may have abused a dominant position in Norway in breach of Article 54 EEA. Previously, airlines needed a specific satellite-based approach system to compete in public tender processes to service several Norwegian PSO routes. The system is called SCAT-1 and was installed at many regional airports in Norway for safety reasons. At the airports where this system was installed, PSO aircraft were required to have certain SCAT-1 receivers on board. Widerøe owns all of the available receivers. ESA’s preliminary view is that Widerøe infringed Article 54 EEA by refusing to supply the SCAT-1 receivers to possible competitors. Consequently, according to ESA, Widerøe appears to have been the only airline able to win a number of the PSO tenders.

**Trustly antitrust case – financial sector**

On 25 October 2016, ESA opened proceedings against DNB, Nordea, Finance Norway and BankID for suspected breaches of Article 53 of the EEA Agreement. ESA is investigating whether these members of the Norwegian banking community engaged in concerted practices aimed at blocking a new market entrant, the Swedish company Trustly, from providing a new e-payments service in Norway. At present, Norwegian consumers are unable to benefit from a new service that is now available in most other EEA countries. ESA will investigate whether there are valid reasons for this under the EEA competition rules. The substance of the case fits with the implementation of the Payment Services (PSD2) Directive in 2018, pursuant to which it is likely that foreign e-payment service providers such as Trustly will obtain market access. The investigations are ongoing; however, informal signals from ESA may suggest that the case will be closed in early 2019.

---

6 ESA decision 195/16/COL of 25 October 2016.
Telenor abuse cases – telecoms

On 1 February 2016, ESA sent a statement of objections to Telenor. The case concerns Telenor's conduct in three Norwegian markets: the market for wholesale mobile access and origination services, the market for mobile broadband services to residential customers and the market for mobile communications services to business customers. ESA takes the preliminary view that Telenor's pricing of access and origination services at the wholesale level likely impeded competing offers in the market for mobile broadband services to residential customers. In the market for mobile communications services to business customers, ESA is concerned that clauses in Telenor's contracts have impeded competition by making it very difficult for its customers to switch provider and by making it overly expensive for competitors to capture customers from Telenor. The case is still ongoing.

Dawn raids

Neither the NCA or ESA has published any information related to dawn raids in abuse cases in 2018. The NCA conducted an abuse case dawn raid at the premises of the brewery Ringnes in January 2017. The case involves Ringnes' operations regarding the sale of beer to eateries in Norway. No further details have been made public in 2018.

ii Trends and outlook

The NCA has finally adopted a decision pursuant to Section 11 CA (abuse of dominance), a provision introduced into Norwegian law by the entry into force of the CA in 2004. Until the 2018 Telenor decision the NCA had not taken any abuse case decisions that were not later settled or quashed by the courts. (Two major cases that were settled or quashed are the SAS case of 2005 and the Tine case of 2011.) Thus, irrespective of the Telenor decision in 2018, it is safe to say that the enforcement of abuse of dominance cases by the NCA is low.

ESA has successfully enforced the similar provision of the EEA Agreement (Article 54) on several occasions, of particular note in the Posten case of 2010 (fines of approximately €11 million) and the Color Line case of 2013 (fines of approximately €19 million).

With regard to the application of Section 10 to vertical agreements, it could be noted that the NCA has not adopted any such decision after the entry into force of the CA in 2004.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Market liberalisation

The government's efforts on liberalisation are aimed at particular two markets: rail passenger transport services and air navigation services.

Rail passenger transport services

The market pillar of the EU Fourth Railway Package will make it compulsory for EEA countries to open the market for domestic passenger services by December 2019, while competitive tendering for PSO will be obligatory in the majority of cases from December 2023. The government has already ‘unbundled’ train operations and infrastructure management, and has initiated the deregulation of the Norwegian market by way of placing various routes on tender through a phasing-in period from 2017 to 2022.
Air navigation services
The government has conveyed, although not particularly forcefully, that the markets for air navigation services will be liberalised. They have also stated that the incumbent service provider and owner of most of the airports in Norway, Avinor, may await the introduction of remote towers prior to placing the services on competitive tendering. Thus, it may take many years before the market is opened to other air navigation service providers.

ii Regulated industries
As in other EEA countries, as pursuant to EU and EEA secondary legislation, electronic communications (including telecom), the power industry and the postal sector are subject to additional sector-specific competition rules. The enforcement of these provisions did not raise particularly noteworthy issues in 2018.

iii Trends and outlook
Grocery sector
As previously mentioned, in 2019 the NCA shall particularly focus on competition in the grocery sector. The background to this can be found in the fact that the Norwegian grocery sector is apportioned between a very few large chains with the attendant high risk of sub-optimal competition. Moreover, due to the Norwegian customs regime for foodstuffs, it has proven challenging for foreign grocery chains to penetrate the Norwegian market. The NCA carried out a dawn raid in this sector in April 2018.

Private versus public entities – competition on the merits
Norway has a very large public sector. On the governmental level, a commissioned report on competition between private and public entities was published 23 January 2018. The topic of public commercial entities is not as controversial in Norway as it is in many other countries. It has yet to be decided by the government whether it will adopt changes to the current legislation in this regard in addition to the requirements of general EU and EEA state aid law (i.e., to shield private commercial operations from being stifled by state-owned enterprises).

V STATE AID
Although not part of the EU, Norway has a state aid regime similar to that of EU Member States (i.e., Article 61 of the EEA Agreement mirrors Article 107 TFEU). Thus, the EEA Agreement prohibits state aid in order to prevent distortions of competition and negative effects on trade.

The prohibition is, however, subject to exemptions, recognising that government intervention can be necessary to correct market failure and for other purposes. To benefit from these exemptions the government must, as a rule, notify aid measures to ESA for prior approval. Aid measures may be implemented without prior approval when they comply with the General Block Exemption Regulation (GBER) or other specific rules. The main piece of Norwegian legislation on state aid, in addition to the main parts of the EEA Agreement having been incorporated into Norwegian law, is the State Aid Act of 1992. All procedural rules and the EEA block exemptions have been implemented into Norwegian law as part of the State Aid Act. Similar to the EU model, ESA may request that illegal and incompatible state aid is recovered from Norwegian beneficiaries.
ESA has substantial resources enabling it to monitor the Norwegian market. Regarding ESA enforcement versus European Commission enforcement, there is, however, one key difference: Regulation No. 734/2013 has, for institutional reasons, yet to be incorporated into the EEA Agreement. Thus, ESA’s competences follow from the previous regulation, Regulation No. 659/99. The effects are, *inter alia*, that ESA cannot prioritise complaint cases in the same degree as the European Commission; nor can ESA request market information pursuant to the rules of Regulation No. 734/2013. That said, most cases are in any event notification cases that ESA has to handle within the applicable deadlines.

Moreover, a key observation from a factual perspective is that ESA is only monitoring Norway, Iceland and Liechtenstein, enabling ESA to allocate significant resources to the Norwegian market. In addition, Norway has a public affairs sector that in relative terms is much larger than that of most other countries.

With regard to private enforcement, national courts are empowered to enforce, *inter alia*, the state aid standstill provision and the block exemption provisions. However, private enforcement of the state aid framework has so far been limited in Norway.

**Significant cases**

ESA adopted six state aid cases related to Norway in 2018, in addition to 31 Norwegian notifications pursuant to the GBER not requiring any ESA decision. All cases were notification cases (i.e., cases notified for the approval of legal aid). Conversely, ESA did not open any formal proceedings in 2018 based on a complaint.

The main areas for state aid in Norway are regional aid, aid to promote and make environmentally friendly solutions competitive, aid to CO₂ capture technology related to oil and gas exploration, and aid to shipping in the form of a special tax regime. To this end, two significant cases from 2018 are as follows.

**‘Hurtigruten’: the Coastal Route Contracts Bergen-Kirkenes (2021–2030)**

Service compensation paid by the Norwegian government for the ‘Hurtigruten’, the shipping route between Bergen and Kirkenes, has been under state aid scrutiny on several occasions throughout the years. In March 2017, ESA approved state aid inherent in the current Coastal Route Agreement, but encouraged Norway to facilitate more competition. Norwegian authorities split the new tender competition into three smaller packages and awarded contracts to two transport companies. The new agreements apply as from 1 January 2021, have a duration of 10 years and entail total government payments of around 8 billion Norwegian kroner. According to the new agreements, the Norwegian government will compensate the company Hurtigruten for sailing seven ships and the company Havila for sailing four. The entities will be compensated to perform daily sailings from Bergen to Kirkenes throughout the year with calls at 34 ports. Following the competitive tender ESA adopted decision 072/18/COL on 16 August 2018 and concluded that there is no state aid involved in the new agreements.

**Petroleum tax reimbursement case**

ESA is currently in an informal investigation phase related to parts of the Norwegian petroleum tax scheme (i.e., the reimbursement system for exploration costs). Due to the extraordinary returns on production of petroleum resources, oil companies are subject to an additional special tax. In 2018, the ordinary company tax rate was 24 per cent and the special tax rate was 54 per cent, generating a marginal Norwegian petroleum tax rate of 78 per cent.
The reimbursement system for exploration costs was introduced to reduce entry barriers and encourage economically viable exploration activity. Under the system, companies that are making a loss may choose between requesting an immediate refund of the tax value of exploration costs from the taxation authorities and carrying forward the losses to a later year when the company has a taxable income. If a company chooses the immediate payment option, the exploration costs cannot be deducted from income in later tax assessments. Based on a complaint, ESA is currently investigating whether the system could include illegal state aid.

ii Trends and outlook

With regard to enforcement priorities, Regulation 2015/1589, transferring a possibility on ESA to prioritise state aid cases, has yet to be incorporated into the EEA Agreement. However, ESA has in an unofficial capacity stated that it will, within the existing legal framework, not prioritise small cases not affecting competition in the marketplace to any appreciable degree: it will, *inter alia*, not prioritise complaint cases related to public sales of minor properties allegedly at below market price.

Another trend is the increased use of GBER block-exempted aid. Norway has made active use of the GBER, with 36 block-exempted aid measures in 2016, 43 block-exempted aid measures in 2017 and 31 block-exempted aid measures in 2018. The purpose of the GBER, introduced in 2014, is that only larger, more distortive and complex cases will remain subject to prior notification and detailed scrutiny by ESA. Within the scope of the GBER, the requirement is that larger aid awards are published on a publicly available website, and certain schemes require an evaluation plan under which ESA conducts monitoring exercises.

The focus of individually notified aid is on regional aid to Norway’s outermost regions, aid to support the shift from being an oil and gas-producing country, and aid to support environmentally friendly choices.

Many European countries provide aid to promote the use of renewable energy in households. In Norway, however, renewable energy already accounts for 99 per cent of the total electricity production (mostly hydropower: almost 50 per cent of Europe’s hydropower capacity is in Norway) Thus, this is not a focus of aid in Norway.

The agricultural sector is aid-intensive in Norway. This sector (as well as the fisheries sector) is, however, not covered by the EEA Agreement. Thus, agricultural aid in Norway is monitored only by national political control.

VI MERGER REVIEW

Section 18 et seq of the CA requires that concentrations meeting certain thresholds are notified to the NCA. Thus, concentrations where the undertakings concerned have a combined annual turnover in Norway exceeding 1 billion Norwegian kroner must be notified, unless only one of the undertakings concerned has an annual turnover in Norway exceeding 100 million Norwegian kroner.

Since the CA entered into force in May 2004, the NCA has intervened in 47 cases, of which 15 concentrations have been prohibited.

The procedure pursuant to the CA reflects roughly the EU Merger Regulation, albeit with substantially shorter pre-notification discussions. The main features are as follows: Phase I lasts 25 working days. A standard standstill prohibition applies until approval. There is no deadline for notifying a concentration. Concentrations that are unlikely to affect competition
may be notified by a short-form notification, with market share thresholds mirroring the DG Comp Short Form CO. The notion of a ‘concentration’ mirrors that of the EU Merger Regulation, and the same holds true for the substantive test: the significant impediment of effective competition test. The Competition Authority publishes a notice of all notified concentrations on its website.

During 2018, the NCA received 111 merger notifications, of which two triggered an intervention by way of approvals subject to conditions.

Although Norway is not an EU Member State, it is covered by the one-stop shop of a Form CO filing to the European Commission pursuant to the EUMR. Two key particularities are that turnover in Norway (EFTA) is not relevant for the assessment of the European Commission’s jurisdiction, and the European Commission’s jurisdiction only covers products and services covered by the EEA Agreement (Article 8). Thus, exceptions include, inter alia, agricultural products, which may require a separate filing in Norway if national jurisdictional thresholds are met. There are also additional EEA and EFTA particularities in relation to the referral procedures between the European Commission and the NCA.

Significant cases

**E-payments: Vipps, BankID and BankAxept – approved, subject to conditions**

The Vipps, BankID and BankAxept merger was approved by the NCA 27 April 2018. The merger created the largest electronic payment and identification verification operator in the Nordic region. Access to BankID and BankAxept is, however, essential also for other players to compete effectively against the consolidated company. Thus, the merger was approved subject to the following conditions: (1) the consolidated company commits itself to offer BankID to third parties’ payment solutions on non-discriminating terms; (2) the consolidated company commits itself to offer necessary services for the issuing of virtual BankAxept cards to third parties’ payment solutions on non-discriminating terms; (3) the consolidated company is committed to offer BankAxept as a separate service; and (4) the decision is valid for three years with an option to renew.

**Fuel retail markets: St1/Statoil Fuel & Retail Marine approved, subject to remedies**

On 20 June 2018, the NCA approved the acquisition of Statoil Fuel & Retail Marine by St1, subject to conditions. Both companies are active in markets related to marine gas oil, products to be used as fuel for maritime vessels. Against the background of appreciable overlap between the parties in Stavanger, Tromsø and Harstad, the parties accepted various structural commitments related to these local (geographical) areas.

**Mobile telecommunication services: Telia, Get and TDC, Phase II approval**

On 8 October 2018, the NCA approved Telia’s acquisition of Get and TDC Norway. In Norway, Telia mainly operates mobile and fixed telephony services. Get/TDC’s main business in Norway is within fixed broadband access and TV services, but the company also has some business in mobile and fixed telephony. The NCA has in several cases expressed concerns related to the competitive situation in the Norwegian market for mobile telecommunications.

---

7 See, e.g., the decision in M.7015, Bain Capital/Altor/Ewos, Section 4 Paragraph 8.
8 NCA decision V2018-18 of 27 April 2018.
services. Against that background, the NCA market tested the proposed concentration and retained comments from approximately 40 customers and competitors in the affected markets. Based on the market testing the NCA concluded that, despite the fact that Telia and Get/TDC are two major players in Norway, they meet only to a small extent as direct competitors. Based on that the concentration was approved late in Phase II.

**Other cases**

The notification of a joint venture (Nordic Port Services) between Greencarrier Shipping Logistics, DFDS Logistics and Seafront Group, notified on 20 September 2017, was withdrawn by the parties in January 2018. The withdrawal was based on a statement from the NCA conveying its preliminary view that it intended to block the concentration due to the transaction’s impediment of competition in markets related to the port terminal services of sea containers.

**ii Trends and outlook**

The NCA has for many years focused on competition in local markets, which has led to a higher number of prohibition decisions than in comparable jurisdictions with a more neutral focus. The same focus has led the NCA to have one of the highest global ratios of prohibition decisions compared to the number of launched Phase II investigations: for example, in 2016 (97 merger cases) a Phase II investigation was launched in three cases, and all three cases ended with a prohibition decision. It remains to be seen whether this approach will be endorsed by the (new) Competition Appeals Tribunal.

Most of the NCA’s internal enforcement resources are allocated to merger control, with the effect that complex cases under Sections 10 and 11 (Articles 101 and 102 TFEU cases) are usually not subject to an in-depth investigation.

**VII CONCLUSIONS**

The NCA’s 2019 enforcement focus will particularly target competition in the grocery sector.

Regarding antitrust enforcement, the major case of 2018 was the NCA decision of 21 June 2018, imposing a fine of 788 million Norwegian kroner on the Norwegian telecoms incumbent Telenor for abuse of a dominant position (Article 54 EEA/Section 11 CA).

On merger control, the NCA has retained its focus on local markets, which likely will generate outright prohibition decisions in cases raising concerns. It remains to be seen whether the NCA's approach will be endorsed by the Competition Appeals Tribunal.

The most significant issue in relation to public enforcement of the state aid rules is the increased use of block-exempted aid pursuant to the GBER.

Regarding private enforcement, the highest-profile current case in Norway is the Henrik Kristoffersen case, which is currently pending before the Oslo District Court.

No major, material changes to the CA are expected in 2018.
Chapter 20

POLAND

Anna Laszczyk and Wojciech Podlasin

I OVERVIEW

In May 2016, Mr Marek Niechciał was appointed to the position of President of the Office of Competition and Consumer Protection (OCCP). In a number of public speeches, he has expressed an intention to increase detection of restrictive agreements. In this area, his main objective was to focus on hardcore restrictions, mostly cartels. During almost three years since his appointment, he has implemented some initiatives aimed at fulfilling declared objectives, for instance, the introduction of the whistle-blower system and publication of guidelines on how to submit a leniency application. Further, 18 dawn raids and two investigations into potential resale price maintenance initiated in 2018 prove that the OCCP is indeed attempting to increase detection of infringements of competition.

Polish antitrust enforcement has generally not developed substantially in 2018. Since late June 2017, claiming damages for harm suffered as a result of a competition law infringement is supposed to be easier. The Antitrust Damages Directive has been finally transposed into Polish law, and the Polish Damages Act came into force on 27 June 2017. The objective of this Act is to facilitate the recovery of claims concerning legal presumptions, procedural facilitations and quantification of harm. The Act applies not only to cartel infringements but to all other infringements of competition law, including prohibited vertical agreements and abuse of a dominant position. Furthermore, it covers not only EU competition law infringements, but also infringements based solely on Polish competition law. The Private Enforcement Act introduces a number of solutions that should facilitate seeking compensation from competition law infringers through private enforcement. Nonetheless, despite the Act being in force since mid-2017, such cases remain relatively rare in Poland.

Another important development was the enactment of a new law aimed at limiting the use of contractual advantage and granting new powers to the OCCP. The Act on Countering Unfair Use of the Contractual Advantage in Trade of Agricultural and Food Product came into force on 12 July 2017. It lists examples of practices that may be considered as an unfair use of contractual advantage. Such practices pertain to agricultural and food products and include, inter alia, unjustified contract termination, a unilateral right to withdraw from a contract and the unjustified extension of a payment term. Pursuant to this Act, the OCCP has the power to initiate proceedings in such cases ex officio, and in cases of infringement it is entitled to impose a fine of up to 3 per cent of annual turnover. In 2018, the OCCP was quite

1 Anna Laszczyk and Wojciech Podlasin are senior associates at Linklaters C Wiśniewski i Wspólnicy sp. k.
active in applying the provisions of this new Act. It monitored the markets for agricultural and food products and intervened, for example, by instigating proceedings related to the use of the extensive payment terms. It also issued one commitment decision addressed to the manufacturer of food products who applied unfair terms in contracts concluded with farmers.

i Enforcement agenda

In 2018, as in past years, the OCCP focused on consumer protection, in particular in the banking and financial sectors. We observe some developments in the antitrust enforcement exemplified by a substantial number of dawn raids and an increased interest in the vertical restraints, in particular resale price maintenance. As regards merger review, the vast majority of cases were closed in Phase I, which resulted in a reduction in the average length of proceedings. At the same time, we saw a slight decline in the number of merger cases decided in Phase II.

The President of the OCCP announced that it will be applying high fines, since the benefits from an infringement usually outweigh the amounts of fines imposed on infringers. Cartels and other restrictive agreements are expected to attract the close scrutiny of the authority. Mr Marek Niechciał explains that soft measures (i.e., written warnings sent to undertakings without instigating any proceedings) applied so far have not been effective; therefore, we may expect an increase in antimonopoly proceedings concerning vertical arrangements.

II CARTELS

As regards cartels, the OCCP continued to focus on bid rigging. Up to May 2018, the authority had reviewed the legality of 172 tenders and 48 proceedings related to bid rigging were ongoing. Also, in May 2018 the authority imposed a fine of approximately €230,000 on three companies who colluded and fixed the bids in the course of three tender proceedings related to IT sector. Besides bid rigging, the OCCP was not very active in cartel enforcement.

i Significant cases

Since the 2017 OCCP’s decision concerning the cartel between producers of fibre boards and particle boards, there was no major cartel decision issued in 2018. However, in June 2018 the OCCP instigated the antimonopoly proceedings against 16 companies operating fitness clubs and the company offering benefit packages for employees (including sports and recreation packages). The OCCP alleges that the companies entered into a market sharing agreement. Interestingly, the OCCP also instigated the proceedings against individuals since it found evidence confirming that the managers of six companies participated in the agreement. The proceedings are ongoing.

---

6 Decision Nr RKR-3/2018.
7 Decision Nr RKR-3/2018.
Cartel between producers of particle and fibreboards

In late December 2017, the OCCP issued its decision, finding that Swiss Krono, Kronospan Szczecinek, Kronospan Mielec (both referred to as Kronospan), Pfleiderer Grajewo, Pfleiderer Wieruszów (both referred to as Pfleiderer) entered into an anticompetitive agreement. The authority established that the parties had bilateral and trilateral contacts during which they fixed prices and exchanged confidential information on the sales conditions of fibreboards and particle boards. The OCCP gathered evidence during a dawn raid performed on the premises of the decision’s addressees and information provided by the leniency applicant, Swiss Krono.

The OCCP based its decision on both national and EU competition law provisions. The authority imposed a fine amounting to approximately €32 million. Swiss Krono, as a successful leniency applicant, escaped the fine. It follows from publicly available information that Pfleiderer Group, a company listed on the Warsaw Stock Exchange, submitted an appeal against the decision to the Court of Competition and Consumers Protection (CCCP).

Agreement on sharing the markets for local bus passenger transport

In December 2018, the OCCP issued a decision concerning a market sharing agreement between companies offering bus passenger transport services. The authority found that two companies agreed on routes that would be operated by each of them. Interestingly, the explanatory proceedings were instigated as a result of a complaint by one of the addressees of the decision, who claimed that its counterparty was abusing its dominant position. During the investigation, the OCCP found that both companies in fact infringed the competition law by concluding an anticompetitive agreement. However, the authority did not impose a fine on the complainant considering that it informed the authority about the infringement on its own initiative. Such information was provided unintentionally as part of the notification of the alleged abuse of the dominant position. However, in the OCCP’s opinion, imposing a fine would be unjustified and equal to punishing a complainant for its lack of legal knowledge.

ii Trends, developments and strategies

The detection of the most harmful anticompetitive agreements is the declared objective of the OCCP. To facilitate this, the authority tries to encourage individuals and undertakings to inform it about identified irregularities. The OCCP introduced a whistle-blower system as well as published guidelines on how to submit a leniency application.

The Polish Damages Act entered into force in 2017. It facilitates bringing claims for damages for competition law infringements; thus, we may expect that those who suffered harm as a result of such anticompetitive conduct may be incentivised to bring their claims to court. Despite this legislative development, private enforcement cases remain rare in Poland.

Whistle-blower system

The Polish Competition Authority (PCA) launched the pilot whistle-blowing programme in April 2017 with the aim of increasing the detection of prohibited agreements between undertakings. This policy is aimed at allowing the OCCP to obtain information from anonymous individuals who have become aware of an illegal practice. Individuals are able to

inform the authority through its dedicated telephone number or email address and provide evidence of competition-restricting practices. It follows from publicly available information that the authority has received numerous calls and emails informing about potential irregularities pertaining both to the competition and consumers laws. The OCCP is also working on legislative changes designed to ensure that the concept of a whistle-blower is incorporated into the provisions of Polish competition law on a permanent basis.

The whistle-blower system was quite widely used by potential informants. Up to 30 November 2018, the OCCP received 938 emails, 508 phone calls and held two meetings. This system also proved to be successful since in 2018, the OCCP instigated antimonopoly proceedings concerning resale price maintenance as a result of the information provided by a whistle-blower.¹²

**Implementation of the Damages Directive**

The Polish Damages Act, implementing the EU Damages Directive, entered into force in 2017. The Act covers not only competition law infringements relating to the European market, but also those related solely to the national market, and consequently does not multiply the regimes for claiming damages for competition law infringements. The most important aspects of the Act aim at facilitating the recovery of claims concerning legal presumptions, procedural facilitations and quantification of harm.

The Act raises hopes as to the facilitation of compensation claims for competition law infringements. So far, bringing a successful compensation claim has been difficult due to the demanding tort law rules regarding evidence. The Act does not extend the powers of the OCCP, but intends to supplement the authority’s actions. Following its entry into force, undertakings infringing competition law will face not only fines imposed by the OCCP, but also will be exposed to the risk of civil proceedings that could result in potentially substantial amounts of damages to be paid.

**iii  Outlook**

Given the declarations of the OCCP regarding increased cartel detection, we may expect that various means already implemented (for instance, the leniency plus and whistle-blower system) will bring some results in terms of antitrust enforcement in Poland. More activities in the area of antitrust is also a prerequisite for the development of private enforcement of the competition law. Some damages claims proceedings are ongoing; nevertheless, the implementation of the EU Damages Directive is expected to further increase the rate of such claims.

**III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE**

**i  Trends, developments and strategies**

As regards the enforcement of restrictive agreements, no substantial case law development was seen in 2018. Besides the cartel decision described above and a bid-rigging decision mentioned earlier, there were no more cases in 2018 concerning restrictive agreements.

As regards dominance, the OCCP discontinued long-lasting proceedings concerning abuse of a collective dominant position by three major telecommunications operators since

it did not establish the existence of the collective dominance. It also issued a commitment decision addressed to the operator of a railway infrastructure after finding that provisions applied by this company in the agreement with suppliers may be unfair.\textsuperscript{13}

\textbf{ii Significant cases}

Given the poor records of the OCCP’s case law, below we provide a description of noteworthy judgments of the courts concerning antitrust matters.

In March 2018, the Appellate Court decreased the fines for the participants of the Cement cartel to 69 million zlotys from 411 million zlotys, which brought a close to almost nine years of appellate proceedings.\textsuperscript{14} The OCCP’s issued the highest ever fine in this case in December 2009.\textsuperscript{15} The courts also lowered the fines for undertakings in several other cases concerning Sfinks\textsuperscript{16} (to 50,000 zlotys; the case concerned resale price maintenance in the restaurant franchising system) and Royal Canin\textsuperscript{17} (by 20 per cent, to 1.7 million zlotys; the case concerned restriction of form of sales, including online, of pet food).

Recently we have also seen three noteworthy judicial developments concerning procedural rights of the undertakings. First, in October 2018 the Polish Supreme Court indicated in its judgment concerning the OCCP’s decision on interchange fees that the OCCP should change its current practice on restricting access to evidence contained in the case file for parties to antimonopoly proceedings on the basis that these constitute business secrets.\textsuperscript{18} According to the Polish Competition Act, the OCCP may, to the extent necessary, limit the right of access to specific pieces of evidence to protect business secrets of the undertakings. Such a restriction for access is made in the form of a resolution. The Polish Supreme Court found that the OCCP is using this right to often what effectively restricts undertakings’ right of defence and right to be heard. This is because they cannot review the full OCCP’s case file and comment on it while the OCCP may still rely on the pieces of evidence made confidential to the undertaking.

The issue of restricting access to file on the basis of the business secrets has also been considered by the Appellate Court, which considered that the resolution concerning treatment of the data provided to the OCCP during the proceedings as a business secret and restricting access to it to other parties to the proceedings is subject to two-tier review by the Polish courts – by the CCCP in the first instance, whose judgment is further subject to the appeal reviewed by the Appellate Court.

\textbf{iii Abuse of dominant position}

In 2018, the OCCP issued four decisions regarding abuse of dominant position. Three cases concerned local utilities markets. The authority terminated the proceedings without finding abuse of a dominant position. The other proceedings concerning an operator of the railway infrastructure – described above – ended with a commitment decision. The most remarkable decision was issued early this year and concerned one of the trickiest concepts in competition law: an abuse of a collective dominant position.

\textsuperscript{13} Decision of the OCCP dated 20 December 2018, No. DOK-2/2018.
\textsuperscript{14} Ruling of 27 March 2018, No VI ACa 1117/14.
\textsuperscript{16} Ruling of 10 January 2018, No VII AGA 828/18.
\textsuperscript{17} Ruling of 30 August 2018, No VII ACa 877/17.
\textsuperscript{18} Ruling of the Polish Supreme Court of 25 October 2017, No III SK 38/16.
iv  Abuse of a collective dominant position

In early January 2018, the OCCP issued a decision discontinuing antimonopoly proceedings concerning a potential abuse of a collective dominant position by three major telecommunication operators on the national market for retail mobile telecommunication services. The OCCP established that the three mobile network operators (MNOs) did not have a collective dominant position.

The proceedings were initiated in response to a complaint submitted to the authority by a fourth MNO, a maverick firm that entered the market significantly later than three previously mentioned MNOs. The complainant alleged that the three MNOs set higher retail prices for calls made by their customers to the complainant's customers, and that by carrying on this behaviour they had abused their collectively strong market position. The case proceeded on the basis of the provisions of both national and EU competition laws. In the course of the proceedings, the authority sent numerous requests for information, reviewed economic analyses provided by the parties and consulted the European Commission on the matter.

When analysing the potential existence of the collective dominant position, the OCCP referred to established EU case law. It found that the national market for retail mobile telecommunications services is relatively transparent, with homogenous services that facilitate anticipation of competitors’ market behaviour. However, in the view of the authority, this was not sufficient for reaching an understanding of the terms of the collusion. Neither was the plausible implementation of any retaliation mechanisms by the parties to the proceedings. The OCCP established that the market behaviour of three MNOs towards the complainant differed significantly, and thus no signs of coordination were observed. Even though the authority found that prices for calls to the complainant’s customers were higher, the OCCP considered that the three MNOs had legitimate interests to apply them. Given that the three MNOs were not collectively dominant, the OCCP discontinued the proceedings.

v  Outlook

In 2018, the OCCP instigated two antimonopoly proceedings concerning resale price maintenance. This is in line with the antitrust enforcement trends in Europe. It is expected that the OCCP will continue to focus on vertical restraints. Further, the substantial number of dawn raids conducted in 2018 shall be rationally expected to translate into a corresponding number of antimonopoly proceedings.

IV  SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

In 2018, the OCCP published information concerning three market investigations, regarding the market for investment funds, automotive insurance and production of milk.

i  Trends and development

Given the OCCP’s policy of declared openness and transparency, guidelines on publishing results of market inquiries have been issued.19 In the guidelines, the authority announced that information on the results of all market inquiries will be published. The scope of the

information presented to the public may vary, depending on the educational value of the results and the scope of business secrets of undertakings questioned in the course of an inquiry. While deciding on the scope of information, the OCCP will also take into account the efficiency of proceedings conducted by the authority in which the results of the market inquiries may be used.

ii Outlook

In its policy of declared openness and transparency, the OCCP proclaims the enforcement of competition law aimed at network-regulated industries such as telecommunications and energy. A framework of the single European telecommunications market is currently being discussed at the EU level. With the aim of the OCCP to ensure that telecommunications companies will compete on equal terms in the whole of the European Union, it is necessary to facilitate access to broadband networks and to allocate frequencies in a pro-competitive manner. In light of the above, it may be expected that the OCCP will continue to seek opportunities to support regulatory bodies in achieving said objectives. For instance, in November 2017, the OCCP issued a reasoned opinion on the competitive landscape in the television\(^{20}\) and radio\(^{21}\) transmission infrastructure markets within proceedings of the President of the Office for Electronic Communication regarding the market position of Emitel, the infrastructure owner, on those markets.\(^{22}\)

V STATE AID

The European Commission and EU courts adopted several rulings concerning state aid enforcement in Poland in 2018 and early 2019 that are worth noting.

In January 2018, the Commission instigated formal proceedings concerning the Polish tax incentive for shipyards permitting them to use a 1 per cent flat-rate tax on sales of ships.\(^{23}\) The Commission is concerned that this aid scheme may in fact constitute operating aid that would not be compatible with the EU internal market.

In February 2018, the Commission approved the Polish capacity mechanism system,\(^{24}\) alongside the systems in Belgium, France, Germany, Greece and Italy. The Polish system, similarly to the one in Italy, is uses a market-wide capacity mechanism whereby electricity producers will be able to be paid for making their electricity generation powers available on demand. In Poland electricity producers will be able to be paid for making their electricity generation powers available. The Polish system is open to all electricity producers and is auction-based.

In January 2019, the Commission approved regional aid worth €36 million for LG Chem’s investment in electric vehicle factory in the Dolnoslaskie region. The assessment of the aid was performed on the basis of the Regional Aid Guidelines 2014–2020.

---

23 European Commission’s case SA.46981.
24 European Commission decision of 7 February 2018 in case SA.46100.
VI MERGER REVIEW

Trends, developments and strategies

Significant amendments in 2015 introduced a number of significant changes to the Polish merger control system, including two-phase proceedings, revised rules on turnover calculation and amendments to procedural aspects related to remedies. It proved to have positive effects for business, in particular as it resulted in reducing the average length of proceedings before the OCCP. The average proceedings in 2018 lasted 41 days, and remained at a level comparable to that seen in 2016 and 2017. However, the proceedings concluded in Phase I only lasted on average 36 days.

The OCCP issued a record 228 merger control decisions in 2018, 220 of which were Phase I decisions.

We saw a steady number of complex merger cases in 2018, with a slight decline in comparison to 2017 only. In eight cases, a decision was adopted after Phase II proceedings. A further five cases are currently being investigated in Phase II. In the extended review proceedings, the OCCP continued to widely use its market-testing competencies aimed at verification of the relevant market definitions proposed by notifying parties or at obtaining views on the notified transaction from other stakeholders. The OCCP largely relies on the results of such tests. Market testing significantly increases the duration of Phase II proceedings, which on average last approximately seven months.

The OCCP is also widely using statements of objections (SOs), an institution that was introduced in the 2015 review. In 2018, an SO, whereby the OCCP informs the notifying party of its views regarding potential competition concerns resulting from a concentration, was issued in two proceedings.

In concentrations where competition concerns arise, in the two most recent conditional decisions – Eurocash/Eko Holding in December 2016 and PGE/EDF Polska in October 2017 – the OCCP applied remedies that did not involve altering the structure of the transaction (i.e., a simple divestiture remedy and behavioural remedy consisting of an obligation to sell electricity on stock exchange). Nevertheless, the OCCP may continue to rely on ‘fix-it-first’ remedies ordering merging parties to limit the scope of a notified transaction to address any significant impediment to competition.

In 2017, the OCCP was active in gun-jumping enforcement cases, issuing two of the highest-level fines for breach of the standstill obligation in its history. In 2018 we saw no fines for implementation of the concentration without the required OCCP clearance, however one new proceeding was instigated in this regard.

In two cases in 2017 and early 2018, the OCCP requested the European Commission on the basis of Article 9(2)(a) of EU Merger Regulation to refer a case for its review under Polish competition law. In Discovery/Scipps, the European Commission rejected the request and issued a conditional decision. In turn, in Smithfields/Pini Polonia, the Commission accepted the request and referred the case in full to be reviewed by the OCCP.

25 As at 22 February 2018.
26 As at 22 February 2019.
29 As at 31 January 2018.
30 European Commission decision of 6 February 2018 in case M.8665.
31 European Commission decision of 23 January 2018 in case M.8611.
ii Significant cases

The OCCP issued no conditional decisions in 2018 and one conditional decision in 2017, which concerned PGE’s acquisition of EDF assets in Poland (i.e., a power plant in Rybnik and eight heating plants).

PGE is a Polish company listed on the Warsaw Stock Exchange active in the production and distribution of electrical and heat power. EDF’s business activity in Poland concentrates on the production and distribution of electricity and heat, and trading of production fuels such as biomass and coal.

The OCCP investigated the case in Phase II as the business activities of PGE and EDF Poland overlapped on nine national markets related to the production and sale of electricity, of which six markets were horizontally affected. During the market analysis, the OCCP surveyed major companies operating in the power sector and requested the President of the Energy Regulatory Office to submit his opinion on the case.

The OCCP assessed that PGE post-transaction may have a share in excess of 40 per cent on the Polish market for the production and wholesale of electricity in Poland, and pointed out that PGE could gain a dominant position in the electrical power production and distribution market. This could lead to a further drop in trade on the Polish Power Exchange and negatively affect those competitors of PGE that do not have their own generation sources. Consequently, the retail electricity market would also be negatively affected.

The OCCP therefore issued an SO, and PGE submitted its remedy proposals. PGE committed itself to selling additional power through the Polish Power Exchange in an amount effectively equal to the volume of power generated in EDF’s power plant in Rybnik. This commitment, however, does not concern electrical power from cogeneration. The OCCP concluded that the proposed remedy removes the threat of a significant restriction of competition because it limits the possibility of PGE abusing its market power post-transaction. Moreover, according to the OCCP, the remedy also reduced other risks resulting from the vertical relations between PGE and EDF in Poland. The commitment will be in force until 31 December 2021 or until the acquired power plant in Rybnik ceases to belong to PGE. In addition, the OCCP set a requirement that PGE report quarterly on the execution of the commitment.

In 2018 and early 2019 the OCCP issued two SOs concerning the notified concentrations. The first was issued in November 2018 and concerned Air Products’ acquisition of ACP Europe and Eurocylinder, which are subsidiaries of ACP that specialise in liquid carbon dioxide. In February 2019, the OCCP issued the SO concerning Multikino’s, a subsidiary of Vue International, planned acquisition of Cinema 3D. The OCCP considers that this transaction may lead to a significant impediment of competition on the three local markets for network cinemas in Tricity and in Warsaw.

Although the OCCP did not forbid any concentration in 2018 and early 2019, the notifying party withdrew its notification in five cases after the OCCP issued an SO. In these cases, most likely, the commitment proposals were not good enough to mitigate the competition concerns identified by the OCCP.

---

32 As at 22 February 2019.
33 As at 22 February 2019.
In 2017, the OCCP imposed fines for breach of the standstill obligation in three cases: Bać-Pol in June, Fermy Drobiu Woźniak in September and MO in December. The cases show the OCCP’s increased attention on cases pertaining to concentrations closing before required clearance.

In Bać-Pol, the OCCP concluded that Bać-Pol had infringed Polish competition law by acquiring control over Klementynka without the required OCCP clearance. The proceedings were instigated as a result of a complaint submitted by the previous co-owner of Klementynka. The evidence gathered indicated that Sezam had acquired the most important assets of Klementynka, such as key employees, contracts with key suppliers and customers, and goods designated for immediate shipment, which were Klementynka’s main business assets. Although the proceedings did not reveal any written contract confirming the concentration, the OCCP found that the acquisition of those assets constituted a concentration based on other evidence such as mail correspondence and statements of witnesses. The OCCP fined Bać-Pol 527,000 zlotys, which is the highest fine imposed for breach of the standstill obligation in Poland so far. While determining the amount of the fine, the OCCP took into consideration both aggravating circumstances such as lack of cooperation in the course of the proceedings as well as mitigating factors such as no significant impediment of competition on the relevant market (i.e., non-specialised food wholesale) resulting from the completion of the transaction.

Fermy Drobiu Woźniak was also fined 339,000 zlotys for a similar infringement of the competition law. The OCCP concluded that Fermy Drobiu Woźniak acquired assets of Fermy Drobiu Borkowski without notifying the OCCP of its intention to concentrate, and thus violated merger control provisions laid down in the Act. Acting upon a complaint from Fermy Drobiu Woźniak’s competitors, the OCCP collected evidence supporting the fact that Fermy Drobiu Woźniak acquired a part of Fermy Drobiu Borkowski’s assets on the basis of a lease agreement of six poultry farms of Fermy Drobiu Borkowski. In the case, the OCCP confirmed that the lease agreement should have been classified as a form of notifiable concentration.

In MO, an undisclosed individual was fined 22,120 zlotys for the acquisition of joint control over Empik Media & Fashion. The OCCP concluded that MO acquired control at the moment of signing the shareholders’ agreement, under which two major shareholders of Empik Media & Fashion agreed, inter alia, to act in concert as to the exercise of their voting rights at the company’s shareholders’ meeting.

No fines were imposed by the OCCP in 2018, but one ongoing proceeding is worth mentioning owing to the possibility of imposing a fine and precedent character. The OCCP alleges that Gazprom and five other companies breached Polish competition law by financing the creation of Nord Stream 2 gas pipeline without obtaining prior merger clearance. In 2015, the companies notified the OCCP of their intention to create a joint venture responsible for designing, financing and constructing a pipeline in the Baltic Sea. The OCCP raised concerns with regard to this concentration in July 2016 on the grounds that it could lead to a significant impediment of competition concerning gas supply to Poland. The notifying parties withdrew the notification. In April 2017, the OCCP instigated preliminary proceedings to re-examine the case as it learned that former JV parents signed the contract to

---

34 Decision of the OCCP of 5 June 2017, No. DKK-86/2017.
finance the construction of Nordstream. This, in the OCCP’s opinion, could constitute an attempt to circumvent the lack of consent to create a joint venture, given the similar objective of the JV and financing arrangements.

iii  Outlook

It is not anticipated that there will be a major shift in the current merger control policy in 2019.

VII  CONCLUSIONS

As seen in 2017, 2018 also proved that consumer protection continued to be the OCCP’s enforcement priority. Generally, Polish antitrust enforcement did not develop substantially in 2018: the OCCP continued to analyse various methods of improving cartel detection, including introducing rewards for whistle-blowers. In 2018, the OCCP announced its intention of closer scrutiny of resale price maintenance, a practice that had seemed to be of less importance to the OCCP in recent years. We also saw an increased number of dawn raids performed by the OCCP. Decisions concerning abuse of dominant position confirm that the main sector of enforcement in this respect remains the utilities sector, but at the same time actual enforcement is limited due to the declared application of soft measures. Considering the relative strength of the Polish mergers and acquisitions market, the OCCP was active in the field of merger review. The OCCP also paid increased attention to cases pertaining to closing concentrations before the required clearance.
I OVERVIEW

The Portuguese Competition Act, Law 19/2012 of 8 May (the Competition Act), which has been in force since 2012, modified the legal standards for the handling of complaints by the Portuguese Competition Authority (PCA), giving the PCA greater discretion to decide when to open an investigation based on certain criteria.

According to the Competition Act, the PCA will exercise its sanctioning powers whenever it is in the public interest to prosecute and punish an infringement of competition rules, taking into account the goals of its competition policy, the facts that are known to it, the severity of the alleged infringement, the probability of proving its existence and the scope of the investigation that is required.

To increase transparency, at the end of each year, the PCA publishes its strategic priorities regarding competition policy for the following year on its website.

The PCA recently issued its statement of priorities for 2019, which will be the following:2

a proactively detecting and investigating anticompetitive practices, namely cartels;
b increasing the ex officio detection of anticompetitive practices, namely through cooperation protocols;
c developing knowledge of the use of algorithms and artificial intelligence by undertakings related to anticompetitive practices;
d increasing innovation through the removal of the barriers created by legislation and by the practices of incumbents;
e developing initiatives to detect collusion in public procurement procedures and within trade associations;
f implementing the recommendations issued in 2018 related to liberal professions and to the transport sector;
g obtaining swifter decisions in merger control proceedings;
h consolidating internal procedures of checks and balances; and
i strengthening the publication and the searchability of the PCA’s decisions, recommendations and opinions as well as of judicial decisions.

---

1 Joaquim Caimoto Duarte is a counsel and Tânia Luísa Faria is a managing associate at Uría Menéndez Proença de Carvalho.

2 Available at http://www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/Prioridades%20de%20Pol%C3%ADtica%20Concorr%C3%A9ncia%202019.pdf.
These strategic priorities combine the consolidation of internal proceedings, the strengthening of the role of the PCA as a voice to be heard in terms of legislative reforms, and the meeting of the external enforcement trends related to algorithms and artificial intelligence.

i Enforcement agenda

The PCA’s statement of priorities for 2019 indicates that this authority will continue to focus on combating cartels and on continuing to promote ex officio investigations as an essential instrument to identify possible anticompetitive practices using instruments as cooperation protocols such as the one signed in 2018 with the Infarmed, the Portuguese pharma regulator.3

It will also implement the conclusion of the previous studies of certain sectors and will continue to monitor public procurement procedures and trade associations.

II CARTELS

Article 9 of the Competition Act prohibits agreements that restrict competition, including cartel agreements (i.e., agreements and concerted practices between competitors whose object or effect is the restriction of competition by, inter alia, directly or indirectly fixing sale or purchase prices or any other transaction conditions, by limiting or controlling production, distribution or technical development or investments or by sharing markets (including bid rigging), through import or export restrictions and through anticompetitive actions against other competitors).4

The PCA is an independent entity responsible for the enforcement of competition law in Portugal and for conducting administrative infringement procedures under the Competition Act. The PCA’s decisions may be appealed to the Competition, Regulation and Supervision Court (appeals were previously heard by the Commercial Court of Lisbon).

In Portugal, cartels are administrative (not criminal) offences sanctioned with fines not exceeding 10 per cent of the offending undertaking’s turnover in the year preceding the decision, even though criminal law principles apply to this type of infringement. According to general rules subsidiarily applicable to administrative offences, when there is more than one infringement, the maximum fine may be twice the abstract maximum applicable to the most serious offence, which in a cartel would be 20 per cent of the turnover of the offending undertakings.5 Fines imposed to date in cartel cases have generally amounted to around 5 per cent of the infringing undertaking’s turnover.

The members of the board of directors of the offending undertakings, as well as any individuals responsible for the management or supervision of the areas of activity in which there has been an administrative offence, when they know of, or it is their duty to know of, an infringement committed and they have not adopted appropriate measures to end the infringement immediately, are liable to be sanctioned under the Competition Act, unless

---

4 See Article 75 of the Competition Act, as well as the PCA’s Informative Communication on the Portuguese leniency programme, available at www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/DR_NOTA%20INFORMATIVA_CLEMENCIA_PosPublReguDR_03_01-2013.pdf.
they are subject to a more serious sanction under a different legal provision. The fine imposed on individuals cannot exceed 10 per cent of the individual’s annual income deriving from the exercise of their functions in the undertaking concerned.

As an ancillary sanction under Article 71 of the Competition Act, a ban of up to two years on the right to take part in tendering processes for public works contracts, public service concessions, the leasing or acquisition of moveable assets or the acquisition of services or procedures involving the award of licences or authorisations by public entities, may be imposed. The ban may be imposed in cases in which the practice leading to an administrative offence punishable by a fine occurred during or as a result of those processes.

Article 29 of the Competition Act establishes that the PCA may also impose behavioural or structural measures to end the prohibited practices or their effects.

Under the Competition Act, and as regulated by the PCA, undertakings or individuals connected to the cartel may apply for immunity for a reduction of the fine if they provide valuable information about the cartel.

The Competition Act also establishes the possibility of cases being settled, at the PCA’s discretion, before a decision is issued.6

**Significant cases**

The PCA’s cartel cases have included the *Glucose Diagnostic Strips* case (decided in 2005),7 the *Salt* case (decided in 2006 and upheld by the Commercial Court of Lisbon in 2008),8 the *Flower Mills* case (decided in 2005, overturned by the Commercial Court of Lisbon and subject to a new decision of the PCA in 2009),9 the *Catering Services* case (which resulted from a leniency submission from a former director of one of the undertakings involved in the cartel),10 and the *Flexible Polyurethane Foam* case (decided in 2013).11

The largest fines in a cartel case, to date, totalled €16 million and were imposed on Abbot, Bayer, Johnson & Johnson, Menarini and Roche in 2005 for bid rigging in several public offers presented in the context of tendering processes for the supply of glucose diagnostic strips. The Commercial Court of Lisbon (which previously had jurisdiction over appeals of PCA decisions) joined the case with another related to similar charges, and ordered the PCA to correct specific formal irregularities. The PCA issued a new decision, imposing fines of €13.5 million.12

The PCA also sanctioned a cartel involving undertakings operating in the printing and graphics sector. Several undertakings were fined for a price-fixing and market-sharing agreement concerning the market for application form paper after an investigation triggered by a leniency application. The fines totalled €1.798 million. In addition, three board members were fined €6,000 for being aware of the cartel and failing to take action to put an end to it.

---

6 In other antitrust infringements, not connected to cartels, the PCA may decide to close an administrative procedure if it receives what it considers to be adequate remedy proposals from the undertakings. In that case, there will be no infringement under the Competition Act, but the undertakings must implement the remedies agreed with the PCA. The PCA may decide to reopen the procedure under certain circumstances within the next two years.
9 PCA press release of 8 July 2009.
In 2013, the PCA sanctioned a cartel in the market for polyurethane foam for comfort products. This case is very important, as the PCA’s investigation was conducted in parallel with a cartel investigation in the same market by the Spanish Competition Authority. The investigation was triggered by a leniency request by an undertaking that received full immunity (as well as for its board members), and all the sanctioned undertakings and individuals benefited from substantial fine reductions in view of the settlement procedure. The PCA imposed fines amounting to €993,000 on two undertakings and to €7,000 on board members.13

More recently, in December 2018, the PCA sanctioned two insurance companies, Fidelidade and Multicare, and their respective board members, with fines amounting to €12 million for alleged coordination on the offer related to corporate clients.14 As there are other undertakings still being investigated by the PCA on this matter, it is possible that the overall amount of the fines, in this case, will be the highest, so far.

Furthermore, in the area of public procurement, the PCA has also sanctioned five undertakings for anticompetitive practices in public tenders for the supply and assembly of prefabricated dwellings that would be used to enable the normal course of school activities during the reconstruction of certain schools, under a governmental public works initiative named Parque Escolar. In this case, the undertakings involved have waived their right to appeal against the PCA’s decision, in order to benefit from a 10 per cent reduction in their fines. Therefore, the fines imposed by the PCA upon the five undertakings amounted to €831,810.15

Public procurement procedures were also included in the PCA’s enforcement actions, in 2018, with the PCA sanctioning Sacyr and one of its directors for bid rigging in a tender for the provision of maintenance services to railways.16

Although not related to cartel cases, there have been a number of cases involving recommendations and decisions issued by trade associations. In some cases, the infringements are similar to standard antitrust cases (e.g., price fixing). In most cases involving trade associations, the investigated behaviour nevertheless related to recommended practices, as well as maximum prices, which were understood by the undertakings to be mandatory.

For instance, the PCA fined the Association of Navigation Agents of Portugal for alleged price-fixing practices,17 and stated that the National Association of Freighters had issued a decision that, in the PCA’s view,18 constituted a collective refusal to deal with a specific terminal operator19 and in 2011, the National Association of Parking Lot Companies was fined nearly €2 million for its recommendation regarding pricing criteria in response to the introduction of new legislation on parking lots.20

More recently, the PCA fined the Portuguese Association of Driving Schools in the amount of €400,000 for alleged price-fixing practices. In this case, the President of the

---

15 PCA press release of 10 August 2015 (18/2015).
17 Case PRC 2004/07.
18 Case PRC 2004/23.
Association was also fined in approximately €13,776, since the PCA concluded that he was aware and had allegedly been directly responsible for the adoption and effective execution of the anticompetitive practice.\textsuperscript{21}

It should also be mentioned that, in 2017, the PCA closed, with commitments (after a public consultation period), two separate proceedings regarding statistical information systems within trade associations (the Portuguese Association of Specialised Credit and the Portuguese Association of Leasing, Factoring and Renting). The commitments offered by the two associations made significant changes to their respective systems, with regard to the historic nature of the information and the adequate scope of access to the relevant market data.\textsuperscript{22}

The PCA’s investigations into professional associations are also of interest. The PCA has fined several national professional associations, such as the Veterinarians Association, the Dentists Association, the Doctors Association and the Chartered Accountants Association, as a result of decisions that had an effect on their members’ pricing (including recommended and maximum prices considered mandatory by the members).\textsuperscript{23} More recently, the PCA opened proceedings against the Psychologists Association because of clauses in their code of conduct that allegedly had a restrictive effect on the functioning of the market. In order to address the PCA’s concerns, the Psychologists Association offered to amend its code of conduct accordingly and to make the alterations public.\textsuperscript{24} These commitments were later accepted and deemed mandatory by the PCA.\textsuperscript{25}

\section*{ii Trends, developments and strategies}

Under the previous legal framework in Portugal, antitrust decisions were not generally published on the PCA’s website, and current access to antitrust decisions is still very limited in cases with pending judicial appeals, even though the PCA has been making an effort to increase the scope of decisions available on its website. The PCA has also continued to publish the issuance of statements of objections and information regarding the carrying out of unannounced inspections, through press releases.

According to publicly available information, the sanctioning of antitrust conduct in Portugal has occurred, more frequently, with regard to restrictive practices within trade and professional associations, including price fixing, and to bid-rigging cartels. Hence, in 2016 the PCA published an antitrust compliance guide for trade associations, aimed at better elucidating the associations and its members on which behaviours or decisions could present competition risks and should therefore be avoided.

In addition, the settlement mechanism established in the Competition Act has proven to be a very useful instrument for the PCA to investigate and prove cartel cases, as well as other antitrust infringements. The settlement procedure was used in the above-mentioned 2018 decisions in the railway and insurance sectors.

The PCA has also made it clear that the state must refrain from promoting arrangements between competitors, as addressed in the case concerning meetings promoted by the government of the Azores with several milk producers in which commercial conditions

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} PCA press release of 28 September 2017 (14/2017).
\item \textsuperscript{22} PCA press release of 14 November 2017 (19/2017) and 21 December 2017 (21/2017).
\item \textsuperscript{24} PCA press release of 14 September 2016 (18/2016).
\item \textsuperscript{25} PCA press release of 15 November 2016 (23/2016).
\end{itemize}
\end{footnotesize}
might have been discussed. The PCA closed the case without imposing any sanctions, but recommended that the government of the Azores end the practice and refrain from acting in any way that could potentially facilitate collusive behaviour in the region.\(^{26}\)

The PCA will continue to pay attention to practices within trade associations, having carried out dawn raids in at least two trade associations in 2018, as shall be discussed in further detail below.

The PCA is also expected to issue the remaining decisions in the insurance and railway cartels, as several of the undertakings to which the PCA has addressed the statement of objections in these cases have yet to receive a final decision. The separate closing of the cases for each individual participant, normally using settlement procedures, is currently the most common approach of the PCA to restrictive practices investigations.

### iii Outlook

The PCA will continue to make cartel cases a priority for 2019 and will seek to continuously improve its internal investigative procedures, in order to make full use of the most appropriate tools for evidence collection and treatment, namely in a digital environment. Indeed, the PCA has affirmed that it will pay close attention to the eventual use of algorithms or artificial intelligence so that these cannot be a way of exempting responsibility.

The Competition Act strengthened the PCAs investigative powers, which should encourage more effective enforcement of competition law. For instance, within antitrust proceedings, the PCA may carry out, subject to receiving a judicial search warrant, searches of not only an undertaking’s premises and vehicles, but also of the homes of shareholders and members of managerial bodies and employees, if there is reason to believe that evidence of serious anticompetitive practices exists.\(^{27}\) As mentioned, several decisions concerning the insurance and railway sectors are expected in 2019. In 2018, as far as we are aware, the PCA carried out searches in the premises of telecommunication operators\(^{28}\) of an advertising trading association\(^{29}\) and of a food sector trade association,\(^{30}\) and, therefore, we expect developments with regard to the investigations of restrictive practices in these sectors, in principle, in 2019.

The PCA will continue to promote its leniency policy as an essential instrument for cartel investigations. In fact, the leniency programme gave rise to the above-mentioned investigation in the insurance sector.

### III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

As previously indicated, the Competition Act prohibits agreements, concerted practices and trade association decisions, including cartels, whose object or effect is to restrict competition (Article 9 of the Competition Act). It also prohibits undertakings, in a position of dominance, from abusing their position (Article 12 of the Competition Act). Abusive conduct includes imposing, directly or indirectly, unfair purchase or sale prices or other unfair trading conditions, limiting production, markets or technical development to the

---

\(^{26}\) PCA press release of 24 June 2012.
\(^{27}\) Article 19 of the Competition Act.
\(^{29}\) PCA press release of 10 October 2018 (17/2018).
\(^{30}\) PCA press release of 8 October 2018 (16/2018).
detriment of consumers, applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage, making the execution of contracts subject to the acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts, and refusing another undertaking access to a network or other essential facilities that it controls, when appropriate payment for access is offered, in a situation where the other undertaking cannot, therefore, in fact or in law, act as a competitor of the undertaking in a dominant position in the market, upstream or downstream, unless the dominant undertaking can demonstrate that, for operational or other reasons, such access cannot reasonably be provided.

The Portuguese legal framework on restrictive practices and the abuse of dominant positions is very similar to that applied at the EU level; however, the Competition Act also includes provisions on the abuse of a situation of economic dependence. An abuse of a situation of economic dependence may include any of the types of conduct previously mentioned and identified as potentially abusive under the abuse of dominance rules, as well as the full or partial rupture of an established commercial relationship, in view of past commercial relations, trade practices in the relevant market and contractual conditions.

i Significant cases

The major cases regarding the abuse of a dominant position involved Portugal Telecom (PT), the former telecommunications incumbent. In fact, PT was sanctioned for discriminatory pricing for allegedly offering more favourable prices, through special discounts, to operators from its group compared to competing retailers. It was also sanctioned for alleged margin-squeezing practices and for an alleged refusal to grant access to its underground conduit network, which the PCA considered to be an essential facility. The most significant sanction imposed amounted to approximately €53 million, although the appellate court considered the infringement to be time-barred.

In 2009, the PCA dismissed, subject to certain conditions, a case against the food undertaking Sugalidal on the basis that it had allegedly abused its dominant position in the market for purchasing tomatoes for processing by requiring its suppliers to use a specific variety of seed produced by a company of its group. Sugalidal undertook to remove the illegal clause from its contractual arrangements and to publicise the removal.

The PCA also sanctioned Sport TV, an undertaking active in the supply of premium sports content for television platforms, with a fine of €3.7 million for an alleged abuse of a dominant position consisting of applying discriminatory commercial conditions to several pay-per-view operators.

The PCA has also sanctioned a professional association for an abuse of a dominant position. In 2010, the Portuguese Chartered Accountants Association was fined for alleged restrictions imposed in the market for the training of certified accountants.

---

31 An undertaking is considered to be in a situation of economic dependence with regard to another undertaking if it does not have an equivalent alternative to contracting with that undertaking (i.e., when the good or service at issue is provided by a limited number of undertakings and the undertaking would be unable to obtain identical conditions from other commercial partners within a reasonable period).
33 PCA press release of 15 October 2009.
34 PCA press release of 20 June 2013.
More recently, the PCA has sanctioned the National Association of Pharmacies and three other undertakings of the same group (Farminveste SGPS, Farminveste – Investimentos, Participações e Gestão, SA and HMR – Health Market Research, Lda) with a fine amounting to €10.34 million for abuse of a dominant position in the markets for both pharmaceutical commercial data and market studies based on pharmaceutical commercial data. In 2016, this decision was upheld by the Competition, Regulation and Supervision Court, however the amount of the fine has been reduced to €6.89 million.35

In 2018, curiously enough, the PCA has closed an abuse of dominant position by the postal service incumbent CTT by means of the acceptance of certain commitments offered by this company. According to the public information, CTT has undertaken to, under certain conditions, offer access to its postal network to competitors.36

In connection with vertical restrictions, the PCA closed a procedure against Bayer regarding a clause in its standard contract with wholesalers, according to which wholesalers were allegedly obliged to carry Bayer products, exclusively, for five years.37 Bayer removed the clause from the contracts and proposed an amended contract to the PCA as a remedy. The PCA has also fined the dairy company Lactogal €341,098 for resale price maintenance practices (minimum price fixing) in the on-trade distribution market for dairy products, considering it a vertical agreement.38

The PCA sanctioned Petrogal, Galp Açores and Galp Madeira (all of which are part of the Galp Energia group and active in the liquefied petroleum gas sector) with fines amounting to €9.29 million for exclusive distribution agreements that allegedly restricted passive sales.39 This decision was upheld by the Competition, Regulation and Supervision Court (although the Court has reduced the fines to €4.1 million) and more recently by the Lisbon Court of Appeal, which confirmed the previous Court’s decision in full.40

In December 2018, after several years of investigation, the PCA closed its investigation on exclusive distribution agreements regarding certain TV sporting rights between pay-TV platforms and football clubs. These agreements had a duration of 10 years and the pay-TV platforms at stake were shareholders of the main paid TV content channel in Portugal, Sport TV.41

ii Trends, developments and strategies

The cases concerning PT’s abuse of its dominant position faced many judicial obstacles. In fact, the decision imposing a fine of €38 million against PT for refusing to provide competitors access to what the PCA considered an essential facility – PT’s underground conduit network – was overturned on appeal. The appellate court also considered the most significant sanction applied in this context – €53 million – to be time-barred.42

35 PCA press release of 31 December 2015 (31/2015) and of 20 October 2016 (20/2016).
40 PCA press release of 4 January 2016 (01/2016) and of 19 January 2017 (02/2017).
41 PRC/2016/02.
The PCA is currently investigating other abuse of dominant position and well as vertical restrictions cases. In fact, the PCA has issued a statement of objections addressed to EDP, for an alleged abuse of a dominant position by means of the manipulation of the offer of the production infrastructures in order to obtain greater revenues.43

The PCA has also sanctioned undertakings for having provided false or misleading information, in the context of a request by the PCA for information. In the first case, the PCA imposed a fine of €150,000 on Peugeot Portugal.44 Then, the PCA imposed a fine of €100,000 on CP Carga,45 and, lastly, a fine of €150,000 on Ford.46 CP Carga, Peugeot Portugal and Ford appealed against the decision to the Competition, Regulation and Supervision Court, which upheld all the appeals.47

In 2015, the PCA addressed several vertical antitrust concerns in the automobile sector. For instance, in the case against Peugeot Automobiles, this undertaking offered commitments designed to address the PCAs concerns about the alleged existence of a warranty extension agreement that prevented consumers from getting their cars repaired in independent garages. The published proposals were submitted to public consultation and were then accepted and deemed mandatory by the PCA.48 Similar commitments were offered by Ford Lusitana49 and SIVA (importer and distributor of the automobile manufacturers Audi, Volkswagen and Skoda).50 The commitments proposed were also accepted and deemed mandatory by the PCA.51

In 2016, the PCA opened proceedings against DIA Portugal (a supermarket chain) for alleged antitrust concerns arising from the company’s franchise system. In order to address the PCAs concerns, DIA Portugal offered commitments designed to clarify that it did not impose minimum prices to its franchisees’ network.52 The commitments were later accepted and deemed mandatory by the PCA.53

Later in the year, the PCA also issued a statement of objections against the EDP Group and the SONAE Group, having fined the companies in 2017, with a global sanction amounting to €38.3 million for alleged anticompetitive market-allocation practices in 2012.54

More recently the PCA has also issued a statement of objection addressed to the Portuguese brewery Super Bock for alleged resale price maintenance in the HORECA distribution channel.55 The closing of the case regarding the exclusive distribution of football rights – with the PCA stating that this issue was better solved by means of an amendment to

43 PCA press release of September (12/2018).
46 PCA press release of 21 September 2015 (20/2015).
47 PCA press release of 16 December 2015 (29/2015), of 19 October 2016 (19/2016) and of 13 October 2017 (15/2017).
50 PCA press release of 2 December 2015 (28/2015).
51 PCA press releases of 18 September 2015 (20/2015) and of 23 February 2016 (05/2016).
52 PCA press release of 22 March 2016 (07/2016).
54 PCA press release of 4 August 2016 (16/2016) and of 5 May 2017 (05/2017).
the existing framework, in order to centralise and auction these rights, similarly to what takes place in the UK and in Spain — may hint that the PCA will, in certain cases, be more focused on promoting legislative changes than on the alteration of particular contracts.

iii   Outlook

For 2018, the PCA has established as one of its priorities the detection and investigation of anticompetitive practices. Moreover, the PCA is expected to continue its efforts to promote access to its decisions and the decisions of courts of appeal, and to disseminate accurate and complete information on competition rules.

Additionally, the PCA will continue to promote the adoption of commitments, whenever important procedural gains can be anticipated, even in cases of abuse of a dominant position.

IV  SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Competition Act applies to all areas of the economy, including regulated sectors. The PCA has been monitoring several sectors in recent years, and the PCA’s supervisory powers have been strengthened.

i   Significant cases

The most significant cases involving undertakings operating in regulated sectors were the three abuse of dominance cases brought against PT, discussed above. The existence of regulations in the telecommunications sector did not impede the application of competition rules.

The PCA has conducted sector-wide investigations and released reports on several markets over the years, including studies on consumer mobility within the retail banking market, on the liquid fuel and bottled gas retail markets, on electronic communications, on relations between large food retailers and their suppliers, and on fintech operators, digital operators, transport operators, liberal professions and ports.56

ii   Trends, developments and strategies

The PCA will continue to conduct market studies and surveys in various sectors of the economy in order to better identify possible anticompetitive conduct. As previously mentioned, the PCA will focus primarily on controlling possible concerted practices in public procurement.

During 2015, the PCA closely monitored the port sector and, as a result of a market study on the sector, it submitted to public consultation some recommendations to enhance competition.57 In 2016, the PCA set out as priorities the monitoring of the telecommunications and gas sectors and it issued some recommendations for the activity of passenger transport in chauffeur-driven light-duty vehicles.58

In 2017, the PCA issued a report on the industry of liquefied petroleum gas in Portugal and a sectoral inquiry on the market for the supply of natural gas to industrial consumers.

In both documents the PCA identified some alleged competitive concerns (in the view of the Authority) and submitted recommendations on how to mitigate them with regulatory action.\(^{59}\)

In 2018, we highlight the PCA’s study on the port sector, also issuing recommendations for the liberalisation of the access to port-related professions and to the promotion of conditions of competition to the awarding of concessions.\(^{60}\)

### iii Outlook

As indicated, the PCA’s supervisory powers have been strengthened by the Competition Act and include, apart from requiring information from undertakings or associations, the possibility of carrying out inspections and audits. These inspections and audits have proven to contribute to the detection of inefficiencies by the PCA in some markets and sectors, and will increasingly do so. Additionally, as was previously mentioned, the PCA has also set as one of its priorities for 2019 the implementation of measures for removal of the barriers created by legislation and by the practices of incumbents and to implement the recommendations issued in 2018 related to liberal professions and to the transport sector.

### V STATE AID

Article 65 of the Competition Act establishes that aid provided by the state or any other public body may not restrict, distort or appreciably affect competition, in all or a substantial part of Portugal. The PCA may issue recommendations on any public assistance provided and monitor the implementation of those recommendations, for which purpose it may request information from any party. The recommendations are published on the PCA’s website.

The PCA’s powers in this matter are very limited, as the European Commission is the entity with jurisdiction to assess the compatibility of state aid with the European Union’s rules on state aid. In any case, the PCA follows the European Commission’s activities closely, having identified the monitoring of state aid matters as one of its international cooperation goals.\(^{61}\)

### i Significant cases

One of the most important rulings on state aid involving Portugal was the European Court of Justice’s (ECJ) ruling on the appeal in the Azores case.\(^{62}\) The ECJ ruled on the application of territorial selectivity criteria in cases involving autonomous regions (such as the Azores region), and set the necessary conditions to be met for an autonomous region to be considered as the benchmark as opposed to the national territory as a whole.

We also highlight one of the most high-profile cases decided by the European Commission regarding state aid granted by Portugal, which involved assistance that the state gave to shipyards in Viana.\(^{63}\)

---

60 PCA press release of 27 December 2018 (21/2018).
61 See the presentation of the chairman of the PCA’s board, available at: www.concorrencia.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/VFapresentação%20COFAP%2018%20fev%202015_VF.pdf.
62 Case C-88/03 Portugal v. Commission.
The Portuguese banking sector, in the past few years, has also been the subject of several state aid decisions. In 2014, the European Commission found that the resolution plan of the Portuguese bank Banco Espírito Santo (BES) was in line with EU state aid rules (the European Commission assessed the plan under its rules on state aid to banks in the context of the financial crisis and acknowledged that a disorderly resolution of BES could create a serious disturbance in the Portuguese market). In December 2015, following the Bank of Portugal’s decision to put the Portuguese bank Banif into resolution, the European Commission approved Portuguese plans to provide about €2.25 billion of state aid to cover the funding gap in the resolution of Banif, deeming that it was in line with EU state aid rules.

In 2017, the European Commission found that Portugal’s plans to strengthen the capital position of fully state-owned Caixa Geral de Depósitos (CGD) by €3.9 billion were in line with EU state aid rules and, more recently, the European Commission approved the Portuguese restructuring plan and support for the sale of the bridge bank Novo Banco, completing the 2014 resolution of BES.

In 2018, the European Commission approved under EU state aid rules a Portuguese tonnage tax scheme, which, together with a scheme to support seafarers, will encourage ship registration in Europe and contribute to the competitiveness of maritime transport while preserving employment in the sector and promoting high environmental standards.

**ii Trends, developments and strategies**

The banking sector in Portugal has been particularly subject, in the past few years, to state aid procedures. Further to the above-mentioned resolution cases, it should be mentioned that the capitalisation programmes for Portuguese banks and the creation of the Portuguese Finance Development Institution have followed the applicable state aid rules as established in cooperation with the European Commission. Tax havens, including the Madeira Free Zone, have also been subject to the EU’s scrutiny.

**iii Outlook**

Apart from the financial sector, which may continue to be monitored, regional aid is going to be particularly relevant within the next few years. In 2014, the European Commission approved, under EU state aid rules, Portugal’s state aid plan for 2014–2020. These guidelines

---

set out the conditions under which Member States can grant state aid to businesses for regional development purposes and are expected to foster growth and greater cohesion in the single market.

Under the aid map currently in force, regions accounting for 69.01 per cent of Portugal’s population will be eligible for regional investment aid at maximum aid intensities ranging from 25 per cent of the eligible costs of the relevant investment projects in mainland Portugal, over 35 per cent in Madeira, and up to 45 per cent in the Azores.71

It is also possible that aid to projects related to innovation, the environment and energy may be more frequently given. For instance, in 2015, the European Commission found a Portuguese scheme aimed at promoting renewable energy technologies to be in line with EU state aid rules, in particular in view of its 2014 Guidelines on state aid for environmental protection and energy.72

More recently, in 2016 the European Commission found Portuguese plans to support the purchase of low-emission buses for public infrastructure in urban areas to be in line with EU state aid rules – specifically, the European Commission deemed that the project’s contribution to EU environmental goals outweighed any potential distortion of competition.73

Also, it should be noted that the European Commission has opened an in-depth investigation to examine whether Portugal has applied the Madeira Free Zone regional aid scheme in conformity with the 2007 and 2013 Commission decisions approving it. In particular, the Commission has concerns that tax exemptions granted by Portugal to companies established in the Madeira Free Zone are not in line with the Commission decisions and EU state aid rules.74

VI MERGER REVIEW

The PCA has exclusive jurisdiction to enforce the merger control rules established in the Competition Act. Only concentrations, as defined in Article 36 of the Competition Act, which meet one of the notification thresholds established in Article 37(1), are subject to merger control review. The basis of the concept of concentration lies in the notion of change of control on a lasting basis, and the definition of ‘control’ adopted in Article 36(3) of the Competition Act is similar to that used in the European Merger Control Regulation (i.e., the possibility of exercising decisive influence on an undertaking).

The Competition Act, unlike the EU Merger Regulation and the laws of most Member States (except for Spain), establishes alternative turnover and market share notification thresholds, even though a de minimis rule was introduced in 2012.

In brief, undertakings must notify a concentration if any of the following conditions is met:

a. the combined aggregate turnover in Portugal of all the undertakings exceeds €100 million, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeds €5 million;

b. the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 50 per cent; or

c. the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 30 per cent and less than 50 per cent, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeds €5 million.

The time limit for the PCA to issue a decision is 30 business days for normal Phase I proceedings and 90 business days as from the initial notification for cases requiring in-depth investigations. These time limits can be suspended if additional information is requested from the parties and, in general, at the parties’ request or if commitments are offered, or if the parties are invited to comment on the PCA’s draft decision.

The PCA has also approved new filing forms, including, for the first time, a simplified form to be used in concentrations that, in view of certain parameters (e.g., no market overlap or limited joint market shares), will not raise competition concerns.75

Since the enactment of the Competition Act currently in force, and similarly to the EU Merger Regulation provisions, the parties no longer have a specific deadline to notify (unlike previously, where parties had seven business days to do so). The parties nevertheless are obliged to suspend the implementation of the concentration until the PCA has issued a clearance decision. Breach of this obligation entails a fine of no more than 10 per cent of the turnover of the undertaking in breach. Pursuant to the Competition Act, any act or transaction implementing the concentration prior to clearance from the PCA is unenforceable.

The most important exception to the referred standstill obligation is the possibility to implement public takeover bids, provided that, in general, the acquirer does not exercise the voting rights in the target entity until clearance is obtained.

The Competition Act now adopts the significant impediment of effective competition (SIEC) test to assess concentrations instead of the dominance test that was previously used.

Merger control decisions are subject to judicial appeal and to a special administrative appeal if the merger is blocked (although such an appeal would only be upheld if the benefits to the national economy outweigh the disadvantages to competition resulting from the prohibited merger).

i Significant cases

The PCA has extensive experience in merger cases, having reviewed and decided an average of around 50 cases a year; it has issued only six prohibition decisions in merger control cases since its incorporation in 2003, even though there were several notifications withdrawn by the notifying parties in view of the obstacles posed by the Authority.76

75 PCA Regulation 60/2013.
In relation to these prohibitions, it is worth noting that the Minister of Economy, further to a special administrative appeal provided for in the PCA’s articles of association, overturned the PCA’s prohibition decision concerning a merger in the highway management sector.77 One of the PCA’s prohibitions, in the media sector, was based on a binding negative opinion issued by the media sector regulator (since this decision was binding under the merger control framework).78

With regard to merger remedies the PCA’s Guidelines on Merger Remedies are in line with EU law and practice. The PCA has also imposed structural and behavioural remedies on several occasions. For instance, it imposed behavioural remedies in the concentration between two Portuguese commercial airlines (TAP and PGA).79 The remedies in the clearance decision included freeing up slots at Lisbon and Oporto Airports, limiting the number of flights operated by the merged airlines on certain routes, as well as limitations on the prices charged. In 2015, behavioural remedies were also imposed upon two concentrations (involving the same acquiring undertaking, part of the EDP Group, which was previously the incumbent supplier of electric energy in Portugal) in the market for the production of electric energy. In both cases, the acquirer undertook to maximise the production of energy in order to avoid any negative impact on the market, in particular, a potential increase in wholesale prices.80

Regarding structural remedies, the decision practice of the PCA is also noteworthy. Remedies in two concentrations in the transportation sector included the divestment of one of the parties’ operations in the inter-urban route where competition concerns were identified in the TRPN/Internorte case,81 and the approval of an up-front buyer solution in the Powervia/Laso*Auto-Laso*Probilog*Laso Ab case.82 More recently, in the Arena Atlântida/Pavilhão Atlântico*Atlântico case, a merger involving the acquisition of Pavilhão Atlântico (the main indoor arena in Lisbon), one of the shareholders of the acquiring undertaking committed to divest its shareholding in a ticketing services company, since the PCA had identified the referred shareholding as a vertical restraint to competition.83

In 2018, divestment remedies were also offered in the Rubis/Repsol GLP case in order to overcome the horizontal concerns identified by the PCA.84 It should be mentioned that, for the first time, the divestment in question was made through a ‘fix it first’ solution (i.e., with a suitable buyer already found and accepted by the PCA prior to the clearance decision).

As regards the imposition of sanctions on undertakings that failed to file a concentration, early in 2013 the PCA imposed fines amounting to €149,278.79 for failure to notify a concentration in the pharmaceutical sector (this decision was appealed based on formal grounds and was reissued by the PCA in 2014).85 More recently, in 2017 the PCA imposed fines amounting to € 38,500 for failure to notify a concentration in the dental clinics sector, following a settlement procedure.86

77 Case 22/2005 – VIA Oeste (Brisa)/Auto-Estradas do Oeste/Auto-Estradas do Atlântico.
78 Case 41/2009 – Ongoing/Prisa/Media Capital.
79 Case 57/2006 – TAP/PGA.
81 Case 49/2010 – TRPN/Internorte.
82 Case 16/2011– Powervia/Laso*Auto-Laso*Probilog*Laso Ab.
83 Case 38/2012 – Arena Atlântida/Pavilhão Atlântico*Atlântico.
84 Case 37/2017 – RUBIS/Ativos Repsol.
86 PCA press release of 27 December 2017 (22/2017).
Trends, developments and strategies
The simplified filing form and pre-notification contacts have been increasingly used, enabling a swifter assessment and earlier decisions regarding uncomplicated matters.\(^{87}\) The PCA is expected to continue to promote the use of the simplified filing form, as well as pre-notification contacts in order to deliver swifter decisions and enhance transparency in the market.

Also, as regards referral requests by the PCA, it is worth noting that the European Commission, in 2014, refused a request from PCA to refer the Altice/PT merger case for assessment under Portuguese competition law. This merger case involved the acquisition of the Portuguese telecommunications operator PT Portugal by the multinational cable and telecommunications company Altice. The European Commission concluded that, given its extensive experience in assessing cases in this sector and the need to ensure consistency in the application of merger control rules in the fixed telecommunications sector across the European Economic Area, it was better placed to deal with the case.\(^{88}\)

The PCA also seems to have strengthened its demands in terms of remedies, demanding structural remedies in the most complicated cases of 2018, Rubis and Altice (in this last case, as mentioned, the notifying party opted to withdraw the notification).

Outlook
The PCA has also stated that one of its priorities for 2019 is still the implementation of more efficient and quicker merger control proceedings.

It seems that the PCA's merger control decisions are being increasingly subject to judicial review. In 2015, the Portuguese Competition, Regulation and Supervision Court rejected, on the one hand, the appeal by Media, Zon Optimus and Portugal Telecom related to the PCA's decision to initiate an in-depth investigation of this concentration and, on the other hand, these undertakings claim that the concentration had been tacitly approved.\(^{89}\) Also in 2015, this court confirmed the PCA's decision in the Arena Atlântida/Pavilhão Atlântico*Atlântico case.\(^{90}\) The PCA's clearance, after an in-depth investigation, of the SUMA/EGF concentration (a merger decision related to a reprivatisation in the waste sector) is currently being disputed in the courts. So far, the Portuguese Competition, Regulation and Supervision Court has already rejected, in two separate proceedings, the adoption of interim measures to temporarily suspend the effects of the decision.\(^{91}\)

---

VII CONCLUSIONS

The PCA continues to actively pursue the goal of protecting and promoting competition in the Portuguese economy. It is becoming more dynamic, has been investing in its technical capacity, and is determined to contribute to a sound culture of competition policy in Portugal.

The PCA’s focus continues to be combating cartels and anticompetitive practices, being particularly vigilant within the context of trade associations, public tenders and of the up-and-coming digital economy. The PCA will also closely monitor recent mergers, in order to detect eventual gun-jumping cases.

Additionally, in 2019 the PCA is expected to promote advocacy activities, in order to enhance the transparency of its actions and raise awareness of the advantages of effective competition for the Portuguese economy, as well as strengthen its interventions in the reduction of legal or administrative barriers regarding entry into the market.
I OVERVIEW

The 2017 and 2018 financial year saw some interesting developments in South Africa, not least of which are the significant amendments that have been proposed to the Competition Act, 1998 (Competition Act). The Competition Amendment Act of 2018 (Amendment Act) provides for, among others, scrutiny of market concentration and the racially skewed spread of ownership of the South African economy and the amendments seek to empower the Competition Authorities to create more opportunities to advance transformation of ownership. The changes will have a substantial impact on all businesses operating in South Africa and will increase the complexity associated with complying with the Competition Act.

Some of the amendments include, among others: (1) a new regime applicable to foreign investment mergers affecting the country’s security interests; (2) amendments to the abuse of dominance provisions in the Competition Act primarily aimed at correcting the difficulties that the competition authorities have experienced in enforcing abuse of dominance complaints; and (3) amendments to the price discrimination provisions which require that special attention be given to the effect of anticompetitive price discrimination on small businesses and firms owned or controlled by historically disadvantaged persons.

The largest administrative penalty imposed on a single firm in 2017/2018 was imposed by means of a consent order on Autoliv, an automotive safety supplier. An administrative penalty of 149 million rand was imposed following an admission by Autoliv that it had divided the market and rigged bids in relation to occupational safety systems for BMW and VW vehicles. This cartel is part of the international automotive parts investigation in which Autoliv has also paid administrative penalties to competition authorities in the European Union, United States and Canada.²

In addition to the international investigation into automotive parts, the competition authorities are also continuing with their investigation into allegations of foreign exchange collusion by 23 local and international banks. Citibank was the first bank to enter into a consent order in which it agreed to pay an administrative penalty of 69 million rand and Barclays has been granted conditional leniency for its participation in the conduct.

---

¹ Candice Upfold is a senior associate at Norton Rose Fulbright South Africa Inc.
In addition, FR Waring and Willowton successfully challenged and set aside the Competition Commission’s (Commission) warrant authorising a search and seizure operation on their premises. This is the first raid that has been set aside since the raid on Pretoria Portland cement in 2000.³

As will be demonstrated in this chapter, the competition authorities in South Africa are extremely active and have, over the review period, imposed innovative and creative remedies focusing on the public interest in a number of decisions.

i Prioritisation and resource allocation

For the 2017/2018 financial year (which is the most recent reported information available),⁴ the Economic Development Department (EDD) allocated a grant of 30.04 million rand to the Competition Tribunal (Tribunal), which represents a 49.3 per cent increase on the grant allocated to the Tribunal by the EDD for the 2016/2017 financial year.⁵ A significant portion of the Tribunal’s total income consists of the EDD grant (63.71 per cent); however, the Tribunal also received 16.30 million rand in income from merger filing fees and a further 810,000 rand from other sources of income. As a whole, the Tribunal’s revenue has increased by 34.87 per cent to 47.15 million rand in the 2017/2018 financial year.⁶

Similarly, for the 2017/2018 financial year, the EDD allocated 268 million rand to the Commission, which represents a 21.1 per cent increase on the previous financial year. In addition, the Commission received a further 16 million rand from interest on investments, 62 million rand on merger filing fees and 4,873,000 rand from other sources of income.⁷ The Commission is accordingly a well-funded regulatory authority in South Africa. Notwithstanding the resources allocated to the Commission, in its annual performance plan for the 2018/2019 financial year,⁸ the Commission stated that the ‘current funding model and budget allocation are not adequate to support the high (and increasing) volume of cases which the Commission has, nor to support the complex investigations and litigation it undertakes.’ It remains to be seen whether the Commission will receive increased funding for the upcoming financial year.

To date, a significant proportion of the Commission’s efforts to enforce the Competition Act have been focused on detecting, prosecuting and eradicating hardcore cartels, particularly in South African industries that the Commission has identified as ‘priority sectors’ because of their impact on poor and disadvantaged consumers.⁹ It has had notable success in doing so.

---

³ Following litigation to the Supreme Court of Appeal, the raid was set aside in May 2002.
⁴ 1 April to 31 March.
⁵ The grant was increased for a number of reasons, which included increased costs associated with the relocation to larger space on the Department of Trade and Industry campus and the appointment of an additional full-time member in January 2017.
⁹ The sectors identified for prioritisation are food and agro-processing, intermediate industrial input products, infrastructure and construction, healthcare, energy, banking and financial services, and information and communication technology.
Enforcement agenda
The Commission is responsible for investigating and enforcing the Competition Act. Its core functions include:

- investigating and prosecuting restrictive horizontal and vertical practices;
- investigating and prosecuting an abuse of a dominant position;
- deciding on merger and acquisition approval applications;
- conducting formal inquiries into the general state of competition in a particular market;
- granting or refusing applications for exemption;
- conducting legislative reviews; and
- developing and communicating advocacy positions on specific competition law issues.

In its 2017/2018 annual report the Commission has identified three strategic goals that it aims to achieve to contribute to the attainment of a growing and inclusive economy. These include effective competition enforcement and merger regulation, strategic collaboration and advocacy, and a high performance agenda.10

II CARTELS

Since the inception of the Competition Act, a very broad interpretation of the prohibition of any form of direct or indirect price fixing, market allocation or collusive tendering by competitors in South Africa has been imposed.

The Commission has repeatedly emphasised that it regards hardcore cartel conduct as the most egregious violation of the Competition Act,11 and the Tribunal has similarly observed that ‘cartels are viewed as the most abhorrent antitrust practices’ and ‘a cancer to competition and harmful to consumers and economic development’.12

One reason for the Commission’s success in prosecuting cartel conduct is its exceptionally effective Corporate Leniency Policy (CLP).13 While the number of leniency applications is decreasing, it has supplied the Commission with substantial (and frequently damning) evidence with which to build strong complaints. This, together with the Commission’s practice of seeking the maximum fine of up to 10 per cent of annual turnover in virtually all of the cases that it refers for adjudication by the Tribunal, has meant that the vast majority

---

10 See footnote 7 at page 6.
11 ‘The investigation of cartels is at the core of competition regulation because it deals with the most egregious form of anticompetitive conduct, including price fixing, customer allocation, and bid rigging.’ See the Competition Commission’s Annual Report 2009/2010. Also see International Competition Network Anti-Cartel Enforcement Template, Competition Commission of South Africa (30 June 2015): ‘Section 4(1)(b) deals with most egregious horizontal restrictive practices (namely price fixing, division of markets and collusive tendering) as per se prohibited.’
13 The CLP was introduced in 2004 and amended in 2008. In the 2017/2018 financial year the Commission received two applications for leniency. This is in comparison to six applications for the 2016/2017 financial year, 10 applications for the 2015/2016 financial year, 121 for the 2014/2015 financial year and five in the 2013/2014 financial year.
of complaint respondents have elected to settle complaints about hardcore cartel conduct by way of the consent order procedure in Section 49D of the Act\textsuperscript{14} rather than risk protracted, and uncertain, litigation.

i Significant cases

Penalties were imposed in 26 matters\textsuperscript{15} during the 2017/2018 financial year and totalled approximately 354 million rand.\textsuperscript{16} This was a decrease from the approximately 1.63 billion rand\textsuperscript{17} imposed in the 2016/2017 financial year.\textsuperscript{18} Of the penalties imposed in the 2017/2018 financial year, 70.33 per cent were imposed in the manufacturing sector, 19.61 per cent in the financial and insurance activities sector, 8.85 per cent in the professional scientific and technical activity sector and 10.06 per cent in the construction, information and communication, mining and quarrying and transportation and storage sectors.\textsuperscript{19}

As mentioned above, a large proportion of cartel cases are settled by way of consent orders,\textsuperscript{20} and as such, the merits of very few cases are finally adjudicated upon by the Tribunal, or the Competition Appeal Court, as the case may be.

Bicycles\textsuperscript{21}

The Bicycles case involved an alleged cartel to fix prices and trading conditions of bicycles and cycling accessories. The case was referred by the Commission to the Tribunal against 20 respondents that are either wholesalers or retailers of bicycles or accessories. By the time the hearing proceeded in May 2015, 18 of the respondents had settled the matter with the Commission in terms of a consent order. The Tribunal referral hearing therefore proceeded only in respect of two respondents.

The Commission alleged that at meetings attended by both wholesalers and retailers, an agreement was reached to fix the selling price of bicycles and cycling accessories by using the recommended retail price (RRP) as a mechanism by which downstream prices could be increased from October 2008 onwards.\textsuperscript{22} The recommended retail price was set by wholesalers

\textsuperscript{14} See Rules 23 and 24 of the Tribunal Rules. Section 49D permits the Commission and a firm against whom a complaint of a prohibited practice has been initiated in terms of the Act (the ‘respondent’) to agree on a proposed order in order to settle the matter ‘during, on or after completion of the investigation of a complaint’. Section 49D affords the Commission a wide discretion in relation to these proceedings and does not expressly require the Commission to take into account the factors set out in Section 59 of the Act. However, the Commission’s discretion in relation to such proceedings is limited insofar as Section 49D(1) expressly provides that the Tribunal ‘may’ confirm a consent order.

\textsuperscript{15} More than 95 per cent of the penalties imposed were for cartel conduct.

\textsuperscript{16} See footnote 7 at page 34.

\textsuperscript{17} Id. at page 34.

\textsuperscript{18} Ninety-two per cent of the total administrative penalties imposed was imposed on a single firm, ArcelorMittal, for its participation in a range of anticompetitive conduct.

\textsuperscript{19} See footnote 7 at page 33.

\textsuperscript{20} All 26 cases were settled by means of a consent order/settlement agreement in the 2017/2018 financial year.

\textsuperscript{21} The Competition Commission and Fritz Pienaar Cycles (Pty) Ltd and Others case No. CR049Jul12 (30 May 2016).

\textsuperscript{22} Ibid. at Paragraph 24.
but was subject to a known uniform mark-up. At a meeting of 10 September 2008, a proposal was made that the recommended retail price for bicycles be increased from 35 to 40 or 50 per cent, and from 50 to 75 per cent for bicycle accessories.\textsuperscript{23}

Interestingly, many wholesalers and retailers raised concerns that this would amount to price fixing, but they were reassured at the meeting by a representative from Fritz Cycles (one of the respondents) that the conduct was not illegal.\textsuperscript{24}

While this decision is not new, it provides some important insights into the Tribunal’s approach to analysing whether a firm has entered into an agreement or engaged in a concerted practice, in contravention of Section 4(1)(b). While this decision does not develop the law as the principles upon which it was based have been applied in a number of previous cases, this case is useful in summarising some of these principles:

\textit{The form of an agreement between competitors is not relevant}

The Tribunal has confirmed that consensus is sufficient to constitute an agreement under the Competition Act. Furthermore, the Competition Act does not require monitoring or even implementation of an agreement to fall foul of Section 4(1)(b) of the Competition Act.\textsuperscript{25} The Tribunal quoted \textit{MacNeil},\textsuperscript{26} which states that ‘consensus sufficient to constitute agreement under the Act need not amount to a contract at private law, need not be enforceable, punishable or even have a level of precision that the arrangement could defeat an argument that it is void for vagueness’.\textsuperscript{27}

\textit{Firms that intend to deviate from a cartel agreement or have actually cheated on an agreement may contravene Section 4(1)(b)}

A common feature of cartels is the intention to cheat on an agreement. The Tribunal in the \textit{Bicycles} case confirmed the position that the intention to cheat on an agreement does not undermine the finding that an understanding or arrangement was reached.\textsuperscript{28}

The implications of a parties’ passive attendance at meetings where collusive arrangements were discussed has also been dealt with in \textit{MacNeil} and \textit{Videx}.\textsuperscript{29} In this regard, the Competition Appeal Court stated that where a party does not wish to be bound by collusive activity, such party has a ‘duty to distance himself from the proposals under discussion, either by leaving or by stating that he wants no part of them’.\textsuperscript{30} The Competition Appeal Court in \textit{Videx} went on to say that ‘a loss of trust, even a significant breakdown in trust, is not sufficient if unaccompanied by other actions which clearly signal withdrawal from the cartel.’\textsuperscript{31}

\textsuperscript{23} Ibid. at Paragraph 25.
\textsuperscript{24} Ibid. at Paragraph 59.
\textsuperscript{25} Ibid. at Paragraph 174.
\textsuperscript{26} \textit{MacNeil Agencies (Pty) Ltd v. Competition Commission} (121/CACJul12) [2013] ZACAC 3 (18 November 2013).
\textsuperscript{27} Ibid. at Paragraph 56.
\textsuperscript{28} See footnote 21 at Paragraph 127.
\textsuperscript{29} \textit{Videx Wire Products (Pty) Ltd v. Competition Commission of South Africa} (124/CACOct12) [2014] ZACAC 1 (14 March 2014).
\textsuperscript{30} See footnote 26 at Paragraph 64.
\textsuperscript{31} See footnote 29 at Paragraph 67.
The Tribunal therefore confirmed the MacNeil decision, which states that a representative would be under a duty to distance itself from the proposals under discussion, either by leaving a meeting or by stating that he or she wants no part of the discussion.\textsuperscript{32} Being silent and not distancing oneself is therefore not a defence.\textsuperscript{33}

**Agreements in contravention of Section 4(1)(b) need not be ratified by senior representatives of a company**

As noted above, the Tribunal took the view that the term ‘agreement’ in the Competition Act does not have the same meaning as it does in a contract. The Tribunal noted that the Act has extended the ordinary definition of the term agreement when used in relation to a prohibited practice to include ‘... a contract, arrangement or understanding, whether or not legally enforceable’.\textsuperscript{34}

In the *Bicycles* case, the Tribunal confirmed that the lack of authority defence may have application in private contract law, but does not assist in the context of competition law. A lack of mandate can therefore not assist where competition harm to the public consumer is concerned.\textsuperscript{35}

Two of the respondents, Omnico and Cool Heat Agencies, appealed the decision to the Competition Appeal Court on the narrow issue of whether the silent participation of firms at a meeting where cartel activity was discussed amounts to a contravention of Section 4(1)(b)(i) of the Competition Act.\textsuperscript{36}

The Competition Appeal Court found that both Omnico and Cool Heat Agencies contravened the Competition Act. It was found: ‘The principle of passive attendance at meeting to listen to ‘gossip’ among companies cannot excuse an undertaking. Consistent with European competition jurisprudence, as it has now developed, there is a duty to speak or to report to authorities or publicly distance oneself from any anticompetitive behaviour.’\textsuperscript{37}

In reaching its finding, the Competition Appeal Court stated that the Commission had provided sufficient evidence that:

- both appellants failed to distance themselves from the consensus reached at the meeting to increase the RRP from October 2008 so as to afford greater margins to the retailers;
- both appellants gave no indication – either at the September meeting or thereafter in any forum – that they disagreed with the increase and that they would not proceed on that basis; and
- neither appellant had placed evidence before the Tribunal that their pricing, and increased RRP in particular, following the September meeting was the result of independent decision making rather than a result of the unlawful agreement reached at the September meeting.\textsuperscript{38}

\textsuperscript{32} See footnote 21 at Paragraph 112.
\textsuperscript{33} See footnote 21 at Paragraph 169.
\textsuperscript{34} See footnote 21 at Paragraph 77.
\textsuperscript{35} See footnote 21 at Paragraph 167.
\textsuperscript{36} Omnico (Pty) Limited and Cool Heat Agencies (Pty) Limited v The Competition Commission and Others Appeal case No. 142/CAC/June16 / 143/CAC/June16.
\textsuperscript{37} Ibid. at Paragraph 61.
\textsuperscript{38} Ibid. at Paragraph 67.
While the Competition Appeal Court ultimately came to the same decision as the Tribunal, it did reduce the administrative penalties to be paid by both Omnico and Cool Heat Agencies on the basis of mitigating factors.

*Tulisa Cables*9

The *Cables* case is the first of its kind in South Africa demonstrating the difference (on the evidence) between a collusive agreement between competitors and lawful rational behaviour by a rival in an oligopolistic market.

In this decision, the Tribunal was only required to make a decision in respect of alleged conduct on the part of Tulisa Cables (Pty) Limited (Tulisa) as the first and second respondents, Alvern Cables (Pty) Limited (Alvern) and South Ocean Electric Wire Company (Pty) Limited (SOEWC), had entered into a settlement agreement with the Commission and the fourth respondent, Abedare Cables (Pty) Ltd (Abedare), had applied for and was granted leniency.

On the facts, the Commission was unable to establish that Tulisa had attended any meetings in which the parties had agreed to directly or indirectly fix the selling price of power cables, nor was there evidence that Tulisa had been informed of the price-fixing agreement by SOEWC, as alleged by the Commission. The Tribunal was therefore required to consider whether there was evidence of a concerted practice. In this regard, the Tribunal considered whether Tulisa conducted itself in a manner indicative of it being a member of a cartel by basing its prices (as the other respondents’ did) on the price list circulated by Abedare on the first of each month notwithstanding that the price lists were not sent by Abedare to Tulisa.

Tulisa relied on evidence to argue that it never received the Aberdare price lists from any of the respondents and instead received its competitors’ prices from customers. According to Tulisa, it would use the Aberdare price list (which it obtained independently) as a basis off which it would offer further discounts to customers.40

The Tribunal held that there was no evidence before it that Tulisa was in agreement with the other respondents. This is because Tulisa was not in attendance at meetings with the other respondents, nor did it receive the price lists directly from the respondents. On the facts, the Tribunal stated that ‘Tulisa’s actions appear to be consistent with those of a player in an oligopoly market acting rationally and independently of its competitors but well alive to the actions of the competitors (referred to in literature and case law as ‘conscious parallel behaviour’ or ‘conscious parallelism’)’.41

The Tribunal therefore found that on the facts, there was insufficient evidence of Tulisa acting in concert with the other respondents in furtherance of a cartel and the complaint against Tulisa was dismissed.

This case demonstrates that a firm will not automatically be found to have participated in a cartel simply by following a competitor’s price lists if it can be shown on the facts that reference to the price lists is simply as a result of market structure and not concerted action to participate in a cartel.

39 *The Competition Commission of South Africa and Alvern Cables (Pty) Limited and Others Case No. CR205Mar14.*
40 Ibid. at Paragraph 49.
41 Ibid. at Paragraph 57.

© 2019 Law Business Research Ltd
This complaint involves allegations of price fixing against 33 respondents in the media industry. Thus far, four have paid (by way of consent orders) administrative penalties.

The Commission alleged that through Media Credit Co-ordinators (MCC), a non-profit organisation, the respondents agreed to offer similar discounts and payment terms to advertising agencies that place adverts with MCC. For accredited agencies, the discount offered was 16.5 per cent for all payments made within 45 days of the date of the invoice statement, while for the most part the discount offered to non-accredited agencies was 15 per cent.

The Commission also alleged that the respondents employ services of an intermediary to perform risk assessments on advertising agencies for purposes of imposing the above-mentioned discount structure.

The Commission found that the above-mentioned conduct gave rise to a restriction of competition among competing media groups in that they did not independently determine an element of their pricing and trading terms. The Commission found that these practices amounted to price fixing and the fixing of trading conditions.

One of the respondents, DSTV Media Sales, entered into a consent agreement with the Commission, which was confirmed by the Tribunal in which it admitted that it had engaged in the conduct as alleged by the Commission in contravention of Section 4(1)(b)(i) of the Competition Act.

In reaching settlement, DSTV Media Sales agreed to pay not only an administrative penalty but to also be bound by a number of non-conventional remedies which resulted in an effective total of 180 million rand being levied as a penalty. Apart from the administrative penalty imposed (22 million rand), the following innovative remedies were also agreed to:

- DSTV Media Sales undertook to contribute 8 million rand to the Economic Development Fund over three years from the date of confirmation of the consent agreement to enable the development of black-owned small media or advertising agencies requiring assistance with start-up capital and to assist black students requiring bursaries to study media or advertising, among others.

- DSTV Media Sales further agreed to provide 25 per cent in bonus airtime for every rand of airtime bought by qualifying small agencies. This is intended to help smaller agencies participate in the market. The bonus airtime would be provided for a period of three years with a total annual airtime cap of 50 million rand.

**Trends, developments and strategies**

The competition authorities continue to regard cartel enforcement as a major priority, as indicated by the Commission’s initiation of 28 new cases in the 2017/2018 financial year. The Commission has furthermore indicated its intention to clamp down on cartel conduct,
having conducted four dawn raids in the 2016/2017 financial year. This trend continued into the first half of the 2017/2018 financial year, with the Commission having conducted a further three dawn raids. This trend has, however, slowed down as a result of the Commission’s budgetary constraints.

Following a dawn raid conducted in the edible oil industry, FR Waring and Willowton applied for a reconsideration and setting aside of the ex parte order that the Pietermaritzburg High Court issued on 6 December 2016 on an urgent basis. The court found that the Commission had not made out a case for the issuing of the warrant. In particular, the court found that the Commission’s allegations in the application for the ex parte warrant as to the alleged prohibited practice was based on double hearsay and accordingly could never ground ‘reasonable belief’ that there were collusive dealings in the market. The court therefore set aside the search warrant. The Commission applied for leave to appeal this decision but leave to appeal was denied by the High Court on 20 February 2019.

This is the first dawn raid to be set aside since the SCA ordered, in May 2002, the setting aside of the raid conducted on Pretoria Portland Cement.

The trend to impose substantial administrative penalties on parties who have been found to contravene the Competition Act is likely to increase, which is evident from the ArcelorMittal consent agreement reached on 16 November 2016, in which an administrative penalty of 1.5 billion rand was imposed. While the consent agreement was entered into to settle a number of complaints, the considerable penalty imposed is an indication that the competition authorities are seeking to impose substantial penalties on firms that collude.

The Minister of Economic Development, under whose department the Commission falls, also publicly stated in November 2016 that he is of the view that the administrative penalties have not been high enough to date, and that he would encourage the imposition of even steeper penalties.

On 1 December 2017, the Minister of Economic Development published the Competition Amendment Bill for public comment. It is noted in the Competition Amendment Bill’s preamble that the Competition Amendment Bill ‘focuses on creating and enhancing the substantive provisions of the Act aimed at addressing two key structural challenges in the South African economy: concentration and the racially skewed spread of ownership of firms in the economy’.

For purposes of the amendments to the Competition Act, five priority areas were identified:

\[ a \] the provisions of the Competition Act relating to prohibited practices and mergers must be strengthened;

\[ b \] special attention must be given to the impact of anticompetitive conduct on small businesses and firms owned by historically disadvantaged persons;

\[ c \] the provisions relating to market inquiries must be strengthened so that their remedial actions effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets;

\[ d \] it is necessary to promote the alignment of competition-related processes and decisions with other public policies, programmes and interests; and

48 The Commission conducted dawn raids on cargo shipping companies, suppliers of packaging paper, manufacturers of margarine, edible oils and baking fats, and the fresh produce market.

49 These dawn raids were conducted on fire sprinkler installers, beef companies and suppliers of set-top boxes and accessories.
the administrative efficacy of the competition regulatory authorities and their processes must be enhanced.

Following rounds of public comment in 2018, the Competition Amendment Bill was passed by Parliament on 5 December 2018 and was signed by the President of South Africa on 13 February 2018. The Amendment Act will come into operation on a date to be proclaimed by the President.

iii Outlook

The introduction of criminal liability creates some uncertainty for individuals who may have participated in collusive conduct that was ongoing after 1 May 2016. The introduction of criminal liability seemingly will have a negative impact on the Commission’s CLP if individuals are no longer willing to blow the whistle, as leniency is currently only provided for in the CLP for firms that confess to cartel conduct in certain circumstances. The introduction of criminal liability seems to have had an impact on the number of leniency applications received as there has been a decrease in the number of leniency applications received over the past few years. In the 2017/2018 financial year, the Commission received a total of two leniency applications, which is down from the six applications for leniency received in 2016/2017 and a decrease from the 10 applications received in the 2015/2016 financial year.50

While the Competition Amendment Act 2009 (2009 Amendment Act) does make provision for the Commission to certify a person as being ‘deserving of leniency’, it is unclear how this certification would operate in practice, since the National Prosecuting Authority, which is tasked with prosecuting individual criminal conduct, could pursue individuals despite their having obtained the Commission’s leniency certification.

There has been no prosecution of an individual for his or her participation in collusive conduct to date. The Commissioner has, however, on 29 June 2018, called for criminal liability following an order by the Tribunal confirming the consent agreement with three vessel owners who ferry passengers between the Robben Island Museum and the V&A Waterfront in Cape Town for charges of price fixing and collusive tendering. The Commissioner stated that:

Robben Island is an iconic site that represents the saddest and richest history of this country dating back centuries. The museum deserves to be treated with great pride and respect as it symbolises the peak of courage and triumph of human spirit. The actions of these vessel owners exhibited disdain for this country’s history and utter disrespect for the people. Those who show neither remorse nor shame must be considered for criminal prosecution.

It remains to be seen how the provisions will be implemented.

---

50 See footnote 7 at page 40.
III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In addition to imposing an outright prohibition on cartel conduct, the Competition Act also prohibits a range of restrictive agreements that may result in a substantial prevention or lessening of competition, unless it can be shown that the agreement gives rise to technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect.51

The Competition Act also prohibits various forms of unilateral conduct by dominant firms.52

i Significant cases

There have been very few cases in South Africa in which contraventions of these kinds of restrictive practices have been prosecuted; however, on 8 September 2015, the Tribunal made a finding on a predatory pricing case, the first of its kind for South Africa.

Media2453

The Media24 case, which involved a complaint against Media24 for engaging in predatory pricing through its community newspaper (Goudveld Forum) by, inter alia, pricing its advertising below cost, demonstrates the complexities arising from the prosecution of an abuse of dominance case. This case is one of the lengthiest and most complex cases that the Tribunal has heard to date.54 The complaint was first lodged with the Commission in January 2009, with the hearing only taking place some five years later in November 2014. Final submissions were made on 27 March 2015, and on 8 September 2015 the Tribunal made its finding.

This case demonstrates the complexities, from an economic perspective, of establishing that a firm has engaged in predatory pricing. Ultimately, the Tribunal found that the Commission did not prove, on a balance of probabilities, that Media24 had priced below the relevant cost measures. As such, the predatory pricing case was dismissed.55 Having said that, the Commission was able to demonstrate that Media24’s strategy of using one of its titles as a below-cost ‘fighting brand’ (namely Forum) to drive out smaller rivals was exclusionary in nature, and as such a contravention of Section 8(c) of the Competition Act.

Section 8(c) of the Competition Act is a general ‘catch-all’ exclusion provision56 and is a lesser offence to that of predatory pricing. In reaching its decision, the Tribunal referred to the Nationwide case,57 which stated that as far as Section 8(c) was concerned, proof of pricing below an appropriate measure of cost, plus additional evidence, would suffice to prove exclusion.58 In Nationwide, however, the Tribunal did not decide what the appropriate

---

51 See Section 4(1)(a) and Section 5(1) of the Competition Act.
52 See Section 8 of the Competition Act.
54 The Competition Tribunal’s Annual Integrated Report for the 2016/2017 financial year at page 5.
55 See footnote 53 at Paragraph 620.
56 Id. at Paragraph 125.
58 Id. at page 10.
measure or ‘standard’ should be. While there was debate on which mechanism was the correct one to use in Media24, the Tribunal was of the view that average total cost (ATC) was the correct standard, particularly in an economy characterised by high barriers to entry.

Ultimately the Tribunal found that Media24 priced its publication Forum below its ATC, and that, together with other evidence of direct and indirect intent to predate its competitor, and its subsequent ability to recoup the revenue that it lost during the predation period, constituted an exclusionary act. This exclusionary act furthermore had an anticompetitive effect (the exit of a competitor), and there was no evidence of any pro-competitive gain that outweighed the anticompetitive effect.

The Tribunal did not deal with the issue of remedies in this decision, but on 6 September 2016 handed down a decision in which behavioural remedies were imposed on Media24 for its involvement in exclusionary conduct. The remedy imposed included an obligation on Media24 to provide new entrants with credit terms as specified in the condition.

Media24 lodged an appeal with the Competition Appeal Court against the finding that it contravened Section 8(c) of the Competition Act. This was cross-appealed by the Commission, who sought an order that the Competition Appeal Court replace the Tribunal’s finding with one that Media24 has contravened the more serious contravention contained in Section 8(d)(iv) (the predatory pricing provision). On appeal, the Competition Appeal Court confirmed that ATC is not the appropriate cost standard in a predation case brought under Section 8(d)(iv) of the Competition Act. In the Tribunal, since the Section 8(d)(iv) case could not be proven, the Tribunal had instead found that Media24 contravened Section 8(c) (the general exclusionary provision). In reaching this conclusion, it used ATC as the appropriate cost benchmark together with a predatory intention. The Competition Appeal Court found that the attempt to rely on ATC with the dominant firm’s predatory intention is incongruent with the structure of Section 8 of the Competition Act, which emphasises conduct rather than intention.

The Competition Appeal Court went on to say that:

*ATC plus intention has no place in the scheme of s 8 (c) of the Act. It follows that the benchmark of AAC [average avoidable cost] must be employed when seeking to apply Section 8 (c) to a case of predatory pricing as opposed to the hybrid test which the Tribunal sought to apply in the present case without any attempt to reconcile its test with the manner in which s 8 promotes an objective test.*

In applying its conclusions to the Section 8(c) case, the Competition Appeal Court set out to determine whether the Commission established that Forum’s AAC exceeded its revenue during the complaint period. Ultimately, the Commission did not prove that Forum’s AAC exceeded its revenue, and as such, the Section 8(c) complaint failed. Similarly, in considering the complaint in terms of Section 8(d)(iv), the Competition Appeal Court noted that the Competition Act is drafted in precise terms. To successfully prosecute a Section 8(d)(iv) case

59 See footnote 53 at Paragraph 215.
60 Id. at Paragraph 221.
61 Id. at Paragraph 621.
62 There is no administrative penalty imposed for a first time contravention of Section 8(c) of the Competition Act.
63 Media 24 Proprietary Limited and the Competition Commission of South Africa, case No. 146/CAC/Sep16 (19 March 2018).
64 Id. at Paragraph 57.
the Commission would need to prove that the dominant firm is selling goods or services below their marginal or average variable costs. It was common cause in this case that Forum’s revenue exceeded average variable cost, and as such, the Section 8(d)(iv) complaint also failed.

As a result, the Competition Appeal Court ordered that the Tribunal’s decision is set aside and the complaint referral dismissed. The Commission was also ordered to pay the costs on appeal.65

The Competition Appeal Court decision demonstrates the difficulties that the Commission faces in successfully prosecuting abuse of dominance cases.

The Commission has appealed this decision to the Constitutional Court. A date for the hearing of the matter has not yet been set.

**Computicket**66

In this case the Tribunal was asked to determine whether a dominant firm in the market for the provision of outsourced ticket distribution services to inventory providers for entertainment events had abused its dominant position by securing exclusive agreements with clients.

Computicket is an outsourced ticket distributor (OTD) that sells tickets on behalf of providers of entertainment to members of the public. The providers range from theatres and concert promoters to sports stadia. Computicket was accused of using exclusivity in its agreements with inventory providers to exclude more innovative competitors from gaining a foothold in the OTD market.

The exclusivity agreements developed over time from an exclusivity period of approximately four months and in respect of a particular event in the initial contracts (in the late 1990s) to exclusivity in respect of all events for the duration of the contract (from 2005).

The 2005 agreements were for a minimum period of three years (as opposed to four months) and contained an annual renewal clause. The effect of the annual renewal clause was that if neither party cancelled three months prior to the expiry of the existing agreement, it would be renewed for a further year by default.67 Furthermore, the difference between the two contracts was that the initial agreements referred to a single event, while in the later agreements, exclusivity pertained to all events by the client.

It is also noteworthy that a feature of both agreements was that unless the client agreed to exclusivity, there would be no agreement. It was therefore an ‘all or nothing’ policy adopted by Computicket.68

The Commission’s main case was that Computicket contravened Section 8(d)(i) of the Competition Act, which prohibits a dominant firm from engaging in an exclusionary act that requires or induces a supplier or customer not to deal with a competitor. The Commission also relied on Section 8(c) (general ‘catch-all’ exclusion provision) and Section 5(1) (restrictive vertical agreement), however, since the burden of proof for the Commission to prove a contravention of either Section 8(c) of Section 5(1) is greater than for a contravention of Section 8(d)(i), as a first port of call, the Tribunal considered whether a contravention of Section 8(d)(i) could be sustained.

It was common cause that for the duration of the complaint period, Computicket was a dominant firm. In assessing whether the agreements constituted an exclusionary act, the

65 Id. at Paragraph 113.
66 *The Competition Commission and Computicket (Pty) Ltd Case No. CR008Apr10.*
67 Id. at Paragraph 69.
68 Id. at Paragraph 71.
Tribunal stated that the agreements are at least facially exclusive: ‘They prohibit inventory providers who are Computicket’s customers from utilising the services of a competitor for the duration of the contract without the written consent of Computicket.’

In proving a contravention of Section 8(d)(i) of the Competition Act, the Commission has to discharge its evidential onus of establishing an anticompetitive effect. Once the onus has been discharged, the Tribunal then has to consider whether the conduct complained of nevertheless results in any ‘technological, efficiency or other pro-competitive gains that outweigh the anticompetitive effect’. The onus is on the dominant firm to prove the ‘efficiency defence’.

The primary anticompetitive effect that the Commission argued for was that the agreements had a substantial exclusionary effect on rivals by foreclosing the market to them throughout the complaint period because they were not able to compete for sufficient inventory to reach the scale needed to compete effectively in the market.

On the evidence, it was shown that there was limited and ineffectual entry into the market. The Commission contended that this was as a result of the exclusionary nature of the agreements. No other theory for why entry was limited was offered to rebut this conclusion.

The Tribunal followed the approach adopted in South African Airways in order to establish whether the exclusionary act had an anticompetitive effect. In doing so, the Tribunal considered whether there was evidence of actual harm to consumer welfare. While some evidence was inconclusive, the Tribunal found that:

> there is sufficient evidence to suggest that the exclusive agreements had resulted in anticompetitive effects. The strongest evidence was that of foreclosure of the market to effective competition during the complaint period. Evidence concerning supra-competitive pricing effects, a decrease in supply by inventory providers, a reluctance by Computicket to timeously make use of available advances in technology and innovation and a lack of choices for end customers, was consistent with the Commission’s theory of harm. The cumulative effect of all these factors suggest that the Commission has established a case of anticompetitive effect on a balance of probabilities.\(^{72}\)

Computicket relied on evidence that its expert had identified from literature that could justify the existence of exclusive agreements on efficiency grounds. They are:

- a client-specific investment;
- b free-rider risk;
- c reduction in costs associated with splitting of inventory; and
- d lower transaction costs for consumers.\(^{73}\)

While these arguments were raised, the Tribunal ultimately concluded that Computicket had not done enough to discharge the onus to show that the exclusionary conduct was justifiable.

The conduct was therefore found to be exclusionary and a contravention of Section 8(d)(i) of the Competition Act and an administrative penalty of 20 million rand was imposed.

---

69 Id. at Paragraph 89.
70 Id. at Paragraph 91.
71 Competition Commission and South African Airways (Pty) Ltd Case No. 18/CR/Mar01,
72 See footnote 66 at Paragraph 230.
73 See footnote 66 at Paragraph 233.
Computicket has indicated its intention to appeal this decision to the Competition Appeal Court. It bears mention that at all junctures the economic expert witness of the Commission and Computicket disagreed on the approach to be adopted. While the approach adopted by the Commission’s expert ultimately found favour in this decision, these arguments demonstrate that abuse of dominance cases are increasingly tricky to successfully prosecute.

**ii Trends, developments and strategies**

In the 2017/2018 financial year, there was not a large number of enforcement decisions in relation to abuse of dominance, restrictive vertical practices or restrictive horizontal practices (that do not amount to cartel conduct). What remains clear from the abuse of dominance cases that have made their way before the competition authorities is that these kinds of cases are extremely complicated, which means that dominant firms are often able to successfully defend these cases on appeal. The amendments to the abuse of dominance provisions are primarily aimed at correcting the difficulties that the competition authorities have experienced in enforcing abuse of dominance complaints. These amendments include, but are not limited to:

- Requiring the dominant firm to show that its price is reasonable if there is a *prima facie* case of abuse of dominance because a dominant firm charged excessive prices.
- A prohibition on a dominant firm from imposing unfair prices or trading terms on a supplier that is a small or medium-sized business or a firm controlled or owned by historically disadvantaged persons.
- A prohibition on a dominant firm from avoiding or circumventing the provisions of (b) above.
- A lower burden of proof applicable to price discrimination if it involves differential pricing to small and medium-sized businesses or firms controlled or owned by historically disadvantaged individuals. According to the new test an action by a dominant firm is prohibited price discrimination if it is likely to have the effect of ‘impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively’. For all other firms, the test remains that the conduct is likely to have the effect of ‘substantially preventing or lessening competition’.
- Where there is a *prima facie* contravention of price discrimination (insofar as it involves small and medium-sized businesses or firms owned or controlled by historically disadvantaged provisions), it is not permissible to discriminate based solely on volumes.

Despite the fact that there have been few decisions relating to restrictive practices and abuse of dominance in the past, the Commission is increasing its focus on these matters. In the 2017/2018 financial year, a number of complaints against firms for alleged abuses of dominance were initiated and adjudicated upon. This includes:

- a complaint against Rooibos Limited, the largest producer of rooibos tea in South Africa for inducing rooibos tea farmers not to deal with rival rooibos team processors;
- a complaint against SA Airlink, a privately controlled regional feeder airline for allegations of excessive and predatory pricing;
- a complaint against Rand Refinery for exclusionary conduct that made it a requirement for dealers of Kruger rands, existing or prospective, to be members of the South African Association of Numismatic Dealers (this complaint was settled); and
a complaint against Blurock Quarries and Procon Precast for conduct amounting to margin squeeze and price discrimination (this complaint has been settled).

The Competition Commissioner has publicly indicated his intent to clamp down on abuse of dominance conduct. Given the success rate in these cases thus far, with Tribunal decisions forming the subject of appeal, more robust and detailed economic analysis will be required to ensure that these contraventions can be proven by the authority.

While the amendments are aimed at alleviating some of the challenges the competition authorities have faced in successfully prosecuting cases of this nature, it is unclear whether it will achieve that aim. In particular, the amendments are likely to make it more challenging for dominant firms to ensure compliance with the Competition Act.

iii Outlook

While the Commission has focused its attention on cartels and abuse of dominance, since this behaviour results in high prices to the disadvantage of citizens and economic efficiency, more will be required to successfully prosecute abuse of dominance cases. Given the complicated economic analysis that is required to effectively prosecute these cases, additional guidance on the interpretation of the provisions of the legislation, or alternatively legislative reform, may be required. Such legislative reform is in the pipeline but has not yet been promulgated into law, although these amendments are likely to be implemented in the near future.

It also remains to be seen whether the competition authorities will continue to use their platform to impose creative remedies on parties who have been found to contravene the Competition Act. While innovative conditions have been at the forefront of merger decisions in South Africa, the Media24 decision is novel in relation to abuse of dominance cases. Furthermore, while administrative penalties were not imposed by the Tribunal in this case (as the conduct the Tribunal found to have contravened the Competition Act involved a section that does not attract a penalty for a first time offence), the remedy imposed is arguably tantamount to the imposition of an administrative penalty. On appeal this remedy was overturned.

The amendments to the Competition Act will result in substantial changes to the way in which companies do business in South Africa.

The increased protection on small and medium-sized businesses and firms owned or controlled by historically disadvantaged persons creates increased obligations on dominant firms and may require substantial changes to pricing practices in order to ensure compliance.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Commission has extensive powers to conduct a formal inquiry in respect of the general state of competition in a market without necessarily referring to the conduct or activities of a particular firm.
Upon completing a market inquiry, the Commission must publish its report to the Minister of Economic Development with or without recommendations, which may include recommendations for new or amended policy, legislation or regulations; and recommendations to other regulatory authorities in respect of competition matters.\textsuperscript{76}

In addition to making recommendations, the Commission may also, among others, initiate a complaint against a firm for contraventions of the Competition Act.\textsuperscript{77} One of the amendments to the Competition Act is for the Commission to make findings and impose remedies that will be binding. In the background note to the Competition Amendment Bill it is stated that:

\begin{itemize}
\item[	extit{i}] Significant cases
\end{itemize}

\textbf{Liquefied petroleum gas}

In September 2014, the Commission initiated a market inquiry to determine whether there are anticompetitive features in the South African liquefied petroleum gas (LPG) market and how they can be remedied. The Commission’s Terms of Reference were published on 15 August 2014 and focused on high switching costs for bulk consumers, regulatory impediments to effective competition and limited growth of LPG usage by households.\textsuperscript{78}

The Commission completed its analysis and published its preliminary findings for comment on 10 May 2016, in which it identified that there were structural impediments and regulatory bottlenecks that negatively affect competition and that may hinder growth of the market. On 28 September 2016, the Commission extended the date of completion of the inquiry to 20 December 2016. The Commission released the final report of the inquiry on 22 March 2017.

\textbf{Retail sector inquiry}

In the 2015/2016 financial year, the Commission initiated a market inquiry into the grocery retail sector (retail inquiry).\textsuperscript{79} As part of the retail inquiry, the Commission is considering all traders that predominantly sell fast-moving consumer goods, whether as a wholesaler, retailer, or both. The scope of the retail inquiry, as set out in the Commission’s Terms of Reference,\textsuperscript{80} covers six major areas, including:

\begin{itemize}
\item[a] the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers;
\end{itemize}

\begin{footnotes}
\item[76] Section 43C(1) of the Competition Act.
\item[77] Section 43C(3) of the Competition Act.
\item[78] Published under Government Gazette No. 37903 on 15 August 2014.
\item[79] The inquiry commenced on 27 November 2015.
\item[80] On 30 October 2015, the Commission published the final Terms of Reference for the grocery retail sector in Government Gazette No. 39347 (Volume 604 pp. 73–82).
\end{footnotes}
b the impact of long-term exclusive leases on competition in the sector;

c the dynamics of competition between local and foreign-owned small and independent retailers;

d the impact of regulations, including municipal town planning and by-laws, on small and independent retailers;

e the impact of buyer groups on small and independent retailers; and

f the impact of certain identified value chains on the operations of small and independent retailers.

The inquiry is still ongoing but, according to the amended terms of reference, was due to be completed by 28 September 2018. This deadline was, however, not met and it is unclear when the inquiry will be finalised.

There have, however, been reports that the Commission has cut back on its investigations as a result of budgetary constraints.

Healthcare inquiry

The Commission is also conducting a market inquiry to determine whether there are anticompetitive features in the healthcare market with a particular focus on private rather than state-funded healthcare. As part of the inquiry, information has been gathered from eight key stakeholder groups, including hospital groups, pathology providers, radiology providers, registered medical schemes, administrators of medical schemes, managed care organisations, health insurance product providers and the government.

The healthcare inquiry began in May 2014, but given its complexity and the number of participants at various levels of the market, the inquiry is still ongoing. Public hearings conducted during the course of 2016 included discussions on:

a understanding the nature of the private healthcare market;

b how stakeholders interact with each other;

c how consumers access, evaluate and use information about the sector;

d how healthcare services are provided and funded; and

e the regulatory regime for the private healthcare market.

The Commission published its provisional report and recommendations on 5 July 2018 and requested stakeholder comment on the provisional findings and recommendations by 7 September 2018.

Subsequent to the call for submissions, the Commission received a number of requests for an extension of the submission period and, based on individual motivations, the Commission granted certain stakeholders extensions to complete and file their submissions. The final date of extension allowed by the Commission for all outstanding submissions was 15 October 2018.

The Commission’s provisional report and recommendations are extensive. The Commission has highlighted that the South African private healthcare sector is characterised by high and rising costs of healthcare and medical scheme cover, highly concentrated funders’

81 Published in Government Gazette No. 41512 on 23 March 2017.


and facilities’ markets, disempowered and uninformed consumers, a general absence of value-based purchasing, ineffective constraints on rising volumes of care, practitioners that are subject to little regulation and failures of accountability at many levels.

As a result of the complexity of the private healthcare market, the Commission has indicated that the market requires several interrelated interventions. The recommendations aim at improving transparency, accountability and the alignment of interests of consumers and funders. Some of the recommendations include changes to the way scheme options are structured to increase comparability between schemes and increase competition in that market, a system to increase transparency on health outcomes to allow for value purchasing and a set of interventions to improve competition in the market through a supply side regulator.

According to the amended terms of reference, the final inquiry report and recommendations was expected to be completed by 29 March 2019. 84

Other inquiries

In May 2017, the Commission initiated a market inquiry into the general state of competition in the land-based public passenger transport industry. In particular, the Commission set out to consider price setting mechanisms, price regulation, route allocation, licensing and entry regulations, allocation of operational subsidies, transport planning and transformation in the land based public transport industry. 85 In addition, in August 2017, the Commission initiated a market inquiry in order to understand what factors or features of the markets and value chain may lead to high prices for data services. 86 Both inquiries are still at the initial stages, with a call for submissions having being made. As at the time of writing no date has been set for the publication of the provisional report in the public passenger transport inquiry, but the Commission has announced that it intends to release its provisional report for the data market inquiry by 30 April 2019.

ii Trends, developments and strategies

The Commission’s appetite for market inquiries has increased over the period in review. However, it has become apparent that these inquiries require significant resources and have, in all instances, required extensions of time periods.

The process is furthermore burdensome on firms participating in an inquiry given the scope of the information gathered and the time periods within which submissions are required. The Commission’s budgetary constraints have also had an impact on the finalisation of its inquiries.

Any outcome, particularly in the healthcare inquiry, will be welcome, as the Commission’s approach to all complaints that have been lodged with it recently relating to issues being addressed in the healthcare inquiry is not to refer such complaint to the Tribunal. This approach of not referring complaints in the healthcare industry was adopted by the Commission on the basis that it has embarked on the healthcare inquiry and, as such, the conduct will be considered in that forum. 87 This outcome is, of course, not satisfactory for

---

84 Terms of Reference published in Government Gazette No. 42068 on 30 November 2018.
complainants, given that the Commission's inquiry will not automatically result in a finding of a contravention and will only result in recommendations being made, or alternatively a new complaint being initiated. However, complainants can privately refer their complaints to the Tribunal for adjudication in instances where the Commission elects not to do so.

Amendments to the Competition Act will significantly increase the Commission's powers to conduct market inquiries. Of significance is that the scope for an inquiry has been expanded from 'the general state of competition' in a market to also include an inquiry into levels of concentration and structure of a market. Furthermore, the Commission will be entitled to impose binding remedies, as well as recommend divestiture. Since divestiture is an extreme remedy (particularly if there has been no finding of anticompetitive conduct) such remedy will need to be ordered by the Tribunal.

In addition, the Minister of Economic Development will have the power to prompt the Commission to conduct a market inquiry, as well as the power to appoint deputy commissioners to chair market inquiries. As regards confidential information, the Minister of Economic Development will be permitted access to confidential information, and the Commission is empowered to determine whether information is confidential (which is currently under the remit of the Tribunal).

A positive in the amendments is that a time limit of 18 months is provided within which to conclude a market inquiry. This will assist in ensuring that these matters do not run over a number of years as has been the case in the majority of the market inquiries thus far. It must, however, be noted that the Commission can apply for an extension from the Minister of Economic Development.

iii Outlook

The year 2019 will bring greater certainty in relation to the outcome of many of the inquiries currently under investigation.

Notably, the Commission will not be limited to make only non-binding recommendations, but will be permitted to impose remedies that are reasonable and practicable.

V MERGER REVIEW

During the 2017/2018 financial year, the Commission received 377 merger notifications. This demonstrates a 9 per cent decrease from the 418 mergers received in the 2016/2017 financial year. While the Commission received fewer merger notifications in the 2017/2018 financial year than in the previous year, it finalised 388 mergers, which represents a slight increase from the 385 mergers finalised in the previous financial year. Of the finalised mergers, 120 were large, 260 were intermediate and eight were small mergers. During this period, 325 mergers were approved without conditions, while 52 were approved with conditions. This is a substantial increase from the 31 mergers approved with conditions in the 2016/2017 financial year, the 37 mergers approved with conditions in the 2015/2016 financial year and the 43 conditional approvals in the 2014/2015 financial year.89

88 Initiating a complaint only after the inquiry may have unintended consequences of anticompetitive conduct being time-barred and as such incapable of prosecution.
89 See footnote 7 at page 51.
The Commission also prohibited 12 merger transactions in the 2017/2018 financial year, which is more than double the five prohibited mergers in 2016/2017.

In March 2019, the Commission published final Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act (Guidelines). The Guidelines present the general methodology that the Commission will follow in determining administrative penalties when concluding consent or settlement agreements and when seeking an administrative penalty where there has been a failure to notify or prior implementation referral before the Tribunal.

For purposes of determining the administrative penalty that a firm will be liable to pay in instances of failure to notify and prior implementation, the Commission has proposed the following methodology:

a Step 1: determination of the nature or type of contravention – since failure to notify and prior implementation can take place in many forms, the Commission will consider how the failure to notify or prior implementation occurred. To the extent that the parties are competitors and the conduct amounts to a contravention of Section 4(1)(b) for example if the merging parties agree on prices, the conduct will be assessed under Section 4(1)(b) of the Competition Act and not as prior implementation. Furthermore, if the Commission determines that the conduct is wilful or deliberate, the Guidelines will not apply and the Commission will seek the maximum allowable penalty.

b Step 2: determining the base amount – the base amount will be double the applicable filing fee. The filing fees increased with effect from 1 January 2019 and are now 165,000 rand for an intermediate merger and 550,000 rand for a large merger.

c Step 3: duration of the contravention – in this step, the Commission will add to the base amount an amount calculated in terms of a formula. For contraventions not exceeding one year, the additional amount (to be added to the base amount) is 50 per cent of the base amount multiplied by the number of months of the contravention. For contraventions exceeding one year but less than two years, the additional amount is 75 per cent of the base amount multiplied by the number of months of the contravention and for contraventions exceeding two years, the additional amount is 100 per cent of the base amount multiplied by the number of months of the contravention.

d Step 4: considering factors that might mitigate or aggravate the amount reached in step 3.

e Step 5: rounding off this amount if it exceeds the cap provided for in Section 59(2) of the Act – the administrative penalty cannot exceed 10 per cent of the turnover of the firm in the Republic and its exports from the Republic for the preceding financial year.

Since these guidelines have only recently been published, they have not yet been used for purposes of imposing an administrative penalty in any failure to notify or prior implementation case.
In this landmark decision, the Constitutional Court confirmed that merger approval is a ‘once-off affair’. As such, once de facto control has been acquired, a party does not need to notify and seek approval from the Commission for a transaction when control is subsequently acquired in a different way.

In 2017, Hosken Consolidated Investments Limited (HCI) proposed to increase its shareholding in Tsogo Sun Holdings Limited (Tsogo) to more than 50 per cent. HCI already exerted de facto control over Tsogo pursuant to an unconditional prior merger approval issued by the Tribunal in 2014. In 2014, HCI sought approval for the acquisition of sole control of Tsogo. While HCI did not acquire control by virtue of Section 12(2)(a) of the Competition Act at the time as it did not acquire more than 50 per cent of the shares of Tsogo, it was common cause that HCI exerted de facto control within the meaning of Section 12(2)(g) of the Competition Act.

The Commission was of the view that the acquisition of more than 50 per cent of the shares crossed ‘a bright line’ by acquiring control in terms of Section 12(2)(a) of the Competition Act. HCI and Tsogo did not agree with the Commission’s analysis and approached the Tribunal for an order declaring that the proposed transaction does not require approval. The Tribunal declined to grant the order on the basis that it did not have jurisdiction.

On appeal to the Competition Appeal Court, the Competition Appeal Court disposed of the jurisdictional issue, finding that it and the Tribunal did have jurisdiction to hear and make a decision on the matter.

The Competition Appeal Court stated that Section 12(2) of the Competition Act does not list different kinds of control, each of which must be separately notified. Instead, it illustrates the different ways in which control may be acquired. The Competition Appeal Court went on to say that:

Merger approval is thus a ‘once-off’ affair. We find that the proposed transaction does not constitute a notifiable merger because the competition authorities have previously approved the acquisition of sole control of Tsogo in 2014 by HCI, and because HCI already exerts sole control of Tsogo pursuant to the 2014 merger approval.

The Competition Appeal Court therefore concluded that the Commission could not require the notification based on the reason that it wished to assess the implications of the 2017 transaction.

90 Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another [2019] ZACC 2.
91 Section 12(2)(g) of the Competition Act provides for the acquisition of control by a firm if they have the ability to materially influence the policy of the firm.
92 Hosken Consolidated Investments Limited and Another v. Competition Commission CAC Case No. 154/CAC/Sept17 at Paragraph 53.
93 Id.
On appeal, the Constitutional Court stated that there is no indication in Section 12(2) of the Competition Act that one form of control (notably *de jure* control) is more significant than any other form of control. Each of the instances of control listed in Section 12(2) of the Competition Act are freestanding and each, on its own, constitutes a ‘bright line’.  

The questions that the Constitutional Court considered in making its decision included (1) is the transaction notifiable simply because HCI now acquired *de jure* control in distinction to a different form of control (*de facto* control); and (2) can the respondents rely on the once-off principle to avoid having to notify the 2017 transaction? 

The Constitutional Court confirmed the once-off principle but stated that the competition authorities retain their power to revoke approval if a firm has breached an obligation attached to the approval. Accordingly, the Commission retains its wide powers in terms of the Competition Act to investigate the assurances given by the parties in 2014. The Constitutional Court agreed with the Competition Appeal Court that HCI and Tsogo were not obliged to notify the 2017 transaction to the Competition Authorities. However, the appeal only succeeded partially because it is within the power of the Commission to investigate assurances given during the 2014 merger approval proceedings in terms of Sections 15 and 16(3) of the Competition Act (the sections permitting revocation).

**Other**

As mentioned above, the Commission is increasingly approving mergers subject to conditions. Of the 52 mergers approved subject to conditions, public interest conditions were imposed on 32 mergers. Apart from a moratorium on retrenchments – which remains relatively commonplace in mergers and seems to be increasing in frequency – other public interest remedies imposed by the Commission in the 2017/2018 financial year include, among others, an obligation to maintain procurement from local suppliers; an obligation to continue procuring from small suppliers; an obligation to conclude a broad-based black economic empowerment (BEE) transaction within a certain period; an obligation to invest, maintain or increase the current level of local procurement of goods and services, use reasonable endeavours to promote the export and sale of manufactured products for sale to China, give preference to black-owned businesses and small businesses for independently owned service stations and set up a development fund to develop small businesses; an obligation to increase BEE shareholding within a certain period and set up a development fund to develop black enterprises; and an obligation to continue with internship programmes offered by the target firm in South Africa.

In terms of behavioural remedies, the competition authorities predominantly concerned themselves with cross-directorship. Remedies aimed at limiting the extent to which directors...
sit on the boards of competing companies and limiting the exchange of commercially sensitive information between competitors with common shareholders and directors were imposed in several transactions. Another remedy that was imposed in two mergers was divestiture.\textsuperscript{102}

\textbf{ii \quad Trends, developments and strategies}

The focus on public interest considerations has markedly increased. Only four public interest conditions were imposed in the 2010/2011 financial year, which increased to 22 and 28 in the 2011/2012 financial year and the 2012/2013 financial year, respectively. There was a decrease in the 2013/2014 financial year, with only 10 transactions being approved subject to public interest conditions, but this number increased substantially to 39 in the 2014/2015 financial year and 28 in the 2016/2017 financial year. During the period under review, the number has increased to 32.

From the above cases, it is clear that large international transactions garner significant interest from ministers and trade unions, and, where appropriate, significant creative conditions are imposed. Employment considerations have in earlier years been of significant concern, and continue to play a big role. However, in addition to maintaining employment levels, the competition authorities have now started to impose far more onerous conditions on merging parties to ensure local procurement, continued promotion of historically disadvantaged individuals through equity shareholding and the creation of large funds. These funds in particular have significantly increased over the years, from a 200 million rand fund in the Walmart/Massmart merger in 2012 to a 1 billion rand fund in 2016 in the AB InBev/SABMiller merger.

The conditions imposed, while aimed at protecting local industry, place a significant burden on international companies seeking to invest in South Africa. For example, in the Bayer decision, conditions to offer discounts to small emerging farmers as well as an obligation to continue with various social initiatives was imposed.

In addition to the trend to impose extensive public interest conditions, the Commission is also taking a more interventionist approach by prohibiting mergers between competitors that give rise, or have the potential to give rise, to a high market share accretion or monopoly position. However, the Tribunal does seem to more readily impose conditions aimed at addressing these concerns,\textsuperscript{103} as opposed to prohibiting these transactions.

A notable amendment to the Competition Act is the introduction of a new executive approval regime applicable to foreign investment. It is intended that the President of South Africa will constitute a Committee responsible for considering whether the implementation of a merger involving a foreign acquiring firm will have an adverse effect on the national security interests of the Republic. The President will be required to publish a list of national security interests (which has not yet been done). Some of the factors that will be considered in compiling the list include the impact of a merger transaction on the Republic’s defence capabilities and interest, the supply of critical goods or services to citizens and the economic and social stability of the Republic.

\textsuperscript{102} Bayer Aktiengesellschaft and Monsanto Corporation Case No. 2017Feb0004 and Vitas South Africa (Pty) Ltd and certain operations and certain assets of a group of companies and subsidiaries within Profert Holdings (Pty) Ltd Case No. 2017Jul0026.

\textsuperscript{103} Request for Consideration between Clover SA (Pty) Ltd and Nkunzi Milkway (Pty) Ltd and the Competition Commission case no. IM175Dec14 (020461) and Hollard Holdings (Pty) Ltd and Regent Insurance Company Limited and Regent Life Assurance Company Limited case No. LM253Mar16, Case No. IM193Oct17.
Where a merger requires approval by the Committee, the Commission or the Tribunal (as the case may be) cannot make a decision on the merger if the merger has been prohibited on national security grounds. As such, approval before the competition authorities will be delayed until a finding has been made by the Committee that is likely to have an impact on the timing of approval of a transaction.

iii Outlook

In light of the trends over the past few years, this interventionist trend is likely to continue. The competition authorities are carefully scrutinising mergers that have an impact on the public interest, and in light of the implementation of the Public Interest Guidelines on 2 June 2016,\footnote{Published in Government Gazette No. 40039 on 2 June 2016.} which give a clear indication of the Commission's approach in merger transactions, we are likely to see additional focus on these issues, particularly in light of the amendments to the Competition Act.

For example, public interest has been elevated to the same status as the competition analysis in a merger transaction. Furthermore, public interest grounds have been expanded to include ‘increasing the spread of ownership by workers’.

Given the level of scrutiny being applied to public interest factors lately and which will be centre stage going forward, merging parties will need to build in sufficient time for these issues to be properly ventilated, as well as allocate potentially required resources, when setting an implementation timeline. Considering the current economic climate, the competition authorities are likely to focus on ensuring the protection of local industry and employment.

VI CONCLUSIONS

The year in review has given rise to a number of novel decisions both in the merger and abuse of dominance areas. The competition authorities continue to review and finalise a large number of mergers and have shown increased focus on prosecuting collusive conduct as demonstrated by the number of complaints initiated and the number of dawn raids conducted. However, the extension of time periods on all the market inquiries means that significant resources will continue to be allocated to these investigations. The challenge will be to ensure that these inquiries can be finalised as expeditiously as possible and deliver suitable recommendations aimed at addressing the harm identified.

The substantial amendments to the Competition Act are likely to significantly affect the way in which companies do business in South Africa. While there is currently some uncertainty on how the proposed amendments will be interpreted and enforced by the competition authorities, we are likely to see a new body of case law being established to assist in the interpretation.
Chapter 23

SWEDEN

Peter Forsberg, Johan Holmquist and David Olander

I OVERVIEW

The current Swedish Competition Act (Competition Act)\(^2\) entered into force on 1 November 2008 and governs all types of actions that may distort competition. The Competition Act aims to incorporate EU competition law as far as possible. It is therefore interpreted in accordance with the case law of the Court of Justice of the European Union (CJEU).

The Swedish Competition Authority (SCA) is the central administrative authority for the administration and enforcement of competition law in Sweden. It is entrusted with investigative powers and, to some extent, decision-making powers. In behavioural cases (i.e., anticompetitive agreements and abuse of dominant market positions), the SCA rather acts as a prosecutor and will have to make its cases before a court. If the SCA can prove a violation, a court may impose a corporate fine of up to 10 per cent of company turnover. However, the SCA may itself impose an injunction to stop ongoing infringements. Following an amendment to the Competition Act on 1 January 2018, the SCA can also adopt decisions in merger control cases.

As of 1 September 2016, a reorganisation of the court system was made effective, where the Market Court, formerly the highest competition court, ceased to exist. The reorganisation was intended to create a more unified and concentrated judicial system for competition cases. The Patent and Market Court (PMC), a division within the Stockholm District Court, is now the competition court of first instance. Its decisions and judgments can be appealed to the Patent and Market Court of Appeal (PMCA), a division within the Svea Court of Appeal in Stockholm. A leave to appeal is required if the PMCA is to hear a case. The PMCA is, in general, the court of last instance. However, in certain instances, the PMCA can grant leave for a judgment or decision to be appealed to the Supreme Court. If that were to happen, the Supreme Court would also need to grant a leave to appeal before the case could be heard.

Breach of the competition rules is not a criminal offence in Sweden. However, a trading prohibition may be imposed on an individual in cases of particularly serious cartel infringements. The SCA will seek a trading prohibition only where it is considered to be in the public interest and the individual has seriously failed to fulfil his or her obligations.

---

1 Peter Forsberg is a partner, and Johan Holmquist and David Olander are associates at Hannes Snellman Attorneys Ltd.

In circumstances where either the company benefits from leniency or the individual has contributed and personally cooperated to a significant extent, the SCA may grant immunity from a trading prohibition.3

In December 2016, Sweden implemented the EU Directive on Antitrust Damages Actions by enacting a new Antitrust Damages Act.4 The purpose is to facilitate injured parties in litigating their competition damages claims. The Act includes provisions that clarify and simplify court proceedings and introduces several new reforms, such as a rebuttable presumption that cartels cause harm; clearer limitation periods; and that a final infringement decision will constitute full proof of the occurrence of a competition law violation in a follow-on damages case.

II CARTELS

Chapter 2 of the Competition Act holds the substantive provisions relevant for cartels and other anticompetitive agreements. Chapter 2, Sections 1 and 2 are modelled on Article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Section 1 prohibits the cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Section 2 sets out the possible exemptions to the prohibition found in Section 1.

The Swedish leniency programme was amended in 2014 to better reflect the EU leniency system. The new leniency regime introduced a marker system whereby a company may apply for a marker and submit limited information about an ongoing infringement. The minimum requirement to obtain a marker is to submit information on the market affected by the infringement, the other companies involved and the nature of the infringement. To secure the marker, the company must submit a complete application within a specified period. Unless the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity.

i Significant cases

Insurance services – reviewability of dawn raids

In April and June 2017, the SCA conducted a dawn raid against a number of insurance companies (Söderberg & Partners et al) for suspected bid rigging in public tenders. This was done after a prior decision by the PMC allowing the raid. During the raid the SCA ‘mirrored’ several hard drives and, with the consent of the companies, brought and reviewed them at the premises of the SCA. However, when the SCA copied certain documents from the hard drives and included them in the case file, one company appealed the measure to copy the documents, arguing that the documents were outside the scope of the PMC’s dawn raid decision. After both the PMC and the PMCA had rejected the appeal, the Supreme Court heard the case.5 The Court stated that if a company contests the SCA’s right to review or copy certain material on the grounds that the measure is out of scope of the original dawn raid decision, the SCA must refer the dispute to the Swedish Enforcement Agency and request its assistance in order to review or copy the contested material. In this case, the SCA had not

3 KKVFS 2012:2.
4 The Antitrust Damages Act (2016:964).
5 Supreme Court, decision of 30 November 2018 in Case No. Ö 5652-17.
requested such assistance, which the Supreme Court found to be a violation of the company’s right to a fair trial under the European Convention on Human Rights. The Court stated, however, that the appropriate remedy for such a violation was economic compensation, rather than to create a new right of review before the PMC. The decisions of the lower courts were thus affirmed.

Data communications services in Gothenburg – bid rigging?
The SCA sued TeliaSonera, Sweden’s largest telecommunications operator, and GothNet, a local network operator in Gothenburg, and requested a total fine of 35 million kronor for having formed a bid-rigging cartel during a public procurement procedure by the City of Gothenburg in 2009. The SCA claimed that when the City of Gothenburg procured data communication services, TeliaSonera and GothNet agreed that TeliaSonera would refrain from submitting a tender in the procurement, even though GothNet and TeliaSonera were competitors. Subsequently winning the bid, GothNet contracted TeliaSonera as a subcontractor. The PMC ruled in favour of the SCA’s claim and ordered each of the parties to pay 8 million kronor in fines. TeliaSonera appealed the judgment, which was reversed by the PMCA. In its judgment from February 2018, the PMCA stated that the nature of the information provided by TeliaSonera to GothNet entailing that TeliaSonera would not be submitting a bid in the procurement was a concerted practice within the meaning of the competition rules. However, considering the economic and legal context of the procurement in which the coordination took place, the court held that the information exchange could not be regarded anticompetitive by object. Since there was not sufficient evidence of anticompetitive effects, the SCA’s claim was rejected.

Moving companies – market sharing?
The SCA sued three companies in the moving company sector, Alfa Quality Moving, NFB Transport Systems and ICM Kungsholms, for a total fine of 42 million kronor. The companies had in two merger transactions included non-compete clauses of five years, which, according to the SCA, were too far-reaching. The SCA claimed that the clauses constituted illegal market sharing agreements. However, the PMC held that the clauses were not anticompetitive by object and that the SCA had not shown any anticompetitive effects. The PMCA affirmed the judgment on appeal. The court pointed out that non-compete clauses may be necessary for the successful implementation of a merger transaction, since such clauses provide the buyer with a certain degree of security. The SCA had argued that the moving companies knowingly had exceeded the three-year period outlined in the Commission’s guiding notice on ancillary restraints. However, the PMCA found that the three-year period reflects the duration under which companies normally can assume to be protected under the Commission notice rather than the maximum duration allowed for a non-compete clause. Accordingly, the court did not hold the non-compete clauses to be anticompetitive by object. The PMCA further concluded that the SCA did not provide evidence of any anticompetitive effects.

---

6 PMCA, judgment of 13 February 2018 in Case No. PMT 761-17.
7 PMCA, judgment of 29 November 2017 in Case No. 7498-17.
ii  **Trends, developments and strategies**

In the past, the SCA has launched cartel cases against companies in the asphalt and petrol markets. For the past few years, the SCA has devoted greater resources to develop its cartel detection methods. Sectors that have been investigated more recently include construction, electronic equipment, and retail. On average, the SCA conducts a handful of dawn raids per year, and it receives approximately five leniency applications per year, of which approximately half are summary applications.\(^8\)

In December 2018, the SCA conducted a questionnaire survey of the level of corruption in the construction industry.\(^9\) Among the responding firms, 49 per cent believed that there were cartels in the industry, and 29 per cent of those believed that cartels operated on a regular basis.

iii  **Outlook**

The fight against cartels is one of the main priorities of the SCA, and measures relating to the detection of cartels has increased, especially concerning bid-rigging cartels in public procurement procedures. There are several ongoing investigations at the SCA of companies suspected of having colluded at the bidding stage.

### III  **ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE**

Chapter 2, Section 7 of the Competition Act sets out the prohibition against abuse of a dominant position. The provision is modelled on Article 102 TFEU.

i  ** Significant cases**

**Access to waste collection infrastructure**

In February 2018, the SCA imposed an injunction on FTI, a waste management company, ordering it to withdraw a contract termination with its competitor, TMR. FTI allows packaging producers to fulfil their legal obligation by offering a service to collect and recycle packaging waste emanating from their products in exchange for a weight-based fee. FTI’s waste collection is primarily based on a nationwide infrastructure of public waste containers. Since 2012, FTI had granted access to this infrastructure to TMR, which offered its services in competition with FTI. In 2016, FTI terminated the access contract with TMR. Having investigated the case, the SCA found that the infrastructure of public waste containers constituted an essential facility and that FTI had abused its dominant position by refusing to deal with TMR. The PMC upheld the injunction on appeal.\(^10\) FTI has appealed the decision, and the case is pending before the PMCA.

**Tobacco coolers labelling system**

The SCA sued Swedish Match, a major supplier of *snus* (a moist tobacco product), for abuse of dominance. The SCA claimed that Swedish Match had foreclosed its competitors by implementing a uniform system for shelf labels in *snus* coolers that it had lent to retail stores. Although Swedish Match permitted sales of other suppliers in those coolers, the SCA argued

---

8 During the period 2010–2014.
10 PMC, decision of 21 January 2019 in Case No. PMÄ 2741-18.
that the labelling system restricted competitors from marketing their products in terms of price and brand, especially since the marketing of tobacco products in general is subject to significant legal restrictions. Swedish Match, on the other hand, had argued, *inter alia*, that its intentions were to ensure that the labelling system complied with the strict marketing regulations relating to tobacco products. The PMC found that Swedish Match had abused its dominant position, and imposed fines of 38 million kronor. However, the PMCA reversed and ruled in favour of Swedish Match. In its judgment from June 2018, the PMCA held that the labelling system indeed was capable of foreclosing competitors by way of restricting their marketing possibilities. However, the court further held that such exclusionary behaviour by a dominant undertaking is objectively justified – a concept rarely accepted by the EU courts – when the purpose is to ensure compliance with tobacco marketing regulations.

**Stock exchange services – foreclosure of competitor**

The SCA sued the operator of the Stockholm stock exchange, Nasdaq, for abuse of dominance and requested fines of 28 million kronor. The case revolved around a data centre provided by Verizon. Nasdaq leased one area in the data centre, and offered its customers, such as high frequency traders, the opportunity to rent space in the same area. The co-location with Nasdaq gave the customers a fast connection to Nasdaq’s trading systems. The events were triggered when Burgundy, a Nasdaq competitor, publicly announced that it had entered into a deal with Verizon and intended to move into the same data centre as Nasdaq. In effect, Burgundy would become part of Nasdaq’s co-location service without having to set up its own service. Nasdaq responded by putting pressure on Verizon, threatening to move to another data centre if Burgundy was allowed into the centre. The SCA did not argue that access to the data centre was essential. Instead, it relied on the concept of a ‘naked restriction’, claiming that Nasdaq’s reaction to Burgundy’s announcement had no other purpose than to restrict competition. The PMC, however, held that this was a normal exercise of contractual rights and competition on the merits. Consequently, the PMC rejected the SCA’s claim. The judgment has been appealed and the case is pending before the PMCA.

**ii Trends, developments and strategies**

The SCA is continuing to investigate markets and sectors at risk of competition concerns. Certain sectors are more closely scrutinised by the SCA due to previous regulations that have created structural imbalances in the market (such as the pharmacies and telecommunications sectors). As abuse of dominance cases are difficult to prove, the SCA has formed a division specialised in such anticompetitive behaviours.

**iii Outlook**

In Sweden, many sectors have previously been characterised by a monopoly or few companies dominating the market. Many of these markets are now in the process of being, or have recently been, deregulated, which has often resulted in a market with non-existent, or low, competition. Therefore, the SCA has focused its efforts on these markets. Of particular interest is the market for passenger transport – both public transport in the cities and nationwide transportation of passengers.

---


12 PMC, judgment of 15 January 2018 in Case No. PMT 7000-15.
IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

E-commerce and the sharing economy

In 2018, the SCA analysed the Swedish e-commerce and sharing economy sectors, and concluded that the emergence of these industries has resulted in increased price transparency and price competition, which is beneficial for consumers. Swedish e-commerce companies are facing increased foreign competition, as this sector has grown significantly over the past few years. The technical development of a digital payment infrastructure has made it more secure for consumers to purchase products or services online. The SCA’s investigation found that a large majority of the sales in the retail sector are still made in physical stores, although e-commerce constitutes a competitive restraint on the physical stores. The SCA also stressed that the increased digitalisation and technical improvement of the e-economy has resulted in new challenges for competition authorities to tackle, for instance that the higher degree of price transparency may facilitate price collusion. The SCA indicated that the increased digitalisation of companies’ business models in the e-commerce and sharing economy sectors will require the SCA to implement more advanced and sophisticated investigation routines.

The investigation found that the sharing economy sector is largely based on digital platforms, which give rise to network effects. The services provided within the sharing economy increase the supply on the market, which results in lower prices and increased choice for consumers. A platform can decide to offer its services for a low price or without charging for its services at all in order to expand more rapidly. A large number of users and collection of user data can give a platform significant market power, which might not be reflected by its revenue figures. The SCA’s investigation found that there is a risk that the current merger control regime does not cover concentrations between platform companies with low revenue but that have significant market power and the potential to impede or hinder the development of effective competition. The SCA has indicated that one solution could be to complement the current turnover thresholds with a ‘size of transaction’ system.

ii Trends, developments and strategies

The SCA may commence a market investigation either by itself or after a complaint. The sector investigation may result in an additional investigation of a specific undertaking or the provision of guidance to the undertakings concerned so that they can modify their behaviour in order to avoid an additional investigation.

iii Outlook

Similarly to the Commission, one of the SCA’s priorities in 2018 concerned the development of the e-economy and sharing economy, and how the growth of these sectors will affect the competition authorities’ enforcement function as well as the risk of anticompetitive conduct. The SCA has pointed out that the growth of the e-economy has, for instance, resulted in increased price transparency, which is beneficial for consumers as it increases price competition but, correspondingly, facilitates the risk of collusion between companies. The SCA has recognised that the authority’s investigation methods are challenged with
the increased digitalisation of the economy as the competition rules need to be applied to
digitalised (rather than offline) market conditions. It can be expected that the development of
the e-economy and sharing economy will remain one of the SCA’s main priorities.

V STATE AID

There is no specific national legislation concerning state aid. However, Articles 107–109
TFEU have been implemented through lex specialis on the application of EU state aid
(2013:338), which entered into force in July 2013. In addition, the Local Government Act14
states that giving support and financial aid to individual businesses is forbidden. According
to Chapter 2 Article 8 of the Local Government Act, municipalities and counties are allowed
to implement measures to promote local business in general, but not to target their efforts
towards a specific company.

The Swedish Transparency Act15 is based on the state aid rules, and requires reporting
to the Commission of all publicly owned or financed operations reaching certain thresholds.

i Significant cases

State aid cases are not very common in Swedish courts. Most cases concern the sale of facilities
or businesses from municipalities to private operators for prices significantly lower than the
market price. Sweden has also been under review of the Commission multiple times, as only
the Commission can approve targeted state aid.

The Supreme Administrative Court has on two occasions in recent years heard cases
on state aid.

Sale of a property

The municipality of Karlskrona decided in February 2008 to sell a property to the
construction company NCC for 5 million kronor, despite a higher bid for the property from
another interested buyer.16 The Supreme Administrative Court stated in its judgment that
the municipality had failed to conduct an independent valuation of the property, and not
considered the higher bid. The Supreme Administrative Court therefore concluded that the
agreement entailed individually targeted support to NCC, and that the contract with NCC
therefore was contrary to Chapter 2 Article 8 of the Local Government Act.

In the second case, which was announced simultaneously to the above-mentioned, the
Supreme Administrative Court concluded that there was no question of illegal state aid.17
In March 2008, the City Council of Årjäng decided, through an exchange contract with a
natural person, to transfer a property for 650,000 kronor and to acquire another property
for 4.9 million kronor. An independent valuation was not conducted, and the sale of the
property was not publicly announced. Shortly after the transaction, the municipality made
an independent valuation of the properties through an independent valuation company.
The first property was then valued at 600,000 kronor and the latter at 5.5 million kronor.

16 Supreme Administrative Court 2010 ref 119.
17 Supreme Administrative Court 2010 ref 119 II.
The court found that the municipality had not intended to directly support the acquiring company and that the transaction in itself did not constitute such support. Hence, the appeal was rejected.

Publicly owned company

In February 2009, a company owned by the municipality of Vänersborg purchased a factory consisting of two properties for 17 million kronor from a private operator. Six months later, the municipality sold the properties to Hammar Nordic Plugg AB, which only three weeks later resold the properties for 40 million kronor. After a complaint to the Commission, the Commission decided that the difference between the price should be repaid to the municipality. The case was appealed to the CJEU, which upheld the decision of the Commission.

The Commission approving Swedish state aid

In recent years, the Commission has on several occasions approved financial support from Swedish municipalities for different infrastructure projects. For example, in 2013, the Commission authorised the municipality of Uppsala to co-finance a new multi-purpose arena. The Commission stated that the public financing was proportional to the objectives pursued. Furthermore, in 2014, the Commission approved state aid granted by Sweden to the operator of Västerås Airport in the form of capital injections from its public shareholders, and under a national scheme for aid to regional airports. In 2016, the Commission also approved state aid granted by Sweden to the operator of the two airports of Sundsvall and Skellefteå.

Trends, developments and strategies

The majority of state aid cases in Sweden are related to municipalities selling property at significantly lower prices than market value. There has, however, been a decrease in the number of such cases in recent years.

The SCA has considered it unnecessary to submit a report to the Commission in accordance with the Transparency Act when the state or the municipalities do not control manufacturing undertakings with a turnover exceeding €40 million.

Outlook

Certain projects concerning infrastructure facilities in the more remote areas of Sweden are dependent on financial support and state aid. Those projects will depend heavily on authorisation from the Commission.

---

18 Case T-253/12 Hammar Nordic Plugg AB v. Commission [2015].
VI MERGER REVIEW

In 2018, the SCA received 80 merger notifications. Two cases went to Phase II, of which one was cleared following the in-depth investigation. The second case is currently pending.

A concentration meets the thresholds and needs to be notified to the SCA if the combined aggregate turnover in Sweden of all undertakings concerned exceeds 1 billion kronor, and at least each of two undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

Where the first threshold of 1 billion kronor is met, but the second threshold is not, the SCA may order a party to the concentration to notify a concentration if there are particular grounds for doing so. Such grounds may be when an undertaking already holds a strong market position and acquires a smaller or newly established undertaking. The acquirer may also in such circumstances submit a voluntary notification. In general, the SCA encourages undertakings to make voluntary notifications of mergers.

i Significant cases

Cheese brands

In December 2018, three dairy producers (Arla Foods, Norrmejerier and Falköpings Mejeri) notified their intention to acquire the intellectual property licensing company Svensk Mjölk via a joint venture arrangement. Svensk Mjölk licenses several cheese brands to some 20 companies, including dairy producers, food wholesalers and retailers. After an initial market survey, the SCA has decided to open an in-depth review of the case that is currently pending.

Security services

In the autumn of 2018, the SCA cleared the security company Nokas’ acquisition of Avarn Security after an in-depth review in Phase II. The merger parties operated on the market for security guards, technical security systems and operation centres. The market essentially consisted of the two merger parties and one other competitor, Securitas. In Sweden, the merged entity’s market share would amount to around 25–45 per cent, whereas Securitas’ would be around 50–60 per cent. In its effects analysis, the SCA analysed bidding data from the past three years. It concluded that the merging parties were not close competitors, which meant that the concentration would not significantly reduce competition.

District heating pipes

In October 2015, the SCA initiated a Phase II investigation to examine the notified acquisition by Logstor of Powerpipe. The relevant product market was the production and sale of district heating pipes. In February 2016, the SCA filed a lawsuit to prohibit the concentration. However, the lower court found that the merger would not significantly impede the existence or development of effective competition and approved the merger. The SCA appealed the judgment to the PMCA. This was the first merger case in 18 years to reach an appellate court. The key issue was the scope of the relevant geographic market. The SCA argued that the relevant geographic market solely covered the Swedish market. However,

22 SCA, Case No. 661/2018.
the PMCA\textsuperscript{24} held that the market comprised the EEA and Switzerland. The PMCA further held that the merged entity would not acquire a dominant position on this market, nor did other circumstances indicate that the concentration would significantly impede the existence or development of effective competition. Consequently, the PMCA affirmed the judgment.

\textbf{ii} \quad \textbf{Trends, developments and strategies}

In comparison to previous years, the number of notifications to the SCA has increased steadily in Sweden and a majority of the notifications have been cleared in Phase I. In cases where there is an absence of vertical links and horizontal overlaps, the SCA often handles the matter with speed and a decision may be received significantly quicker than 25 working days.

Another topic of interest is that the Swedish merger control regime makes it possible for the SCA to request a transaction to be notified if there are particular reasons to so do, and even if the turnover thresholds are not exceeded. The acquirer may also in such circumstances decide to submit a notification voluntarily. The SCA has issued guidance that explains that a voluntary notification should be considered if the transaction can be expected to awaken fears and criticism among customers or competitors. The feature of voluntary notification is a particular mechanism in Swedish merger control.

In 2015, the SCA introduced further guidance for notifications and the assessment of concentrations. The guidance is an update of earlier guidance issued in 2010, and contains more accurate and updated information on merger control based on previous experience of the SCA. The purpose of the guidance is to improve awareness of the investigations of the SCA, contribute to greater predictability and ensure good conditions for cooperation between the parties and the SCA, contributing to a more efficient and effective investigation.

\textbf{iii} \quad \textbf{Outlook}

As of 1 January 2018, the Competition Act was amended to grant the SCA extended decision-making powers in merger control cases. One argument for the reform was to increase conformity with the merger control procedure of the Commission and in other Member States. However, the reform did not receive a uniformly positive response, and it has been argued that the safeguards surrounding the SCAs decision-making process are not as well developed as, for example, the Commissions. It remains to be seen how the reform will be implemented in practice.

\textbf{VII CONCLUSIONS}

As of September 2016, a reorganisation of the court system was made effective. The reorganisation was intended to create a more unified and concentrated judicial system for competition cases. Since the inception of the new court system, the SCA has so far lost all cases that have reached the PMCA. As a result, the SCA has indicated that it will take a more relaxed stance on litigation in the future, and focus on rule of law issues in its decision-making procedure.

\textsuperscript{24} PMCA, judgment of 24 November 2016 in Case No. 7499-16.
Chapter 24

TAIWAN

Stephen Wu, Rebecca Hsiao and Wei-Han Wu

I OVERVIEW

Prioritisation and resource allocation of enforcement authorities

The Taiwan Fair Trade Commission (TFTC) is in charge of the enforcement of the Fair Trade Act of Taiwan, Republic of China (TFTA). The TFTA is the major competition legislation in Taiwan. It was promulgated on 4 February 1991 and became effective on 4 February 1992. On 22 January 2015, the Legislative Yuan approved the amendments to the TFTA. The amendments, which took effect on 6 February 2015, are tantamount to the most sweeping reform of the TFTA since it came into effect. The amendments cover a wide range of legal provisions under the TFTA, such as merger control, cartel enforcement, restrictive competition and unfair competition, which will have significant impact on companies’ business operations as well as their compliance guidelines.

The TFTA can be divided into two parts:

a restrictive business practices, which cover monopolies and the abuse of dominance, combination (merger control), concerted actions (cartel), fixing of resale prices and other restrictive business practices (such as boycotts, discriminatory treatment, solicitation of trading counterparts by improper means, tying and other restrictions imposed on trading counterparts’ business activities without due cause); and

b unfair trade practices, which cover counterfeiting, false advertisements, damage to business reputation, illegal multilevel sales, and other deceptive or obviously unfair conduct capable of affecting trading.

The TFTC has various functions, from policymaking and market surveys to law enforcement. The TFTA empowers the TFTC to:

a draft and formulate fair trade policies and regulations;

b review fair trade matters;

c conduct studies on particular markets or business activities and economic conditions;

d investigate and determine whether an enterprise has violated the TFTA; and

e handle any other matters related to fair trade practices.

1 Stephen Wu is a partner and Rebecca Hsiao and Wei-Han Wu are associate partners at Lee and Li, Attorneys-at-Law.

2 For those case precedents cited in this chapter, all provisions referred to are based on its original chapter numbers under the version of the TFTA at the time of the TFTC’s decision or ruling.

3 The term ‘enterprise’ means any company, sole proprietor, partnership, trade association, or any individual or association that sells products or services. All enterprises are subject to the TFTA.
The TFTC may, on its own initiative or upon complaint, investigate cases that involve unfair competition. In the investigation, the TFTC may:

a. ask the parties and any third party to give a statement;
b. ask relevant agencies, organisations, enterprises or individuals to submit books and records, documents, and any other necessary materials or exhibits; and
c. search or inspect the office, place of business or other locations of the relevant organisations or enterprises.

Any person who, without reasonable grounds, refuses an investigation or withholds evidence may face an administrative fine of NT$50,000 to NT$500,000. If the person remains uncooperative despite receiving another notice, the TFTC may continue to issue notices of investigation, and may impose additional fines of NT$100,000 to NT$1 million until such person cooperates with the TFTC.

As of 6 February 2012, the TFTC is no longer under the supervision of the Executive Yuan and is now an independent government body. The TFTC may, if it is satisfied that one or more enterprises have violated the TFTA, impose administrative sanctions against enterprises. In addition, the new TFTA recognises the TFTC as an independent agency with expertise and credibility to make decisions at the level of the executive system. Hence, enterprises punished by the TFTC may seek a remedy by filing a lawsuit against the TFTC with the administrative court directly without having to appeal against the TFTC’s decision with the Executive Yuan first. Civil and criminal liabilities for violation of the TFTA should be determined by the courts. Except for business libel, enterprises will face criminal liabilities only if they fail to cease the violation pursuant to the TFTC’s order.

### Enforcement agenda

The TFTC’s goals are to promote free and fair competition and strong economic growth. It sets its priority objectives every four years. The TFTC’s priority objectives for the period from 2017 to 2020 are as follows:

a. to continue the aggressive enforcement of cartel regulations and to improve the effectiveness of the operation of antitrust funds;
b. to actively participate in the international community of competition law, expanding international and cross-border cooperation and building a foundation for mutual assistance on global cases;
c. to promote the concept of fair and efficient competition; and

d. to establish industry-specific guidelines to facilitate enforcement and compliance.

### CARTELS

#### Definition

Cartels are regulated by the provisions governing concerted actions under the TFTA. A concerted action is the conduct of any enterprise, by means of contract, agreement or
any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby to restrict each other’s business activities. A concerted action is limited to a horizontal concerted action at the same production or marketing stage, or both, which would affect the market function of production, trade in goods, or supply and demand of services.

ii Significant cases

Record-breaking fine on power producers (2013)

The TFTC rendered a decision on 13 March 2013 penalising nine independent power producers (IPPs) that are members of the Association of IPPs. The TFTC found that, from August 2008 to October 2012, at Association meetings, these IPPs agreed en bloc to refuse to amend power purchase agreements with the Taiwan Power Company, and not to adjust the sale price of electricity even when there was a decline in electricity production costs.

The TFTC found that the IPPs’ joint refusal could disrupt the functioning of the market, since each participating IPP could boost its profits by maintaining the current sale price when its electricity production costs decreased. Eventually, refusal to adjust the price would lead to a price hike for the public. The TFTC therefore found the joint refusal to be a material violation of the concerted action regulation. To penalise the nine IPPs for the concerted action, the TFTC invoked the newly amended punishment provision under the TFTA – the fine formula – in which the maximum fine imposed on a violating enterprise can be up to 10 per cent of its turnover during the previous fiscal year. By applying the fine formula, the total fine imposed in this case was NT$6.32 billion, which is the highest amount imposed in a single cartel case in the TFTC’s enforcement history.

The IPPs filed an administrative appeal against the TFTC’s decision with the Executive Yuan. Although the issue regarding whether the TFTC calculated the fines recklessly is still being disputed in the administrative appeal procedure, the substance of the case (i.e.,

---

5 Any other form of mutual understanding means a meeting of minds other than a contract or agreement, regardless of whether it is legally binding, which would in effect lead to joint actions. A resolution of an association’s general meeting of members or board meeting of directors or supervisors to restrict the activities of its member enterprises will also be deemed a horizontal concerted action.

6 If any enterprise is found to have violated the cartel regulations under the TFTA, the TFTC may order it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take any necessary corrective measure. The TFTC may further impose an administrative fine of between NT$100,000 and NT$50 million. If the perpetrating enterprise fails to discontinue or rectify its conduct or take any necessary measure as ordered, the TFTC may reissue its order and set another time limit, and may impose another administrative fine of between NT$200,000 and NT$100 million, until the enterprise has discontinued or rectified its illegal conduct or has taken such necessary corrective measure. Moreover, the latest amended TFTA provides that, in the case that the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 per cent of the relevant enterprise’s turnover in the previous fiscal year. If the perpetrating enterprise disobeys the TFTC’s order and fails to cease or rectify such conduct, or take necessary corrective action within the given period, or engages in the same or similar violation after the TFTC order, the enterprise will face a criminal fine of up to NT$100 million, and the persons in charge will face a prison term of up to three years, a criminal fine of up to NT$100 million, or both.

7 TFTC decision letter dated 15 March 2013, Ref No. 102035.

8 In September 2013, the Executive Yuan ruled that the TFTC had calculated the fine recklessly. In particular, the fine formula came into effect in April 2012, and chronologically, the alleged concerted action
whether the action of the IPPs amounted to a concerted action) was further contested in the administrative litigation process after the Executive Yuan made a decision upholding the TFTC’s second-time decision in September 2013. On 5 November 2014, the Taipei High Administrative Court (High Court) revoked the TFTC’s decision mainly because as no market exists in the subject case, the IPPs cannot be deemed as competitors with the capability of competing with each other in quantity or price. The High Court viewed that the subject case should be simply a contractual dispute, rather than a competition law matter.

The TFTC appealed to the Supreme Administrative Court. In July 2015, the Supreme Administrative Court revoked the High Court’s judgment and remanded the case to the High Court on the basis that several issues, such as whether a relevant market exists, whether the IPPs reached a meeting of minds and whether the IPPs’ conduct affected the market function, require further clarification. The TFTC filed an appeal against the judgment of the Taipei High Administrative Court. Then, in September 2018, the Supreme Court revoked and remanded the case again to the Taipei High Administrative Court. To date, there is no final decision on this case.

This is the first case in which the fine formula has been adopted by the TFTC. As such, it is anticipated that the interpretation of whether a case should be considered as a material violation and how the 10 per cent turnover fine calculation formula should be calculated will be clarified in the subsequent administrative decision and court judgments. Furthermore, the TFTC has shown how heavy-handed it can be when the public’s interests are at stake; as such, enterprises that receive a high degree of public attention should exercise caution when interacting with their competitors.

Sanction on dairy products suppliers and convenience stores for price fixing (2011)

On 19 October 2011, the TFTC found that Wei-chuan, Uni-President and Kuang-chuan, three leading dairy product suppliers, had violated the prohibition against concerted action under the TFTA by increasing the prices of milk products at the same time and by the same amount, which affected competition in the domestic milk product market. Consequently, the TFTC imposed a fine of NT$12 million on Wei-chuan, NT$10 million on Uni-President and NT$8 million on Kuang-chuan.

According to the TFTC’s investigation, because of the increased cost of raw milk, milk product suppliers felt pressure to raise milk product prices. Nonetheless, the price hikes imposed by Wei-chuan, Uni-President and Kuang-chuan did not reflect their respective costs of purchasing raw milk. For example, the prices of all Wei-chuan’s, Uni-President’s and Kuang-chuan’s one-litre and two-litre milk products were raised by NT$6, regardless of their original prices. This situation ran counter to commercial practice, because Wei-chuan, Uni-President and Kuang-chuan should have had different pricing structures. Consequently, the TFTC concluded that this price adjustment by Wei-chuan, Uni-President and Kuang-chuan was reached through a conspiracy among them. Since Wei-chuan, Uni-President and Kuang-chuan jointly hold more than an 80 per cent share in the Taiwanese milk market, this conspiracy jeopardised consumers’ interests.
The raw milk cost escalation led to another parallel-pricing case. Immediately after its milk decision, the TFTC concluded in a decision dated 2 November that four leading convenience stores, 7-Eleven, Family Mart, Hi-Life and OK, raised the prices of their freshly brewed coffee (with milk added) in the same week by the same increment. Without any justification for the simultaneous price adjustment, such conduct constitutes illegal concerted action, which is prohibited by Article 14 of the TFTA; thus, the TFTC imposed a fine of NT$16 million on 7-Eleven, NT$2.5 million on Family Mart, NT$1 million on Hi-Life and NT$500,000 on OK.

The TFTC indicated in the decision that the convenience store coffee market is highly concentrated where the combined market share of the four convenience stores exceeds 80 per cent. Therefore, any collusion among them would prejudice consumer interest and market competition. According to the TFTC’s investigation, these four stores offer 48 products that are variations of brewed coffee with added milk. Nevertheless, the prices for all these products were simultaneously raised by NT$5, regardless of being different in size, flavour and ingredients. Meanwhile, although the four convenience stores claimed that the price increase reflected the rise in raw milk cost, the TFTC viewed their price adjustment differently. Applying the same logic that it did in the milk decision, the TFTC explained that, since each convenience store has its own operational costs and management policy, increasing price by the same amount, at the same time and for the same product was impossible unless the convenience stores had colluded.

In both decisions, the TFTC pointed out that a concerted action can be proved not only by direct evidence such as a contract or agreement, but also by circumstantial evidence or empirical rules. In these cases, the three suppliers and four convenience stores’ uniform price increases without reasonable calculations as a justification could be considered as circumstantial evidence of their conspiracies.

After losing their appeal before the Executive Yuan, the dairy suppliers subsequently brought a lawsuit to contest the TFTC’s decision. The Taipei High Administrative Court sided with the TFTC. According to the Court’s judgment, since the determining factors of a price are myriad and should vary among suppliers, it is inconceivable that the price increase by the dairy suppliers would eventually be uniform, unless evidence suggests otherwise. The dairy suppliers lost their case because they failed to provide convincing evidence. On 12 June 2014, the Supreme Administrative Court rendered a judgment in favour of the TFTC’s decision on grounds that are almost the same as the view expressed by the High Court.

In addition, the four convenience stores in the coffee case filed a lawsuit against the TFTC’s decision after its unsuccessful appeal with the Executive Yuan. On 19 December 2012, the Taipei High Administrative Court ruled that the increase in the coffee price by each convenience store was merely to reflect the cost increase. Since it is common market practice to raise the coffee price by NT$5 each time, there was no evidence to support the TFTC’s allegation that the convenience stores coordinated with each other to determine the price increase. Instead, the price increase by NT$5 may have been merely a price leader or price follower or parallel pricing conduct, which is not illegal from an academic perspective. It was also doubtful whether the relevant market should be narrowly defined as a ‘convenience store coffee market’, which is an oligopolistic market. Without a clear market definition, the TFTC was unable to confirm whether the alleged price increase, if due to an illegal conspiracy, could have any effect on the relevant market. Based on these reasons, the TFTC’s decision was revoked.
The TFTC appealed against the Taipei High Administrative Court’s judgment. The Supreme Administrative Court found that certain legal issues needed to be clarified further, and remanded the case to the Taipei High Administrative Court on 14 May 2013. On 5 December 2013, the Taipei High Administrative Court issued a remanded judgment that was in favour of the convenience stores and revoked the TFTC decision regarding the alleged illegal concerted action. The TFTC then appealed against the High Court’s second judgment. In its decision, dated 18 April 2014, the Supreme Administrative Court dismissed the TFTC’s appeal. As the Supreme Administrative Court’s ruling is final, the TFTC’s decision was revoked and the case is now over.

###iii Trends, developments and strategies

####Circumstantial evidence

In the past, the TFTC often had difficulty securing direct evidence to prove the existence of a cartel. To improve the TFTC’s enforcement effectiveness, the new TFTA permits the TFTC to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations, etc. By way of this amendment, the new law substantially shifts the burden of proof regarding the existence of an agreement among competitors from the TFTC to the enterprises that are investigated or penalised. Thus, in the future, for an enterprise under investigation, it is advisable to present evidence in a timely manner to prove that its business decision was made independently and reasonably to rule out any possibility of being viewed as participating in a price-fixing scheme due to parallel activities in the market.

####Leniency programme

The 2011 amended TFTA introduced the leniency programme for cartel participants (Article 35) and imposed a higher fine for cartel violations (Article 40). Under the authorisation of the amended TFTA, the TFTC promulgated the regulations for the leniency programme in early 2012, which specify, *inter alia*, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and confidentiality treatment. The adoption of the leniency programme is expected to affect the enforcement of cartel regulations in Taiwan significantly.11

Pursuant to the TFTA, the consequences of violating the cartel prohibitions under the leniency programme are as follows:

a. For any violation of the prohibitions against concerted action, the TFTC may order the violating entity to cease and rectify its conduct or take necessary corrective action within the time prescribed in the order. In addition, it may impose upon such violating entity an administrative penalty of between NT$100,000 and NT$50 million, which can be doubled if the violating entity fails to cease and rectify the conduct or take any necessary corrective action after the lapse of the prescribed period.

b. If the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 per cent of the violating enterprise’s revenue of the previous fiscal year.

---

An enterprise violating the cartel prohibitions under the TFTA can be exempted from or be entitled to a reduction of the above fine if it meets one of the following requirements and the TFTC agrees in advance that the enterprise qualifies for the exemption or reduction:

- prior to the TFTC knowing about the unlawful cartel activities or commencing its *ex officio* investigation, the enterprise voluntarily reports in writing or orally to the TFTC the details of its unlawful cartel activities, provides key evidence and assists with the TFTC’s subsequent investigation;
- during the TFTC’s investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists with the TFTC’s subsequent investigation; or
- only a maximum of five companies can be eligible for a fine exemption or reduction in a single case: that is, the first applicant can qualify for a fine exemption, while the fine for the second to the fifth applicants can be reduced by 30 to 50 per cent, 20 to 30 per cent, 10 to 20 per cent, and 10 per cent or less respectively.

An enterprise that has coerced other enterprises to join or not to exit the cartel cannot be eligible for a fine exemption or reduction.

**The first application of the leniency programme: ODD**

In September 2012, the TFTC found that four optical disk drive (ODD) manufacturers – Toshiba-Samsung Storage Technology Korea Corporation (TSSTK), Hitachi-LG Data Storage Korea Inc (HLDSDK), Philips & Lite-On Digital Solutions Corporation (PLDS) and Sony Optiarc Inc (SOI) – had conspired during the bidding process held by Hewlett-Packard Company (HP) and Dell Inc (Dell), and hence violated the cartel regulations under the TFTA. This case marks the first time that the TFTC dealt with a cartel through the leniency programme introduced into the TFTA at the end of 2011.

According to the TFTC, from September 2006 to September 2009 these four ODD manufacturers, during or before the bidding procedure held by HP and Dell, exchanged their bidding prices and expected bid ranking through e-mails, telephone calls and meetings. In addition, in several bidding cases they agreed on the final price and ranking in advance while exchanging other sensitive information such as capacity and amount of production among themselves. A market survey indicated that the four ODD manufacturers jointly occupied at least 75 per cent of the ODD market. Meanwhile, HP’s and Dell’s notebooks and desktops made up around 10 per cent of the Taiwanese relevant market. As 90 per cent or more of the disk drives used in HP’s and Dell’s notebooks and desktops were purchased through bidding processes, the four ODD manufacturers’ bid rigging had certainly affected the supply and demand in the domestic ODD market. Therefore, the TFTC fined TSSTK, HLDSDK, PLDS and SOI NT$25 million, NT$16 million, NT$8 million and NT$5 million, respectively.

The TFTC indicated that it started to investigate the case because some parties involved in the cartel pleaded guilty and settled the case with the US Department of Justice in November of the previous year. After the commencement of the TFTC’s investigation, one manufacturer applied to the TFTC for leniency and provided all relevant evidence to

---

12 TFTC decision announced on 24 September 2012. The full content of the decision letter has not been published due to the protection of the leniency applicant.
the TFTC in accordance with the new leniency programme under the TFTA. Having fully cooperated with the TFTC, the leniency applicant was awarded a full exemption from the fine. The identity of the applicant is being kept confidential by the TFTC.

This case is notable because it represents the first time the TFTC concluded a case successfully with the help of a leniency applicant after the leniency programme came into effect. The case is also significant because it involved a global cartel, and the public record suggests that the TFTC sought assistance from competition authorities in the United States and the EU to conduct the investigation.

The highest fine imposed on foreign enterprises for a cartel infringement: Capacitor

On 9 December 2015, the TFTC imposed fines on seven aluminium capacitor companies (Nippon Chemi-Con Corporation (NCC), Hongkong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation (Rubycon), Elna Co, Ltd (Elna), Sanyo Electric (Hong Kong) Ltd (Sanyo HK) and Nichicon (Hong Kong) Ltd (Nichicon HK)) and three tantalum capacitor companies (Nec Tokin Corporation (Nec Tokin), Vishay Polytech Co, Ltd (Vishay Polytec), and Matsuo Electric Co, Ltd (Matsuo)) for participating in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity and terms of trade to reach agreements, which conduct was sufficient to affect the market function of capacitors in Taiwan.

The practices violated the cartel regulations under the TFTA. The TFTC therefore imposed administrative fines of NT$1.87 billion on NCC, NT$82.9 million on NCC HK, NT$293.8 million on NCC TW, NT$1.25 billion on Rubycon, NT$76.6 million on Elna, NT$842 million on Sanyo HK, NT$111.3 million on Nichicon HK, NT$1.22 billion on Nec Tokin, NT$31.2 million on Vishay Polytec and NT$24.3 million on Matsuo.

The total amount of the fines was NT$5.79 billion. The TFTC indicated that the Japanese capacitor companies had convened several multilateral meetings and engaged in bilateral communications since the 1980s, and had exchanged sensitive business information to reach agreements. Products involved in this case include aluminium capacitors and tantalum capacitors. Seven aluminium capacitor companies (NCC, NCC HK, NCC TW, Rubycon, Elna, Sanyo HK and Nichicon HK) have been involved in this case, each to a different extent and duration. Starting from at least 2005 to January 2014 at the latest, the companies convened market study meetings, cost-up meetings and Hong Kong sales manager meetings in Japan and other countries, or conspired bilaterally via emails, telephones or gatherings to exchange sensitive business information. The three tantalum capacitor companies (Nec Tokin, Vishay Polytec and Matsuo) also exchanged sensitive business information in the market study meeting and conspired bilaterally via emails, telephones or gatherings to reach agreements.

The TFTC pointed out that aluminium capacitors are mainly used in larger electronic products, for example PCs, household appliances, home video games consoles and power supplies. Tantalum capacitors are mainly used in thin and small electronic products, such as notebooks, mobile phones and handheld games consoles. Domestic electronics companies largely rely on the companies involved in this case for the supply of capacitors. Even though there are a few aluminium capacitor companies in Taiwan, their scale is far smaller than that...
of the Japanese capacitor companies. On the other hand, there are no domestic tantalum capacitor companies; all tantalum capacitors are fully imported. The total revenue for the companies involved in this case from their aluminium capacitors and tantalum capacitors was around NT$50 billion and NT$16 billion, respectively, during the term of their concerted action. NCC, Rubycon and Nichicon are the top three aluminium capacitor companies in the world. The tantalum capacitor companies involved in this case also have considerable global market shares. Hence, such conduct of the companies had a direct, substantial impact on the domestic markets with reasonably foreseeable effects.

The TFTC sees the Capacitor case as a successful outcome of its efforts in international enforcement cooperation with other competition authorities throughout the years. The TFTC had worked with competition authorities of the US, the EU and Singapore in its investigation of the subject case from the beginning. In addition to coordinating a synchronised investigation action on 28 March 2014, the TFTC also exchanged enforcement experiences with those agencies through telephone conferences and emails. The TFTC’s decision is the first among these competition agencies, and will be of great concern internationally as the case is still under investigation in the EU, the US, Japan, Korea, Singapore and China.

Meanwhile, the TFTC invoked the ‘10 per cent rule’ (i.e., for a serious concerted action, the fine can be up to 10 per cent of the violating enterprise’s revenue in the last fiscal year; see below for details) when determining the fines imposed on the capacitor manufacturers. This is the first case that the TFTC applied this fine formula to foreign enterprises and the one with the highest fines that the TFTC has imposed on foreign enterprises. It is noteworthy that the fines imposed by the TFTC can be up to 10 per cent of an enterprise’s ‘global revenues’ instead of 10 per cent of the revenues generated in Taiwan only.

**Facilitating practices theory**

The TFTC’s 2004 sanction on CPC and FPC, the two oligopolists in the petrol industry, for fixing gasoline prices is the first time that the TFTC decided a concerted action case involving facilitating practices, and is highly indicative of the TFTC’s future approach to such cases. Since then, enterprises may not use advance announcements to test their competitors’ attitude before making joint price rises. The decision sets a new precedent for the treatment of concerted actions, and may protect consumers’ interests by discouraging the widespread commercial practice of coordinated price rises. In its 2009 judgment, the Supreme Administrative Court upheld the TFTC’s finding that the price adjustments via prior information exchanges amounted to an unlawful coordinated action via a ‘form of mutual understanding’ prohibited under Articles 7 and 14 of the TFTA.

**iv Outlook**

**Compliance programme**

To assist Taiwanese enterprises establish internal compliance rules to curb their risk of violating antitrust laws of other countries, in December 2011 the TFTC published its Guidelines on Setting up Internal Antitrust Compliance Programme (Guidelines) and Antitrust Compliance-Dos and Don’ts (Principles of Conduct).
According to the Guidelines, an enterprise should stipulate an antitrust compliance programme appropriate for its business strategies and corporate culture. The programme should cover at least the following measures to ensure compliance:

- developing a corporate culture where legal compliance is essential;
- stipulating policies and procedures that everyone should observe;
- providing education or training programmes;
- establishing audit, review and report mechanisms;
- creating proper rewards and punishments; and
- designating a means for contact or a consultant.

To allow each enterprise to grasp what is and is not permissible, the TFTC published the Principles of Conduct, including types of violation under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct lists dos and don'ts for concerted action (cartel), restrictions on resale price, monopoly and abuse of market power.

The Guidelines and Principles of Conduct are administrative directives with no binding legal effect; however, the TFTC encourages Taiwanese enterprises to take their own initiative and draft their own compliance programmes so as to lower their risk of violating the relevant laws. In addition, besides referring to the Guidelines and Principles of Conduct, each enterprise, while drafting such programmes, should take into consideration its corporate culture and industry characteristics.15

**Fine calculation formula**

According to the TFTA, if the TFTC considers a concerted action to be serious, it may impose a fine of up to 10 per cent of the violating enterprise’s revenue of the previous fiscal year. The TFTC has published rules on the calculation of fines through the fine formula.16 Pursuant to the fine formula, a ‘serious’ concerted action is one that materially affects the competition status of the relevant market where the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT$100 million; or the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT$50 million).

In addition, the fine imposed on a serious cartel should be reached based on the ‘basic amount’ and ‘adjusting factors’, according to the fine formula. The basic amount refers to 30 per cent of the total amount of turnover of the relevant products or services during the period the cartel is active. Adjusting factors include aggravating factors such as being punished for violating cartel or monopoly regulations within the previous five years, and mitigating factors such as full cooperation during the TFTC’s investigation. As shown in the Capacitor case (see Section III.iii), the TFTC seems to hold the view that the 10 per cent cap should be based on the violating party’s 'global' revenues instead of Taiwanese sales only.

---


16 This fine formula can also be applied to serious violations of the monopoly regulations.
III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Definition
The TFTA defines a monopoly as a situation in which an enterprise faces no competition or has such a superior market power that it is able to exclude competition in a relevant market.\(^{17}\) Two or more enterprises as a whole will be deemed to have the status of a monopolistic enterprise if they do not in fact engage in price competition.

An enterprise meeting one of the following requirements may be deemed as a monopolistic enterprise, provided, however, that an enterprise will not be deemed a monopolistic enterprise if its market share does not reach 10 per cent or its total sales in the preceding fiscal year are less than NT$1 billion:\(^{18}\) the market share of the enterprise in a relevant market reaches 50 per cent; the combined market share of two enterprises in a relevant market reaches two-thirds; and the combined market share of three enterprises in a relevant market reaches 75 per cent.

An enterprise not qualified under the above criteria or falling under the exception may still be deemed a monopolistic enterprise if the establishment of such enterprise or any of the goods or services supplied by such enterprise to a relevant market are subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded (Article 8 of the TFTA).

While the possession of monopoly power is not illegal per se, a monopolist is prohibited from abusing its dominant position in any of the following methods:

- using unfair means to exclude, directly or indirectly, other enterprises from entering the market or otherwise participating in competition;
- improperly determining, maintaining or changing the prices of goods or services;
- requiring a counterpart to the transaction to provide preferential treatment without proper cause; and
- engaging in any other abusing acts of its dominant market position (Article 9 of the TFTA).

ii Significant cases

Local CD-R manufacturers filed complaints with the TFTC in June 1999 against Koninklijke Philips Electronics NV (Philips), Sony Corporation (Sony) and Taiyo Yuden Co, Ltd (Taiyo Yuden) for an unlawful concerted action, abuse of their dominant power and tying of their technologies in joint licensing CD-R manufacturing technologies. In a decision dated 20 January 2001, the TFTC found that Philips, Sony and Taiyo Yuden had committed an unlawful concerted action, abuse of their dominant power and tying of their technologies in joint licensing CD-R manufacturing technologies. In a decision dated 20 January 2001, the TFTC found that Philips, Sony and Taiyo Yuden had committed an unlawful concerted action and abuse of monopoly power, and fined them NT$8 million, NT$4 million and NT$2 million respectively. The three companies appealed to the Executive Yuan. In November 2001, the Executive Yuan overturned the TFTC’s decision and remanded the case to the TFTC. The TFTC made another decision on 25 April 2002, fining the three companies NT$8 million, NT$4 million and NT$2 million respectively for an unlawful

---

\(^{17}\) In defining the relevant market, both the relevant products or services and the geographical markets will be taken into consideration.

\(^{18}\) The monopoly threshold may be amended in the wake of the new TFTA.

\(^{19}\) TFTC decision letter dated 20 January 2011, Ref No. 100012.
concerted action and abuse of monopoly power. The Executive Yuan upheld the TFTC’s 2002 decision. The tree companies appealed to the Taipei High Administrative Court. In 2003, the Taipei High Administrative Court overturned the TFTC’s decision and ordered the TFTC to make a proper disposition upon further investigation. The TFTC appealed to the Supreme Administrative Court, but the appeal was dismissed by the Supreme Administrative Court in 2007. The TFTC applied for a retrial, but the application was dismissed by the Supreme Administrative Court in 2009.

The Taipei High Administrative Court overturned the TFTC’s 2002 decision, and the Supreme Administrative Court dismissed the TFTC’s appeal because the courts found that:

a. the three companies were not competitors, as their technologies were not substitutable in making CD-Rs, and hence their joint licensing did not constitute a concerted action;

and

b. the three companies are monopolistic enterprises in the CD-R technology market and they abused monopoly power, but the fines imposed by the TFTC were improper because the three companies should not have been penalised for abuse of market power before 3 February 1999 as they were not the monopolistic enterprises defined under the TFTA at that time, and the amounts of the fines did not reflect the interest (i.e., the ratio of the royalties) received by the three companies.

In its decision dated 28 October 2009, the TFTC ruled that the three companies are monopolistic enterprises in the CD-R technology market, and that they abused monopoly power by improperly maintaining the formula to calculate the licence fees even when the market had drastically changed, refusing to provide important trade information on the licensed patent technologies and prohibiting their trading counterparts from contesting the validity of the patent – all of which are abuses of market power. Considering the Taipei High Administrative Court’s accusation of its previous improper assessment of the fines, the TFTC reduced the fines imposed on Philips, Sony, and Taiyo Yuden to NT$3.5 million, NT$1 million and NT$500,000 respectively. It stated that, while the Taipei High Administrative Court overturned the TFTC’s 2002 decision, the Taipei High Administrative Court and the Supreme Administrative Court upheld the TFTC’s findings that the three companies as a whole had the same status as a monopolistic enterprise by virtue of their joint licensing, and that they abused monopoly power. It further pointed out that from 1999 to 2001, when the CD-R market grew significantly and there was a substantial shift in market demand and supply, the three companies refused the licensees’ request to change the formula for the calculation of royalties. When the three companies negotiated the licence agreements with the licensees, they did not make full disclosure regarding the content, scope and term of validity of the subject patent, and they also prohibited other enterprises from raising objections on the patent’s validity. The above-mentioned conduct violated the prohibitions on abuse of market power provisions under the TFTA.20

20 In 2011, the TFTC reissued its decision, as per the order of the Supreme Administrative Court, but still ruled that the parties had abused their market power. Despite the subsequent appeal and administrative lawsuits, the TFTC’s 2011 decision was eventually upheld and confirmed by the Supreme Administrative Court in July 2013.
Largest-ever fine on Qualcomm (2017)\(^{21}\)

At its commissioners’ meeting on 11 October 2017, the TFTC ruled that Qualcomm Incorporated (Qualcomm) has a monopolistic market position in the baseband chip markets of code-division multiple access, wideband code division multiple access, long-term evolution and other cellular communication standards, but that:

\[ a \] it refuses to grant licences to competing chip companies;
\[ b \] it requests that companies enter into restrictive clauses;
\[ c \] it refuses to grant licences to enterprises that do not enter into licence agreements;
\[ d \] it enters into exclusive rebate clauses with specific enterprises; and
\[ e \] the conduct involved in its overall licensing model caused harm to competition in the baseband chip markets, which directly or indirectly prevents other enterprises from competing through unfair means that are in violation of Article 9.1 of the TFTA.

Therefore, a fine of NT$23.4 billion was imposed on Qualcomm. This is the largest fine ever imposed in the TFTC’s enforcement history.

The TFTC’s decision has sparked intense debate among the local industries and governmental agencies. In particular, Taiwan’s Ministry of Economic Affairs expressed its concern that the TFTC has punished a company that has always been a valuable partner for the Taiwanese communications and semiconductor industry, and believed that the TFTC should have considered Taiwan’s broader economic policy goals before handing down the heavy fine on the chipmaker. More rarely, out of a total of seven commissioners, three issued dissenting opinions criticising the decision, implying that the TFTC’s internal view on the subject matter is split.

Qualcomm filed an appeal against the TFTC’s decision with the Intellectual Property Court. On 9 August 2018, the TFTC and Qualcomm reached a litigation settlement whereby Qualcomm agreed to abide by and implement specific commitments relating to licensing cellular standard essential patents to the Taiwanese handset manufacturers, and thus lifted the TFTC’s antitrust concern on Qualcomm’s SEP licensing practices. In addition, Qualcomm agreed not to contest the fine instalment amounts already paid, totalling NT$2.73 billion, and committed to undertake commercial initiatives for investments in and collaborations with Taiwan over a five-year period.

The TFTC said that after comprehensive consideration, it reached the settlement with Qualcomm based on public welfare. This is the first time the TFTC has settled in litigation proceedings. As part of the settlement, Qualcomm need not pay the remainder of the fine that was initially imposed. The TFTC expects that this case would not only effectively form a sound competition environment for the cellular communication industry but also bring a positive impact on the semiconductor, cellular communication and 5G technology development in Taiwan.

The settlement, however, has been criticised by many scholars, who are concerned that if the fine can be substituted by investment, the settlement conveys the message to the public that companies can engage in antitrust behaviour in Taiwan. In addition, the licensing commitments made by Qualcomm are very ambiguous, which may not solve the licensing

---

\(^{21}\) TFTC decision letter dated 20 October 2017, Ref No. 106094.
problems. Finally, while most countries around the world are preventing companies from engaging in antitrust behaviour and have imposed significant fines on Qualcomm, Taiwan is on the opposite track.

With respect to the criticism, the TFTC responded that as the competent authority in charge of matters pertaining to antitrust law, it shall consider not only market competition but also economic situation that is affected. The TFTC entered into the settlement because the harm and impact to companies and industries in Taiwan due to the lengthy administrative litigation procedure may be hard to recover from, and because the commitment made by Qualcomm can achieve the purpose of imposing the significant fine and benefit companies and industries in Taiwan.

iii Trends, developments and strategies
On 5 February 1999, the requirement that monopolistic enterprises be announced by the TFTC was taken out of the TFTA. Since then, an enterprise will be deemed a monopolistic enterprise if it falls within the definition of monopolistic enterprises under Article 8 of the TFTA. Given the rapid pace of change in market and business models, competition law has been characterised by a high level of uncertainty, making the collection of evidence of violation a challenging task.

Administrative settlement
On 2 May 2002, the TFTC established a software market monopoly taskforce to investigate the perceived monopolistic dominance of Microsoft Taiwan Corporation (Microsoft) in the software market, unreasonable software pricing and inappropriate bundling of Microsoft Office software. On 3 October 2002, Microsoft requested an administrative settlement with the TFTC. At its commissioners’ meeting on 31 October 2002, the TFTC agreed in principle to Microsoft’s request for administrative settlement, and began the negotiation process. On 26 February 2003, Microsoft submitted a settlement offer to the TFTC on behalf of itself and the relevant affiliates. At its commissioners’ meeting on 27 February 2003, the TFTC decided that the settlement offer was in the public interest and agreed to sign an administrative settlement agreement with Microsoft.

The signing of this administrative settlement agreement was followed by a fall in software retail prices, improved after-sales service and a general enhancement of consumer welfare. The agreement also created opportunities for companies in the information and communications technology sector to utilise source code made available by Microsoft in new product development, and a licensing environment based on fair competition. It has been proven that the use of administrative settlement helps reduce wastage of administrative resources and avoid time-consuming lawsuits, encourages compliance with the TFTA by enterprises, and implements competition law and competition policy.

Regulation on oligopolists
In TFTC’s 2004 decision to penalise CPC and FPC for price fixing, a commissioner pointed out that as the two companies did not in fact engage in price competition, they as a whole may be deemed to have the status of a monopolistic enterprise and their concurrent increases in prices may constitute an abuse of monopoly power. However, monopoly power is
exercised on a lasting or structural basis while a simple coordination of competitive conduct of competitors under a project may be analysed under the provisions on the prohibition of cartels. If the TFTC could not find a ‘normal market price’ based on economic analysis to prove any improper price change by the oligopolists, it could not prove whether they had abused monopoly power. Given the difficulty in proving an improper price change, the TFTC decided that the fixing of petrol prices by CPC and FPC was a concerted action involving facilitating practices.

**Increase of maximum fine**

Under the TFTA and according to the fine formula, the maximum fine for monopolistic enterprises’ abuse of market power has increased from NT$50 million to 10 per cent of the violating enterprise’s revenues in the previous fiscal year. However, since the fine formula came into effect, it has not been applied to a monopoly case.

**iv Outlook**

According to the amendment bill to the TFTA, the chief revisions to the monopoly provisions are as follows:

*a* raising the threshold for not being a monopolistic enterprise: if the total sales in the preceding fiscal year of an enterprise are less than NT$2 billion, such enterprise shall not be deemed a monopolistic enterprise. The raised threshold is in keeping with economic growth in recent years; and

*b* revising the definition where two enterprises may be deemed as the monopolistic enterprise as a whole: two or more enterprises will be deemed one monopolistic enterprise if they do not in fact engage in competition with each other, and thus they as a whole have the same status as a monopolistic enterprise. In addition, since competition activities cover not only competition in price but also in other categories, the amended provision changed the wording from ‘price competition’ to ‘competition’.

Furthermore, in November 2018, the TFTC published the draft amendments to Articles 39, 41 and 47-1 of the TFTA. Among the amendments, the TFTC proposes a provision regarding ‘suspension of statute of limitations’ for anticompetitive matters, such as abuse of dominance and cartels. To be specific, the five-year statute of limitations period for the TFTC to penalise the violating party of an anticompetitive matter will be suspended upon the launch of investigation by the TFTC. According to the TFTC, the aforesaid amendment aims to tackle the situation whereby the TFTC often runs short on time to close a complicated case involving multiple foreign companies and voluminous evidence within the current five-year period. The draft amendments are still subject to review by the Executive Yuan and then need to pass the three rounds of reading by the Legislative Yuan. Thus, whether and when the amendment will come into effect is currently unknown at this time.
SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Blu-ray patent pool\(^2\) (2011)

On 31 March 2011, the TFTC conditionally permitted a proposed combination for the joint operation of One-Blue by Hitachi, Panasonic, Philips, Samsung, Sony and Cyberlink.\(^3\) One-Blue will act as a licensing agent for the patent pool to license essential blue-ray disk (BD) patents for the manufacturing of backwards-compatible BD products. Upon the consummation of the combination, the participating parties will respectively acquire a one-sixth shareholding and then jointly operate One-Blue.

The relevant market of One-Blue is defined as ‘the domestic product market, technology market, and innovation market which are related to BD’. The basis for such broad definition is that the participating parties not only hold technologies for the manufacture of BD products but are also engaged in the manufacture of BD products.

Regarding competition analysis, the TFTC held that the proposed combination would not give rise to competition restraints due to the following arrangements in the applicable pool agreements:

\(\textbf{a}\) only essential patents will be included in the patent pool and the essentiality of the patents will be determined by independent patent experts, according to the pool agreements;

\(\textbf{b}\) the patent pool will be open to all patent holders, and thus it is not a closed pool, and all licensors of the patent pool are required to conduct individual licensing activities for any licensee requesting individual licences on a reasonable and non-discriminatory basis;

\(\textbf{c}\) licensors are prohibited from disclosing their confidential information so as to ensure that the confidential information will not be exchanged between licensors, resulting in a conspiracy among pool members;

\(\textbf{d}\) licensors cannot have access to licensees’ information provided for the application of per-batch licence before each shipment of product;

\(^2\) TFTC decision letter dated 31 March 2011, Ref No. 100002.

\(^3\) Although combination should be deemed helpful to lower transaction costs for Taiwanese enterprises when applying for licences, to prevent the participating parties from stifling competition through the patent pool the TFTC attaches six necessary conditions to eliminate any disadvantages from possible competition restraints, and to ensure the overall economic benefit, as follows: (1) the participating parties should not engage in any concerted action by entering into any agreement restricting the quantities or prices of BD products or by exchanging important transaction information; (2) the participating parties and One-Blue should not restrict licensees’ scope of technology use, trading counterparts and product prices; (3) the participating parties and One-Blue should not forbid licensees from challenging the essentiality and validity of the licensed patents; (4) the participating parties and One-Blue should not forbid licensees from researching and developing, manufacturing, using and selling competing products or adopting competing technologies during the licence term or after expiration of the licence; (5) the participating parties and One-Blue should not refuse to provide licensees with the content, scope and term of the licensed patents; and (6) the participating parties are required to provide executed copies of the pool agreements for the TFTC’s review.
the scope for the grant-back provision is limited to essential patents, and the royalties paid under the applicable pool agreement will qualify for the royalty rate for the grant back of essential patents; and

licensors are not prohibited from using competing technologies or developing competition standard or products.

The TFTC further explained that regarding BD technology, Taiwanese enterprises are in a position to adopt technologies that have been developed by others. If this combination were prohibited, Taiwanese BD products manufacturers would have to negotiate for licences with patent holders individually, and the transaction cost of individual negotiations and the accumulated royalties are expected to be higher than those involved in being granted licences through One-Blue. Therefore, licensing the essential BD patents through a patent pool is expected to make it easier for Taiwanese manufacturers to obtain licences for essential patents, lower the transaction cost and avoid the risk of infringement and litigation, which will promote competition among Taiwanese manufacturers, with consumers being the ultimate beneficiary.

On the other hand, since the participating parties are also engaged in the manufacturing and sales of BD products, the patent pool will increase the opportunity for third parties to use the licensors’ essential patents, which may stimulate competition in the downstream market. The licensors will not acquire sensitive information such as cost data, and will refrain from exchanging sensitive information among themselves, and thus upstream and downstream vertical competition will not be negatively affected.

In January 2013, the TFTC cleared another similar case with five conditions in which LG Electronics, Philips, Pioneer Corporation and Sony will jointly operate a DVD patent pool named One-Red.24 As the rationale adopted by the TFTC to analyse both One-Blue and One-Red cases is similar, it seems the TFTC may have set up reliable case precedents for patent holders intending to establish patent pools to follow and observe.

Merger of cable system operators25 (2010)

In a decision dated 29 October 2010, the TFTC conditionally permitted the proposed combination of Dafu Media Co Ltd (Dafu), Cheng Ting, Kbro and 12 cable system operators (SOs) controlled by Cheng Ting and Kbro. The case is noteworthy because the TFTC imposed a record-breaking 13 conditions for its clearance. Previously, the TFTC granted clearance in December 2009 for the combination between Taiwan Mobile Co Ltd (TWM) and Kbro with 10 conditions, although the transaction was not successfully concluded owing to other regulatory issues.

Kbro is a Taiwanese company that Carlyle has invested in, and Kbro itself has invested in 12 SOs. It provides general advertising services. The transaction involves Dafu’s acquisition of Kbro and the 12 SOs. While the parties are in different markets and there are no overlapping products, or upstream or downstream relations, the major shareholders of Dafu are the chair, vice chair and directors of TWM and Dafu’s affiliates. Since TWM is the second-largest mobile telephone and fixed-line telecoms service provider and has invested in four cable system operators, there will be a horizontal or vertical combination effect if Dafu and TWM jointly manage Dafu’s business. After considering the relevant market structure

---

24 TFTC decision letter dated 24 January 2013, Ref No. 102002.
25 TFTC’s decision letter dated 29 October 2012, Ref No.099004.
and competition, opinions from relevant industries, trends in technology development and
the maintenance of market competition after the combination, the TFTC concluded that the
overall economic benefit due to this transaction would outweigh the disadvantages of stifled
competition. Consequently, it permitted the subject transaction subject to the following four
conditions:

a preventing Dafu and its affiliates (collectively Dafu Group) from further combination
with other SOs to abuse Dafu Group’s market power;

b preventing Dafu Group from further vertical combination with channel providers to
abuse its market power;

c ensuring digitalisation of cable television and developments of digital convergence; and

d demanding information from Dafu Group to check its compliance with the conditions
imposed by the TFTC.26

26 The TFTC gave clearance on the combination on the following 13 conditions: (1) Dafu Group cannot
directly or indirectly acquire or own any shares in a Taiwan SO or its affiliates (other than those SOs in
this proposed transaction); (2) no director, supervisor or manager of Dafu Group can simultaneously serve
as a director, supervisor or manager in a Taiwan SO or its affiliates (other than those SOs in this proposed
transaction); (3) Dafu Group cannot sell any shares in a company of the group to TWM group companies
(including but not limited to TFN Media Co, Ltd and the SOs controlled by it, collectively TWM Group),
or directly or indirectly acquire or own any shares in a TWM Group company; (4) no director, supervisor
or manager of Dafu Group can simultaneously serve as a director, supervisor or manager in TWM Group,
and vice versa; (5) Dafu Group cannot collocate headends, share trademarks or customer service, or jointly
conduct any other business operation with other SOs not within Dafu Group; (6) Dafu Group cannot
increase the number of analogue channels being produced or distributed by companies in its group; (7)
Dafu Group cannot, jointly with other SOs or their affiliates, collectively procure programmes from
channel providers, set the purchase price for the procurement, boycott channel providers or conduct any
concerted actions as defined under the TFTA through any kind of agreements; (8) Dafu Group cannot
jointly with other programme distributors sell programmes produced or distributed by Dafu Group or
conduct any concerted actions as defined under the TFTA; (9) Dafu Group cannot, without reasonable
grounds, refuse to license, or impose different licence fee schedules on or place conditions other than
licence fees on other SOs, direct-to-home (DTH) operators, multimedia content transmission service
operators, or other competing wired or wireless content transmission service providers for broadcast
of channels produced or distributed by Dafu Group; nor can Dafu Group discriminate against them;
(10) Dafu Group cannot, without reasonable grounds, grant licences at difference prices or on different
transaction terms to other SOs, DTH operators, multimedia content transmission service operators,
or other competing wired or wireless content transmission service providers for broadcast of channels
produced or distributed by Dafu Group; (11) Dafu Group must actively (a) implement digitalisation of
cable television and two-way network construction, (b) fulfil the Digital Convergence Plan announced
by the Executive Yuan to popularise the digital cable television services, (c) obtain a licence from channel
providers to broadcast through internet protocol television (IPTV) and reasonably relicense such rights
to IPTV operators to ensure the fair competition among different platforms and (d) assist with the
development of HD contents and channels, as well as the cultural creative industry; (12) Dafu must
submit the following information to the TFTC for five years starting from the date of the combination:
(a) names of the channels and copies of the distribution and agent agreements for the channels being
produced or distributed by Dafu Group, (b) information related to pricing, licensing fees, discounts and
licensees of such channels and (c) a report on how the combination benefits the general public and the
overall economy; and (13) Dafu must submit from time to time within the five-year period any change
of the chair of the board, directors, supervisors, managers or articles of incorporation of each Dafu Group
company to the TFTC for its records.
As society advances rapidly, there is a need to promulgate or amend rules that can serve as guidelines in regulating industries in which business models change often so as to protect the overall economy. To such end, the TFTC from time to time stipulates new guidelines for handling cases related to certain industries.

**Guidelines for airlines**

After Taiwan High-Speed Rail started to provide domestic transportation services, the TFTC revoked its Guidelines for Handling Civil Air Transportation Enterprises’ Merger Filings and Guidelines on Unendorsed Ticket Transfers between Airline Companies, and issued the Guidelines for Handling Merger and Concerted Action Cases of Domestic Civil Air Transportation Enterprises (2008 Guidelines) in 2008. The 2008 Guidelines are intended to enable the TFTC to effectively handle domestic civil air carriers’ merger filings and applications for concerted actions in order to maintain the orderly conduct of trade, uphold consumers’ interests and assure fair market competition, following the major changes in the competitive environment in Taiwan’s domestic air transportation market. In 2015, the TFTC modified the Guidelines again, taking into account the facts that the market competition status has varied since the last amendment and the TFTA has undergone several revisions in recent years. The 2015 Guidelines mention the following points:

1. **market definition:** the definition of markets will in principle be based on the ‘city pair’ as the smallest market unit. The following factors may also be considered depending on the circumstances of each case: the time and distance for transportation and the frequency of service of other air routes originating from areas close to the point of departure; the time and distance for transportation, and the frequency of service of air, rail, road and water transportation modes; and other factors relevant to the definition of domestic air transportation market; and
2. **market share:** besides considering such information as the service volume, sales quantity, service value and sales value of an enterprise compared with the totals for the related markets, the market share of a domestic air carrier may also be calculated on the basis of market demand (cargo volume, the number of passengers carried by, or the turnover of; a specific domestic civil air carrier, expressed as a proportion of the total number of passengers carried by, or the total turnover of, all civil carriers in the relevant market) or market supply (cargo capacity, the number of seats made available by a specific domestic civil air carrier, expressed as a proportion of the total number of seats made available by all civil carriers in the relevant market).

**Guidelines for 4C enterprises and financial industry**

The TFTC has established the following guidelines for handling competition in different market sectors:

1. **TFTC Disposal Directions on Cable Television and Related Industry;**
2. **TFTC Disposal Directions on Telecommunication Industry;**
3. **TFTC Disposal Directions on the Business Practices Cross-Ownership and Joint Provision among 4C Enterprises (telecommunications, cable TV, computer network, and e-commerce);**
TFTC Disposal Directions on Electronic Marketplace; and

Outlook

According to the TFTC’s priority objectives for 2017 to 2020, the industries that affect overall economic growth and people’s daily lives or welfare will be the priority targets for the investigation. These industries include real property, liquefied petroleum gas, TFT-LCD, DRAM, LCD and retail. The TFTC aims to enhance its regulatory power over those industries, starting with conducting research into their market structures. Through an in-depth analysis of the markets, the TFTC expects to learn more about the background as well as the general business models of each market to swiftly detect any unlawful conduct that could stifle competition. Meanwhile, on par with the international trend, the TFTC indicates that it will dedicate more resources to research or even investigate the monopoly issues in the digital platform sectors if any potential violation is found. In any event, the TFTC may conduct study reports on monopolisation by tech giants in the near future.

MERGER REVIEW

Definition

Under the TFTA, a defined combination meeting certain thresholds as prescribed by the TFTA would require a prior notification to the TFTC. The term ‘combination’ is broadly defined in the TFTA to include combinations conducted offshore (i.e., an extraterritorial combination or a foreign-to-foreign transaction).

Types of notifiable combination

According to Article 10 of the TFTA, a ‘combination’ is defined to include:

a. a merger;
b. a holding or acquisition of at least one-third of the voting shares of or interest in another enterprise;
c. a transfer or lease of all or a substantial part of an enterprise’s business or assets;
d. an arrangement with another enterprise for a joint operation on a regular, ongoing basis, or the management of another enterprise’s business based on a contract of entrustment; or
e. direct or indirect control over the operation or personnel of another enterprise.

Filing thresholds

According to Article 11 of the TFTA, if any or all of the parties to a combination meet any of the following thresholds, a notification must be filed with the TFTC prior to the closing of the proposed transaction:

a. as a result of the combination, any of the enterprises will acquire at least one-third of the market share;
b. any of the enterprises participating in the combination holds a market share of at least a quarter before the combination; or
the preceding fiscal year’s turnover of an enterprise participating in the combination exceeded the amount set forth by the TFTC (i.e., for a combination between non-financial enterprises, one of the enterprises generated an annual turnover of at least NT$10 billion, while the other enterprise generated an annual turnover of at least NT$1 billion).\(^{27}\)

In December 2016, the Thresholds and Calculation of Sales Amounts which Enterprises in Mergers shall File with the TFTC was also amended, adding an additional turnover threshold regarding the combined worldwide sales of parties. Thus, by this amendment, the aforesaid turnover filing threshold for a combination between non-financial enterprises includes:

\(a\) the aggregate global turnover of all the enterprises to a combination in the preceding fiscal year exceeded NT$40 billion, and each of at least two of the enterprises had a turnover in Taiwan of at least NT$2 billion in the preceding fiscal year; or

\(b\) one of the enterprises generated a turnover in Taiwan of at least NT$15 billion in the preceding fiscal year, while the other enterprise generated a turnover in Taiwan of at least NT$2 billion in the preceding fiscal year.

**Extraterritorial transactions**

The TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers are stipulated for the purpose of handing merger filings related to foreign mergers. In spite of these Guidelines, the filing requirements (thresholds, time frames, documents, etc.) for foreign mergers are the same as those for domestic transactions, although the TFTC will take the local effect into account when determining whether it will exercise jurisdiction.

In December 2016, the TFTC amended the Extraterritorial Mergers Guidelines. In the past, if none of the enterprises in an extraterritorial combination had any production or service facilities, distributors, agents or other substantive sales channels within the territory of Taiwan, the TFTC would not have exercised its jurisdiction over the case. After the amendment, the aforesaid circumstance became one of the factors that the TFTC will consider when determining whether to exercise its jurisdiction.

Furthermore, before the amendment, a merger of two or more foreign enterprises outside the territory of Taiwan would have been deemed an extraterritorial merger only if there was a direct, substantial and reasonably foreseeable effect on the domestic market. According to the newly amended Extraterritorial Mergers Guidelines, the local effect element is only one of the factors that the TFTC will consider in determining whether to exercise its jurisdiction. In general, the above amendments may give the TFTC more discretion in determining whether to exercise its jurisdiction over an extraterritorial merger.

**ii Significant cases**

**Combination between chip makers\(^ {28}\) (2012)**

At its 1 August 2012 commissioners’ meeting, the TFTC unconditionally cleared the proposed combination between MediaTek Inc (MediaTek) and Mstar Semiconductor Inc (Mstar).

---

\(^{27}\) The TFTA stipulates that the TFTC is authorised to designate different turnover thresholds applicable to different industries.

\(^{28}\) TFTC decision announced on 1 August 2012.
The proposed combination entails the acquisition of at least 40 per cent and up to 48 per cent of the shares in Mstar by MediaTek through a public tender offer. Following the consummation of the tender offer, a post-closing merger will be further pursued in which MediaTek will be the existing company and Mstar will be the dissolved company.

According to the TFTC, MediaTek and Mstar overlap in the mobile chip market and TV/display control chips market, and thus the transaction should be defined as a horizontal combination. However, for the reasons listed below, the TFTC concluded that the proposed combination would not generate any anticompetitive effect on the Taiwanese relevant product markets:

- as most of the participating parties’ relevant products are exported for sale globally, the participating parties face intense competition from their worldwide competitors. Therefore, after the combination, even if any attempt is made to raise product prices arbitrarily, it would be constrained by market forces;
- the proposed combination is unlikely to result in any concerted action among the participating parties and their competitors. Furthermore, no material entry barrier to the relevant markets exists; hence, Taiwanese and other multinational enterprises interested in the industry can enter the market any time, making the market even more competitive; and
- because there are already numerous enterprises in the relevant markets, when choosing business partners, the participating parties’ upstream and downstream counterparties have a wide pool to choose from. In fact, the participating parties’ transacting counterparties have considerable bargaining power. Consequently, the merged entity would not be able to abuse its market power after the combination.

The TFTC also indicated that the proposed combination did not have the potential of undermining competition and would instead fortify the Taiwanese TV/display control chip makers’ ability to compete with global enterprises.

Given the above, the TFTC found that the overall economic benefit from this transaction would outweigh the disadvantages of stifled competition. Consequently, it cleared the subject transaction under Paragraph 1, Article 12 of the TFTA.

### Remedies

In September 2012, the TFTC updated the Directions (Guidelines) on Handling Merger Filings (Merger Guidelines) to include its official standards for remedies. According to the Merger Guidelines, the remedies the TFTC can impose as conditions are:

- measures affecting the structural aspect: the TFTC can order parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations or remove personnel from certain positions; and
measures affecting the behavioural aspect: the TFTC can order parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedy on a case-by-case basis. The Merger Guidelines also outline that the TFTC may seek parties’ opinions on the possible remedy before it makes its final decision.

**International cooperation for merger reviews**

No official documentation indicates that the TFTC has, to date, ever cooperated with foreign authorities while conducting the review of a combination notification. However, the TFTC has entered into certain cooperation agreements or memorandum with the following countries for the application of competition regulations: Hungary, Canada, Australia, New Zealand, France and Mongolia. Meanwhile, while reviewing a cross-border transaction, it is not uncommon for the TFTC to order the filing parties to report the current status in other jurisdictions where a combination notification has also been made. Given the above, even without formal coordination, the TFTC still more or less consults agencies in other jurisdictions to make its decision on a merger filing.

**Outlook**

According to the TFTA, the main revisions to the merger control rules are as follows:

- When assessing whether a transaction constitutes a combination and whether any filing threshold is met, the new law prescribes that in addition to the turnovers and shareholding of a party’s parent or subsidiary, those of affiliate companies (including sister companies under common control) should also be taken into consideration.

- Apart from holding shares through corporate entities, it is not uncommon for an enterprise’s business operations or the appointment of personnel to be under the control of certain individuals. It is also common for an enterprise to hold shares in another enterprise through natural persons or non-corporate entities. As the transactions of the above-mentioned shareholding structures may have the same effect as a combination under the TFTA, the new law stipulates that those natural persons or non-corporate entities that have a controlling share in a company should also be subject to the merger control rules, even though they are not corporate entities.

- The review period for a merger filing case has been revised from 30 days with a possible extension of an additional 30 days to a possible extension of an additional 60 days, as the original period may not be sufficient for the agency to thoroughly analyse a case that may have potential anticompetitive effects. Further, in May 2017, the above-mentioned review period has been revised from 30 days with a possible extension of an additional 60 days to 30 business days with a possible extension of an additional 60 business days. This amendment is to avoid a situation where the review period for major merger filing cases is unduly shortened due to successive national holidays. The amendment also precludes an acquirer in a hostile takeover from improperly fixing the review period by manipulating the filing schedule.
It is noteworthy that the new TFTA follows the old law in implementing a dual filing threshold system. The TFTC’s proposal of removing the market share filing thresholds did not pass the Legislative Yuan’s final review.

VI CONCLUSIONS

Although the TFTC perceives itself as the guardian of market competition that enforces the TFTA to ensure fair trade in Taiwan’s markets and protect the public interest, it has been criticised for devoting most of its resources and efforts on unfair conduct, and neglecting anticompetitive conduct. While the TFTC dedicates most of its administrative resources to misleading advertising and illegal activities by multi-level marketing enterprises, the public expects the TFTC to also crack down on anticompetitive activities, such as abuse of market power or the formation of cartels, which have caused greater harm to the overall economy.

Understanding that some changes are necessary to create a better competitive environment in Taiwan, in early 2015, the Legislative Yuan passed the amendments to the TFTA after three rounds of reading by considering opinions from the government, businesses and academia. Now that the new TFTA has come into effect, the TFTC is equipped with new investigative tools. For instance, the TFTC may keep anything that may serve as evidence, to such an extent and for such a period as may be necessary, for the examination, inspection, verification or any other purposes in connection with the preservation of evidence. Moreover, the TFTC is allowed to abort an investigation to save administrative costs if the business ceases its illegal conduct and undertakes corrective measures. All in all, the amendments are to strengthen the TFTC’s powers in investigations, impose severer penalties and streamline the administrative process. As all these changes have resulted in an overhaul of the TFTA, we expect to have a new competition law environment in Taiwan.

According to data published on the TFTC’s website, among the decisions made by the TFTC in 2014, 95 cases concerned unfair conduct (including misleading advertising), while 27 cases concerned anticompetitive conduct (including abuse of market power, illegal combination and illegal concerted action).

Despite the ‘administrative seizure right’ granted by the new law, the proposed introduction of ‘the right to search and seize with the assistance of the judicial authority’ (i.e., the right to conduct a dawn raid) that the TFTC has long lobbied for has not passed the Legislative Yuan’s final review due to the concerns related to the administrative agency’s excessive power.
Chapter 25

TURKEY

Serbülent Baykan

I  OVERVIEW

i  Domestic outlook

According to Article 20 of the Law on the Protection of Competition, ‘[the] Competition Authority, [being] a public entity and [having] administrative and commercial autonomy, has been established to supervise the application of this law and to perform the duties attributed to it by law’. Under this provision, the Competition Authority possesses broad powers and has what might be described as a semi-administrative, semi-judicial structure. It has its own budget made up from funds allocated by the Ministry of Industry and Trade; payments in an amount equivalent to 4 per cent of the capital of all newly incorporated partnerships and limited companies, and that of the remaining amount from any capital increase in existing entities; and publications and similar revenue. The main functions of enforcing competition law are carried out by the Competition Board, one of three separate divisions of the Authority.

The main goal of the Competition Act is the prohibition of cartels and other restrictions on competition, prevention of abuse of dominant position by a firm that has dominance in a certain market and prevention of the creation of new monopolies by monitoring certain merger and acquisition transactions. The goal of the Competition Authority, which is charged with enforcing the aforementioned Act, is to facilitate and protect competition in markets.

Apart from related articles of the Turkish Constitution, the Competition Act is the basic law of competition and the main tool with which competition is regulated. The Competition Board also has the authority to issue regulations related to the subjects in the Competition Act (Article 62), which are prepared by the Board and put into force via a resolution of the Council of Ministers.

Another duty of the Competition Board is to issue communiqués and make the necessary regulations as to the implementation of the Competition Act. Further, any decisions by the Competition Authority constitute precedent, and so are important in practice.

In accordance with Article 55 of the Act, Ankara Administrative Court is authorised to examine cases against the decisions of the Competition Authority as a first instance court and the Council of State is authorised for appeals.

The Competition Authority issued Communiqué No. 2012/2, which introduced a standard form and content requirements for applications. The Communiqué seeks to pave the way for more proactive enforcement by enabling the Competition Authority to

---

1 Serbülent Baykan is the founding partner at BaykanIdea Law Offices.
conducted examinations with respect to applications that are serious and complete, avoid wasting resources on applications that are insufficient in terms of form and content, and shift resources to those areas given priority by the Authority.

In accordance with the annual report on competition policy developments in Turkey in 2018, the Competition Board made final decisions on 378 cases, 88 of which concerned competition infringements, 44 concerned negative clearances or exemptions, 210 concerned mergers and acquisitions and specialisation, and 13 concerned other issues.

ii International outlook

The increasingly international nature of Turkey’s competition law and policy is a consequence of the process of globalisation, which is requiring domestic competition authorities to cooperate on an international level. The Turkish Competition Authority has achieved participant status in international cooperation through bilateral and multilateral platforms that allow the exchange of information and experience between states, and create opportunities for the implementation of competition rules. In addition to the EU full membership process, the Competition Authority has been participating in studies conducted by multilateral platforms such as the Organisation for Economic Co-operation and Development, the United Nations Conference on Trade and Development, the International Competition Network (ICN) and the World Trade Organization. Within the framework of bilateral relationships, the Competition Authority has also signed cooperation protocols with the competition agencies of Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Egypt, Georgia, Kazakhstan, Korea, Kyrgyzstan, Mongolia, Northern Cyprus, Portugal, Romania, Russia and Ukraine.

A memorandum of cooperation, which was prepared with the aim to increase cooperation between the Tunisian authorities and the Turkish Competition Authority, was signed on 21 July 2017.

A memorandum of cooperation in the area of competition policy was signed between the Turkish Competition Authority and the National Institute for the Defense of Competition and the Protection of Intellectual Property of the Republic of Peru on 31 October 2017.

Most recently, a memorandum of cooperation was signed between:

a the Competition Agency of Kosova and the Turkish Competition Authority on 10 April 2018;

b the Competition Agency of Macedonia and the Turkish Competition Authority on 12 April 2018;

c the Competition Agency of Serbia and the Turkish Competition Authority on 20 April 2018; and

d the Competition Agency of Albania and the Turkish Competition Authority on 18 September 2018.

There has been an obvious decrease in the number of cases resolved by the Competition Authority in the past five years. Most of the reduction has occurred in competition infringement cases. There has also been a vital change in the classification of the topics of final decisions; the majority of final decisions moved to cases about mergers and acquisitions from cases about competition infringements.

Free trade agreements (FTAs) are bilateral agreements that countries sign to improve trade by reciprocally removing barriers to trade. In this way, producers in the countries party to an agreement can compete on equal terms, and the parties’ international competition power increases.
As of 2015, 17 countries and country groups had signed FTAs with Turkey, and negotiations are in progress with 14 country groups. Moreover, there are initiatives to commence FTA negotiations with 10 country groups.

II CARTELS

In accordance with the Competition Act, there is no difference between undertakings and individuals. The Competition Act definition of ‘undertakings’ is ‘natural and legal persons who produce, market and sell goods or services in the market, and units [that] can decide independently and . . . constitute an economic whole’. The Competition Act also defines an association of undertakings as any type of association, with or without legal personality, which is formed by undertakings to accomplish particular goals.

Contravention of the Competition Act can result in administrative (civil) or criminal penalties. Administrative fines may be issued to undertakings, associations of undertakings or affiliates of these associations infringing the Competition Act. The nature and application of fines, the acts resulting in them and their method of calculation are set out in Section 3 of the Competition Act in Articles 16 and 17.

Criminal sanctions apply to all types of agreement and concerted practice between undertakings set out in Article 4 of the Competition Act, and those that abuse a dominant position in any market for certain goods and services or distort competition through any behaviour mentioned in Article 6 will be obliged to indemnify any type of damage to injured parties according to Article 57 of the Competition Act.

‘Cartel’ is a common concept that refers to anticompetitive agreements or concerted practices among competitors, including price fixing, market allocation, restriction of supply, or imposition of quotas and collusive bidding in tenders. Cartels, which are accepted as the most severe competition restriction, strive to increase their profits by controlling different market-related variables, especially price and quantity.

Due to the severe damage they do to the economy, there is worldwide consensus among competition authorities that cartels should be treated differently to other practices restricting competition and should be punished in the most harsh manner.

In accordance with the Competition Act, those actively cooperating with the Competition Board may have their fines reduced taking into consideration the quality, efficiency and timing of their cooperation. The means of demonstrating the explicit grounds and terms for immunity from or reduction of fines in the case of cooperation, and procedures and principles in relation to cooperation, are determined by the Regulation on Active Cooperation for Detecting Cartels (Leniency Regulation).

Compared with other types of infringement, it is more difficult to detect and investigate cartels, since they are secret by nature unless parties to a cartel cooperate with the Competition Board in accordance with the Leniency Regulation. Therefore, it is helpful if penalties are: not imposed on, or are reduced for, those who actively cooperate with the Competition Authority; assessed independently for each undertaking party to the cartel and their managers; and waived for employees who help detect and investigate cartels.

In addition, those who actively cooperate with the Authority in detecting and investigating cartels should not be left at a disadvantage compared with those who do not cooperate. Therefore, in cases where the Leniency Regulation has no clear provision and requires interpretation, it is essential that the conclusion favours those who cooperate.
Additionally, a conciliation procedure for cartel investigations, similar to a plea bargain in many countries, is currently at bill stage with the Competition Board, and is based on the principle of reduced punishment if an enterprise accepts responsibility for a breach. However, if the leniency programme is applied successfully, such method will not be required.

There are special regulations concerning cartels that have been drawn up based on articles of the Competition Act: the Regulation on Active Cooperation for Detecting Cartels and the Guidelines on the Explanation of the Regulation on Active Cooperation for Detecting Cartels.

The ICN is directed by ‘steering groups’ composed of 15 selected members, including Turkey and three ex officio appointed member competition agencies. The ICN working groups that currently exist cover mergers, cartels, agency effectiveness, competition advocacy and unilateral conduct. The Turkish Competition Authority was the co-chair of the Competition Policy Implementation Working Group, which is now called the Agency Effectiveness Working Group, and the Unilateral Conduct Working Group, and as of 2017, it is the co-chair of a sub-group of the Cartel Working Group.

III ANTI TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Turkish national competition law and all related regulations and applications are equivalent to Articles 101 and 102 of the Treaty on the Functioning of the European Union.

As previously mentioned, restrictive agreements are regulated in Article 4 of the Competition Act, and are described as ‘agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited’. It should be noted that this list is not exhaustive.

Such cases are, in particular, as follows:

a fixing the purchase or sale price of goods or services, elements such as cost and profit that dictate the price, and any terms of purchase or sale;

b partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements;

c controlling the amount of supply or demand in relation to goods or services, or determining them outside the market;

d complicating and restricting the activities of competing undertakings, or excluding undertakings operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market;

e except for exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts; and

f contrary to the nature of the agreement or commercial usage, obliging the purchase of other goods or services together with a good or service, tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service.
Where the existence of an agreement cannot be proved, where the price changes in the market or the balance of demand and supply, or the operational areas of undertakings, are similar to those in markets where competition is prevented, distorted or restricted, this constitutes a presumption that the undertakings are engaged in concerted practices.

Each of the parties may relieve itself of the responsibility by proving they have not engaged in a concerted practice, provided that this is based on economic and rational facts.

A dominant position is regulated in Article 6 of the Competition Act, and is defined as ‘the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited’.

Particular cases of abuse include:

a preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market;

b directly or indirectly discriminating by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts;

c purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in the case of resale, such as not selling a purchased good below a particular price;

d actions that aim to distort competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market; and

e restricting production, marketing or technical development to the prejudice of consumers.

The violations listed in the Competition Act are the most common types of abuse of a dominant position. It must be emphasised that it is not necessary for an enterprise to be at fault while abusing a dominant position. Fault, and its extent, will only be taken into consideration while imposing a sanction.

Becoming dominant or reinforcing the dominant position of an entity through association or acquisition is prohibited by the Competition Act if such a situation limits competition to a large extent. Acquisition means gaining control of another establishment by way of agreement by a person or persons in control of a current establishment. The economic effects of acquisitions and associations are subjected to the same scrutiny, as they have the same effects. The Competition Board has the authority to determine, via its communiqués, the types of mergers and acquisitions that must be notified to the Board and for which permission must be obtained. The Competition Authority can invalidate procedures that cause distortion of competition, and can also decide to separate parties if they are not actually associated.

According to Communiqué No. 2012/3, issued on 3 January 2013, which confirmed amendments to Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorisation of Competition Authority, in a merger or acquisition transaction as specified under Article 5 of Communiqué No. 2010/4, authorisation of the Competition Board will be required for the relevant transaction to carry legal validity if the total turnover of the transaction parties in Turkey exceeds 100 million Turkish liras, and the turnover of at
least two of the transaction parties in Turkey each exceed 30 million Turkish liras. Previously, the authorisation of the Competition Board was also required where an asset or activity subject to acquisition in acquisition transactions, or at least one of the parties to a transaction in merger transactions, had a turnover in Turkey exceeding 30 million Turkish liras, and the other party to the transaction had a global turnover exceeding 500 million Turkish liras. However, this authorisation requirement was abolished by an amendment to Article 5 of Communiqué No. 2010/4 in 2017.

**i Significant cases**

*Examples of decisions on anticompetitive agreements*

**Numil/Nestlé/Montero/Kopas/Hipp/Abbott investigation**

The above-mentioned enterprises operate in Turkey and import infant formula and follow-on milk. It was alleged that they jointly determined the prices in the market by mutual agreement in breach of Article 4 of the Competition Law. At the on-site investigations carried out at said enterprises no proof could be found to indicate that they were in an anticompetitive collusive relationship, therefore in February 2019 the Turkish Competition Authority found that the concerned undertakings did not breach the Competition Law and determined that there was no need to open a fully fledged investigation into the undertakings.

**Michelin Lastikleri Ticaret investigation**

It was claimed that the resale price and conditions were determined by Michelin, sales restrictions were imposed on the dealers, and that dealers working with competitors were excluded from the market. It was concluded that there was no need to open an investigation against Michelin in respect of the alleged complaints.

*Examples of decisions on abuse of dominance*

**Mercedes Benz Turk investigation**

This was an investigation about the rebate (discount) system on truck sales applied by Mercedes Benz Turk AS. The relevant decision concerned the investigation of abuse of dominance in the concrete pump market in the agreements concluded with concrete pump suppliers and the applied rebate system. It was decided that there was no violation of Article 6 of the Competition Act and no administrative fine was applied.

**Mey Icki investigation**

There was investigation to determine whether Mey İçki obstructed the operations of competing undertakings by putting pressure on raki points of sale by means of concessions and certain practices, and violated the Competition Act by abusing its dominant position.

---

5 Decision No. 18-29/489-239 of 27 August 2018.
It was decided that Mey İçki, which holds a dominant position in the raki market, had violated Article 6 of the Competition Act by engaging in the following practices:

a it provided discounts and other financial advantages to the on- and off-premises points of sale depending on the points of sales’ realisation of the raki purchase targets, set at more than 80 per cent of the total raki purchases of the point of sale within a certain period;
b it provided periodic purchase targets for points of sale without purchasing agreements with Mey İçki and provided discounts and other financial advantages depending on whether these targets were achieved; and
c it provided discounts and financial advantages to points of sales in return for having shelf and visibility arrangements in the traditional channel points of sale to the advantage of Mey İçki.

Therefore an administrative fine was imposed on the undertaking under Article 16 of the Competition Act.

Examples of decisions on exemption and negative clearance

Card Storage Service of BKM exemption examination

The examination to deal with the individual exemption request application of the Bankalararası Kart Merkezi AŞ (Interbank Card Centre – BKM) for the card storage service it provides. The card storage service comprising the subject matter of the notification is a service provided to those undertakings that receive repeated payments to ensure that payment can be made without requiring said undertakings to store the information for the card to be used for payment, by having another organisation (BKM, in this instance) store the relevant information for them. Within the framework of the notified BKM card storage service, member businesses were not put under any restrictive obligation such as non-compete, exclusivity, etc. The business was able to work with any organisation offering a member business agreement. BKM did not intervene in the commercial relationship between the undertakings in question (such as contract negotiations, virtual point of sale usage conditions, commission negotiations, etc.) In this respect, it was evaluated that the notified service fulfilled the requirement of Article 5(d) of the Competition Act, which prohibits placing undue restrictions on competition. As a conclusion, it was decided that despite its restrictive effects on competition, the card data storage service to be provided by BKM had positive aspects due to technical developments and consumers benefits it would cause, and therefore could benefit from individual exemption under Article 5 of the Competition Act. However, since the relevant market was an emerging one, the exemption in question would expire one year after the date of the decision herein.

Booking.com administrative fine

At the end of this investigation, Booking.com and its Turkey office (Booking.com Destek Hizmetleri Ltd Şti) were found to have violated Articles 4 and 6 of the Competition Act, and

8 Decision No. 17-01/12-4 of 5 January 2017.
the Competition Authority issued an administrative fine amounting to 2,543,922.85 Turkish liras in accordance with the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

In Turkey, there are authorities that have sectoral authority regarding competition, including the Energy Market Regulatory Authority (EMRA), the Information and Communication Technologies Authority, the Capital Markets Board of Turkey, and the Banking Regulation and Supervision Agency. Articles 1, 3 and 5 of the Electricity Market Law, which give authority regarding competition in the electricity market to the EMRA, state that the EMRA has the power and duty to develop a competitive market, maintain a competitive environment and, in the case of undeveloped competition, regulate prices. Similarly, the Electronic Communications Law states that the Information and Communication Technologies Authority has the power and duty to develop a competitive environment and inspect breaches of competition, and maintain a competitive environment while regulating the sector. However, the limits of the authority of the above institutions are unclear. If a conflict of authority were to occur between these institutions and the Competition Authority, determining the competent institution in such a scenario would be problematic.

V STATE AID

In accordance with the obligations implemented by the bilateral agreements between Turkey and the EU, a state aid law had to be adopted to set out general conditions and rules for authorisation to monitor the implementation and recovery of state aid. Therefore, Law No. 6015 on Monitoring and Supervision of State Aids prepared by the Undersecretariat of the Treasury was adopted on 13 October 2010 and entered into force on 23 October 2010 (and was published in Official Gazette No. 27738).

Similar to Article 107 TFEU, state aid is defined as ‘any aid providing a financial benefit to its beneficiary granted by the state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, insofar as it affects trade between Turkey and the EU’ in Article 2 of Law No. 6015. According to the definition, the aid needs to fulfil five criteria to be classified as state aid:

a. state aid needs to provide a financial benefit to its beneficiary or beneficiaries;
b. this benefit should be granted by the state through state resources;
c. this benefit should be on a selective basis;
d. the aid should not distort or threaten to distort competition; and
e. this aid should not affect trade between Turkey and the EU.

Law No. 6015 was required to be enacted by Parliament to bring Turkish law in line with EU requirements. The enactment of Law No. 6015 was postponed to 31 December 2016 by Resolution of the Council of Ministers No. 2015/8325 of 21 December 2015, which was published in Official Gazette No. 29576 on 28 December 2015. The Law was enacted and came into force on 31 December 2016.
VI MERGER REVIEW

Significant changes occurred on the subject of mergers with the implementation of the New Turkish Commercial Code,\(^9\) which became effective on 1 July 2012. According to the Code (as was the case with the former Code), there are two types of merger: a merger by way of acquisition in which one party is acquired by the other party; and a merger by way of the formation of a new company in which both parties merge through a newly formed company.

Under the New Turkish Commercial Code there is a new regulation regarding mergers that annuls a former provision prohibiting a merger of companies with different company types. As such, there is no longer any legal obstacle regarding a merger of companies of different types (e.g., a limited liability company and a joint-stock company now have the right to merge). The likely impact of this change will be an increase in the number of mergers taking place.

As mentioned above, to avoid any possible illegal market dominance, as established in the Competition Act and related communiqués, certain types of merger are subject to the approval of the Competition Authority. Authorisation of the Competition Board will be required for the relevant transaction to carry legal validity if the total turnovers of the transaction parties in Turkey exceed 100 million Turkish liras, and the turnovers of at least two of the transaction parties in Turkey each exceed 30 million Turkish liras.

Merger and acquisition transactions that increase prices for customers, decrease variety and undermine innovations are prohibited under Article 7 of Act No. 4054.

Cases that are considered as mergers or acquisitions under Article 7, mergers or acquisitions requiring the authorisation of the Competition Board, and the procedures, principles concerning the notification thereof to the Competition Board are regulated by the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No. 2010/4).

There is no provision that precisely prescribes a deadline for the notification that shall be made to the Authority regarding a merger of companies that exceeds the above-mentioned thresholds. Additionally, in the absence of a notification, the Authority shall make an inquiry regarding the concerned merger and, if the merger is deemed to be unlawful, the Authority will take measures regarding the merger and initiate an investigation; however, if the merger is deemed lawful, the Authority will charge an administrative fine to both parties for failing to provide notification. As per Communiqué No. 2018/1 on increasing the Minimum Limits of the Administrative Fines Specified in Article 16.1 of Law No. 4054, the minimum amount of administrative fine prescribed for mergers that take place without notification is 21,036 Turkish liras.

The Competition Authority has released a Draft Guideline on the Evaluation of Horizontal Mergers and Acquisitions and a Draft Guideline on the Evaluation of Non-Horizontal Mergers and Acquisitions (together, Draft Guidelines), which intend to establish the general principles to be considered in the assessments made by the Competition Authority concerning horizontal and non-horizontal mergers and acquisitions, for public discussion. As a result, the Turkish competition regulations will have a more specific and measurable base for additional legislation and secondary legislation.

\(^9\) The New Turkish Commercial Code (No. 6102).
i Significant cases

The following transactions are noteworthy:

\[a\] 29 November 2018: request for authorisation for the acquisition of all shares of Cast Future Holdings SpA by Robertshaw SRL;\(^{10}\)

\[b\] 22 November 2018: request for authorisation for the acquisition of all shares of Apollo Aviation Holdings by TC Group LLC;\(^{11}\)

\[c\] 19 September 2018: request for authorisation for the acquisition of 80 per cent shares of Arimpeks Aluminyum by Aluflexpack AG;\(^{12}\)

\[d\] 15 November 2018: request for authorisation for the acquisition by The Global Infra Co JS Arl of Simba Holding SARL’s 50 per cent shares in Corning Corporation;\(^{13}\)

\[e\] 15 November 2018: request for authorisation for the acquisition of all shares of BDP International Inc by Greenbriar Holdings IV LLC;\(^{14}\)

\[f\] 8 November 2018: request for authorisation for the acquisition of all controls of Unifeeder A/S by the DP World Investments BV;\(^{15}\)

\[g\] 11 October 2018: request for authorisation for the acquisition of 100 per cent shares of Goat TopCo GmbH by Grupa Azoty SA;\(^{16}\)

\[h\] 4 October 2018: request for authorisation for the acquisition of all controls of Sanyo Special Steel Co Ltd by the Nippon Steel & Sumitomo Metal Corporation;\(^{17}\) and

\[i\] 26 September 2018: request for authorisation for the acquisition of all controls of Bohai Capital Holding Co Ltd by Onix Aviation System Ltd.\(^{18}\)

All requests for authorisation for acquisitions were accepted by the Competition Authority.

ii Trends, developments and strategies

In 2018, 223 operations concerning mergers, acquisitions and specialisations were notified to the Authority. Those included 210 mergers and acquisitions, and 13 specialisations. Of the merger and acquisition notifications, 150 were cleared, two were cleared under conditions, one was blocked and 30 did not satisfy the thresholds.

iii Outlook

As a result of the public discussion on the Draft Guidelines, the Turkish competition regulations will have a more specific and measurable base for additional legislation and secondary legislation.

In addition, considering the annulment of the prohibition on mergers of two companies of different types, a rise in the number of mergers and acquisitions is likely.

---

\(^{10}\) Decision No. 18-45/704-346.

\(^{11}\) Decision No. 18-44/697-341.

\(^{12}\) Decision No. 18-33/551-272.

\(^{13}\) Decision No. 18-43/681-334.

\(^{14}\) Decision No. 18-43/680-333.

\(^{15}\) Decision No. 18-42/666-327.

\(^{16}\) Decision No. 18-38/607-296.

\(^{17}\) Decision No. 18-37/596-291.

\(^{18}\) Decision No. 18-34/567-280.
VII CONCLUSIONS

There are provisions in many Turkish laws that enable the resolution of certain types of disputes by means of conciliation. Conciliation is therefore a legal institution familiar in Turkish law, particularly regarding those mechanisms that have been implemented for many years in Turkish tax law and that were formalised in 2005 in the Turkish Criminal Code. In the Competition Act, there is no specific provision that clearly regulates methods of conciliation; only Subparagraph 3 of Article 9 enables conciliation by means of interpretation.

Some important changes have been made to the competition law through amendments made to the Competition Act and issued communiqués.

Through the change of Communiqué No. 2012/2, a standard has been specified for the form and content of applications made to the Competition Authority that will allow it to shift its resources to priority areas.

The Council of State’s authority regarding appeals filed against decisions of the Competition Authority has been revoked as a result of the specification of the administrative courts as the courts of first instance to examine such cases. The goal behind such change is to decrease the workload of the Council of State, which actually operates as a supreme court in the area of administrative procedures, and to allow the Council of State to retain its status as a supreme court. It is stated in the preamble of Law No. 6352 that prescribes this change that the workload of the Council of State, and the delay to the resolution of cases that has resulted from this, has violated the European Convention on Human Rights.

Measures to be taken in the forthcoming period are as follows:

a European legislation to comply with 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, and Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, increasing the alignment level with the EU law in the antitrust area by introducing substantive and procedural amendments in mergers and also introducing reduced commitment and settlement procedures.

b Framework for state aid for research and development and innovation (2014/ C198/01), Commission Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. Aligning with the EU acquis on state aid and fulfilling the obligations arising from the Custom Union (Articles 34 and 39 of Decision 1/95 of the EC Turkey Association Council) and Turkey–EU European Coal and Steel Community (ECSC) Free Trade Agreement (Article 7).

c Guidelines on State to Promote risk finance investment (2014/C/19/04), Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. Aligning with the EU acquis on state aid and fulfilling the obligations arising from customs union (Articles 34 and 39 of Decision 1/95 of the EC Turkey Association Council) and the Turkey–EU ECSC Free Trade Agreement (Article 7).

d Aligning with the EU acquis on state aid and fulfilling the obligations arising from the Customs Union (Articles 34 and 39 of Decision 1/95 of the EC Turkey Association Council) and the Turkey–EU ECSC Free Trade Agreement (Article 7).
The following regulations have been introduced during the past five years:


c. Block Exemption Communiqué on Specialisation Agreements (Communiqué No. 2013/3);

d. Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2);

e. Guidelines on the General Principles of Exemption dated 28 November 2013 No. 13-66/923-RM(10);

f. Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control dated 16 July 2013 No. 13-35/RM(9);

g. Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions dated 4 June 2013 No. 13-33/449-RM(8);

h. Guidelines on the Assessment of Horizontal Mergers and Acquisitions dated 4 June 2013 No. 13-33/448-RM(7);

i. Guidelines on the Explanation of the Regulation on Active Cooperation for Detecting Cartels dated 17 April 2013 No. 13-23/325-RM(2);

j. Guidelines on Horizontal Cooperation Agreements dated 30 April 2013 No. 13-24/326-RM(6);

k. Communiqué Concerning the Increase of the Minimum Administrative Fines Specified in Paragraph 1 of Article 16 of Act No. 4054 on the Protection of Competition, valid until 31 December 2016 (Communiqué No. 2016/1);

l. Block Exemption Communiqué on Research and Development Agreements (Communiqué No. 2016/5);

m. Communiqué No. 2017/2 Amending the Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Communiqué No. 2010/4) Being Published;

n. Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector (Communiqué No. 2017/3);

o. Communiqué on the increase of the Lower Threshold for Administrative Fines Specified in Paragraph 1, Article 16 of Act No. 4054 on the Protection of Competition to be valid until 31 December 2018 (Communiqué No. 2018/1);

p. Guideline on Vertical Agreements dated 29 March 2018 No. 18-09/179-RM(1);

q. Guideline on Enterprise, Turnover and Subsidiary Restrictions related to Mergers and Acquisitions dated 5 April 2018 No. 18-10/195-RM(2); and

r. Guideline on Statuses situated as Mergers and Acquisitions and Concept of Control dated 5 April 2018 No. 18-10/195-RM(2).
Chapter 26

UNITED KINGDOM

Marc Israel, Sophie Sahlin and Arthur Henderson

I OVERVIEW

The biggest talking point in UK competition law continues to be the UK’s withdrawal from the EU (Brexit). At the time of writing, the UK is fast approaching the 29 March 2019 Brexit deadline, and the prospect of a ‘no deal’ Brexit is increasingly possible. In the face of ongoing uncertainty, the Competition and Markets Authority (CMA) continues to devote significant time and resources to preparing for Brexit: guidance has been published on the CMA’s role in merger cases, antitrust enforcement and state aid in the event of a ‘no deal’ Brexit, and more in-depth draft guidance on the effects of a ‘no deal’ exit on the CMA was released at the end of January. As the CMA notes in its 2019–2020 annual plan, ‘we have made great strides to ensure we have the people, skills and infrastructure to launch or take over major international cartel or antitrust cases, merger investigations and State aid enforcement when the UK leaves the EU’. This growth is necessary because the CMA anticipates an increased workload post-Brexit: as the annual plan states, the CMA expects ‘to take on a bigger role on the world stage post-Exit.’ The CMA has been given additional funding to meet this challenge. Improvements and efficiencies are considered to be a crucial part of Brexit preparation – as Ann Pope, the Senior Director for Antitrust has stated, ‘Brexit makes it imperative that we are working as smartly and efficiently as possible so we are ready to take on larger and more complex cases.’ At the same time it is relocating its headquarters to Canary Wharf in September 2019 to allow for expansion and cost-cutting in London. The Edinburgh office is also being significantly expanded.

---

1 Marc Israel is a partner, Sophie Sahlin is a counsel and Arthur Henderson is a trainee at White & Case LLP.
7 Ibid.
9 Ibid.
i  **Brexit**

While a deal may still be struck with the EU, in which case there would likely be a transition period during which time EU competition law would remain in force, the publication in January 2019 of ‘no deal’ draft guidance has gone some way to clarifying the position and remit of the CMA in the event of a ‘no deal’ Brexit. The draft guidance makes it clear that certain CMA functions are unlikely to be materially affected by Brexit, namely regulatory appeals, market studies, market investigations and the criminal cartel offence. In instances where CMA guidance on these functions refers to EU law, the Competition (Amendment etc.) (EU Exit) Regulations 2019 statutory instrument (the Competition SI) will work to remove such references. This statutory instrument is designed to disentangle UK and EU competition law and allow for a stand-alone UK regime post-Brexit. As the draft guidance explains, the Competition SI ‘revokes EU competition regulations, European Commission decisions made under EU regulations and treaty rights that will be incorporated into UK law on Exit Day. It also amends the CA98, EA02, European Block Exemption Regulations and other legislation containing competition provisions, as appropriate’.

The CMA’s merger control and antitrust (including cartels) functions will be affected in varying ways by a ‘no deal’ Brexit. In terms of merger control the draft guidance clarifies that mergers previously under the exclusive jurisdiction of the European Commission may now also be reviewable in the UK, meaning that certain mergers may be subject to simultaneous review by both the Commission and the CMA. If no decision on a merger case reviewable by the European Commission has been taken prior to Exit Day, the CMA will no longer be prohibited by the EU Merger Regulation (EUMR) from taking jurisdiction and will be able to review the merger if the jurisdictional thresholds in the UK are met. The UK merger control regime will remain voluntary: there will be no obligation on merging parties to notify the CMA, but the CMA has a statutory four-month period in which to refer a completed merger for a Phase II investigation. Post-Brexit, this four-month period will apply to completed mergers from EU exit or from the point at which the CMA is considered to have been provided with notice of the material facts about the merger (whichever is later). This means that the CMA may obtain jurisdiction over completed mergers on Exit Day, and will then have a four-month period in which to choose whether or not to begin a Phase II investigation (provided the material facts of the merger were not brought to the CMA’s attention at an earlier date).

In terms of cases opened after Brexit, the CMA will no longer be prevented from investigating, under the Enterprise Act 2002 (EA02), a merger that has a Community dimension. As mentioned above, this is likely to lead to a number of mergers that are reviewed at both CMA and Commission level. The draft guidance emphasises that the CMA will endeavour to cooperate with the Commission in such cases, and will attempt to ‘coordinate merger reviews’, including the exchange of confidential information where possible. It is also possible that some cases that would have previously been reviewable under the EUMR no longer meet the jurisdictional thresholds once the parties’ UK turnover is no longer taken into account and that national filings in certain Member States are required instead.

---


11 It should be noted that transactions without a Community dimension can be reviewed by the European Commission in certain circumstances, which may apply in some of these situations.
As regards antitrust enforcement, the effect of Brexit is that the CMA will cease to have jurisdiction to apply Article 101 of the Treaty on the Functioning of the European Union (TFEU) on anticompetitive agreements (including cartels) and Article 102 TFEU on abuse of dominance. Instead the prohibitions in the Competition Act 1998 (CA98) will be applied, but under the Competition SI the CMA and UK courts will still be required to interpret the prohibitions consistently with pre-Brexit EU case law. At present, Section 60 CA98 requires UK competition authorities and courts to ensure that the application of UK competition law is consistent ‘so far as possible’ with EU competition law. The Competition SI would repeal Section 60 CA98 and replace it with Section 60A. Under Section 60A there will be no requirement to take post-Brexit EU case law into account and the UK courts may depart from pre-Brexit EU case law where appropriate in light of particular circumstances. Once again there is a strong likelihood that anticompetitive behaviour will be reviewed simultaneously by the CMA and the Commission, and the draft guidance goes into depth on the status of investigations opened before and after Exit Day. It is worth noting that the Block Exemption Regulations, which work to exempt certain agreements from the Article 101 prohibitions, will be preserved by the Competition SI and will continue to apply in the UK as ‘retained exemptions’. This draft guidance will, of course, only be relevant in the event that Britain fails to agree a deal with the EU.

ii UK competition law regime

Alongside Brexit preparations, the Secretary of State for Business, Energy and Industrial Strategy is due to publish a review of the UK’s existing competition regime, and has separately said that he will trigger ‘a far-reaching review into business practices, centred on concerns over companies using big data to exploit consumers in a vulnerable situation’.12 This ties in with the CMA’s priorities for 2019–2020, which are discussed below. Although the exact contents of the review are as yet unknown, it is unlikely that it will suggest changes to the fundamental aspects of UK competition law, which are as follows.

CA98 prohibits agreements or concerted practices that prevent, restrict or distort competition (Chapter I prohibition) and abuse of a dominant position (Chapter II prohibition), in each case within the UK. EA02 contains the criminal cartel offence, and the legal basis for UK merger review and market investigations.

The CMA has primary responsibility for public enforcement of competition law in the UK – both the Chapter I and Chapter II prohibitions and, as it currently stands, Articles 101 and 102 TFEU – although these provisions may also be enforced by private parties before the courts. Clearly, the CMA will no longer be able to enforce Articles 101 and 102 TFEU post-Brexit but that will not affect the substantive provisions of the equivalent rules in the UK. In addition, a number of sectoral regulators (such as Ofcom for communications, Ofgem for energy, Ofwat for water, the Office for Rail and Road and the Civil Aviation Authority for rail and air transport respectively, the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) for financial services, and UREGNI for utilities in Northern Ireland) have concurrent power to enforce the Chapter I and Chapter II prohibitions and (currently) Articles 101 and 102 TFEU in their sectors.

In recent years one of the most active sectoral regulators has been the FCA, which has only been a concurrent enforcer of competition law since April 2015. In November 2017 it issued its first statement of objections (SO) to four asset management firms alleged to have shared information on the pricing of two IPOs and one share placing. Market studies into the wholesale insurance broker market and the investment platforms market are ongoing. The mortgages market study final report is also expected in spring 2019 and a credit information market study will launch in June 2019. The FCA's 2018–2019 business plan makes it clear that competition is a high priority objective, stating that 'Our work across wholesale and retail markets aims to promote innovation and keep markets open and competitive, driving benefits to consumers and the wider economy'. To that end the FCA entered into a memorandum of understanding (MOU) with the CMA in April 2018. The MOU aims to set out in practical detail how the CMA and FCA will work together within the framework of competition law. In the wider financial services sphere, in February 2018 the PSR announced that it had opened its first CA98 case involving a number of 'dawn raids', and a market review into the supply of card-acquiring services has recently been announced. The CMA now publishes an annual ‘concurrency report’ to summarise the operation of these concurrency arrangements, the most recent of which was published in April 2018. In a case opened in November 2018 into suspected anticompetitive practices in the financial sector, the CMA and FCA agreed that the CMA would investigate.

The main focus of the CMA's attention in recent years (Brexit aside) has been on increasing enforcement. In a February 2016 report, the National Audit Office criticised the CMA's first couple of years for advancing too few enforcement cases to a decision. It found resources were disproportionately used on market investigations, noting that UK competition authorities imposed only £65 million of competition enforcement fines between 2012 and 2014, compared with almost £1.4 billion of fines imposed by their German counterparts. However, the CMA has increased its enforcement action. Between 2010 and 2015, the CMA (or its predecessor the Office of Fair Trading (OFT)) opened an average of seven CA98 cases a year, but in 2016–2018 this rose to an average of 10. As the 2019–2020 annual plan notes, the CMA will enter 2019–2020 with 23 competition enforcement cases, six consumer enforcement cases, 12 merger investigations, and two market studies under way. Factoring in the increased activity at the FCA, the direction of travel in the UK is very much towards increased enforcement.

---

15 See www.fca.org.uk/publications/market-studies/mortgages-market-study.
25 See all cases at www.gov.uk/cma-cases.
To facilitate this enforcement, and indeed the other work of the CMA in an increasingly digitalised world, a new data science team has been set up to expand the CMA’s expertise in the digital sector. The unit will focus on:

a understanding how firms use data and algorithms in their business models and what implications this might have for competition and consumers;

b developing how the CMA obtains and uses data in its ongoing work; and
c engaging with the tech business, academic research and government data communities in the UK and internationally.

iii Prioritisation and resource allocation of enforcement authorities

A 2015 spending review saw the CMA being allocated a budget of £65.94 million (as well as a capital budget of £7.4 million).26 This represented around a 7 per cent decrease in real terms over four years, however in the 2017 autumn budget the government allocated the CMA an additional £2.8 million funding each year, earmarked for increased enforcement.27 This means that the CMA’s total budget for 2019–2020 will be £68.75 million. The Treasury also allocated £23.6 million in additional funding in the 2018–2019 financial year to enable the CMA to continue Brexit preparations. A full departmental spending review for the period up to 2023–2024 is expected from the Treasury in 2019–2020.28

The CMA’s increased enforcement activity is borne out by statistics on how CMA staff time was split across different types of work in 2017 and 2018: 45 per cent of staff time was spent on enforcement in 2018, compared with 42 per cent from April 2016 to March 2017. This increase came at the expense of staff time allocated to market investigations and regulatory appeals, which fell from 13 per cent in 2017 to 9 per cent in 2018. Time devoted to mergers rose from 20 per cent in 2017 to 23 per cent in 2018.29,30 The annual plan makes it clear that, in the event of a ’no deal’ Brexit, there will be a ‘short-term opportunity cost’ in the sense that the CMA will have even less time to launch discretionary work using its markets and enforcement powers.31

As mentioned above, the CMA has also announced its intention to increase its presence in Scotland, increasing its headcount to around 30, allowing the office to both establish a talent base and prepare for Brexit.32 The CMA has also recruited additional personnel to handle an increased post-Brexit workload, although the annual plan acknowledges that only around three-quarters of the required staff have so far been recruited.33

iv Enforcement agenda

In its annual plan for 2019–2020, the CMA focuses on priority themes rather than specific objectives due to the ongoing uncertainty surrounding Brexit. The CMA’s intention is to ‘refine and explain’ its plans as more clarity emerges. The high-level themes (almost identical to those in the 2018–2019 annual plan) which the annual plan proposes are:

- protecting vulnerable consumers;
- improving trusts in markets;
- promoting better competition in online markets; and
- supporting economic growth and productivity.

Online and digital markets continue to be a high-priority area for the CMA. The CMA has been active in the digital sector in recent years, looking at online sales bans (see below for discussion of the Competition Appeal Tribunal’s (CAT) decision in the Ping case), resale price maintenance for internet sales, and ‘most favoured nation’ provisions in price comparison websites. The government has recently launched a Digital Competition Expert Panel, which will conduct an independent review of the state of competition in the digital economy, and the CMA plans to strengthen its Data, Technology and Analytics Unit in the coming year. A study into pricing algorithms was published in October 2018, with a focus on whether they could aid either price fixing or personalised pricing, where customers are shown different prices based on their individual data (e.g., browsing history).

The CMA has also recently looked at social media endorsements, and – under its consumer law powers – obtained undertakings from 16 online ‘influencers’ who agreed to disclose when they had been paid or incentivised to promote a product or service online. Another recent area of focus has been online hotel booking, which resulted in six online hotel booking sites providing formal commitments to cease misleading practices on their websites. Secondary ticketing websites also came under scrutiny, and proceedings were issued against ticketing website viagogo. In this vein, the CMA is considering a UK digital advertising market inquiry into what is a £13 billion UK market, and the Cairncross Review into the sustainability of high-quality journalism, published in February 2019, also proposed that the CMA carry out an investigation of this kind. The annual plan makes it clear, however, that this is ‘heavily dependent on the outcome of EU Exit negotiations’, and an investigation will in any event not be launched before the Furman Review into competition in digital markets publishes its findings in March 2019. This is all in the broader context of the CMA considering and engaging in debates around whether the digitalisation of commerce
United Kingdom

represents a paradigm shift in competition dynamics requiring a rethink of competition law and policy, and whether intervention (e.g., by enforcement or interim measures) is warranted in fast-changing technology markets. As the annual plan puts it, ‘the nature of competition in the digital economy remains the subject of international debate, including how to enforce antitrust laws in the digital age’.

A further tool at the CMA’s disposal is company director disqualifications. This power was granted to UK competition authorities in 2003, but was never used by the OFT: in December 2016, the CMA secured its first disqualification against the director of a company that participated in an agreement on the price of posters and frames sold through Amazon’s UK website.43 In April 2018, the CMA secured the disqualification of two directors involved in an estate agency cartel for three and three-and-a-half years respectively.44 The CMA has confirmed its desire to send a clear message that directors and managers may be held personally liable if their businesses commit breaches of competition law, and that further disqualification undertakings are to be expected in the future.45 New guidance on competition disqualification orders was published by the CMA in February 2019.46

The CMA has also sought to innovate enforcement in other respects in recent years by deploying flexibly other enforcement tools beyond infringement decisions.47 The CMA produces compliance materials and promotes its message at trade association meetings in sectors where there have been competition issues, and has launched a ‘stop cartels’ campaign across social media. The CMA also sends advisory and ‘stronger’ warning letters to businesses that it suspects of being in breach of competition law (which are publicly available48) where the conduct concerned does not merit devoting resources to a full investigation. Further, like other competition authorities, the CMA makes use of settlements, commitments and interim measures. The CMA has also resorted to removing the possibility of immunity from fines under CA98 for small companies for non-price fixing agreements.49 A useful tool for competition practitioners and businesses alike that the CMA has made use of is issuing ‘no grounds for action’ decisions, which give a reasoned indication of what an enforcer considers acceptable conduct in potential grey areas.50 It is without a doubt that the CMA will seek to be at the forefront of competition policy in the global post-Brexit competition landscape.

II CARTELS

Under the current UK regime, cartels are enforced by both civil and criminal means: corporate civil liability under the Chapter I prohibition contained in CA98 or the criminal cartel offence for individuals under EA02, or both. In many cartel cases, both investigations will proceed simultaneously.

The CMA continues to regard cartel enforcement as a major priority, and is working to ensure that it has the requisite people, skills and infrastructure to launch or take over major

44 See www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anticonpetitive-arrangements.
warning-letters-issued-by-the-cma.
50 See, for example, www.gov.uk/cma-cases/consumable-goods-suspected-anticonpetitive-conduct.
international cartel cases post-Brexit. As mentioned above, the draft ‘no deal’ guidance goes into detail on how cartel cases will be treated in the event that Britain leaves the EU without a deal in place.51

i Significant cases

In 2018, the CMA only issued one cartel decision, fining two of the main suppliers of household coal for barbecues £3.4 million for taking part in a market-sharing cartel.52 An investigation in the pharmaceutical sector was launched in October 2017, but was discontinued in November 2018 on administrative priority grounds.53 In 2017, the CMA issued three cartel infringement decisions concerning ‘cleanroom’ laundry services, furniture parts and real estate agents, and brought its criminal investigation into the construction industry to a close. It also successfully defended an infringement decision before the CAT in Balmoral Tanks, a case that raised important points of principle in relation to information exchange.

Supply of solid fuel

As mentioned above, the CMA in 2018 fined two bagged household fuels suppliers over £3.4 million for rigging competitive tenders to secure supply to Tesco and Sainsbury’s through a market-sharing cartel.54 This case started after intelligence work following a tip-off to the CMA’s cartels hotline. The two suppliers had an arrangement wherein for each tender concerned, the other supplier would intentionally submit a higher bid that it was designed to lose, in turn ensuring that the existing supplier could retain their customer. The two suppliers also exchanged competitively sensitive information and confidential pricing information such as ongoing tendering processes, in order to facilitate their market-sharing cartel. The two companies admitted infringing competition law and received a 20 per cent fine discount for settling the case.

Residential estate agency services

On 31 May 2017, the CMA issued a decision finding that six estate agents operating in the Burnham-on-Sea area in South-West England had taken part in a cartel to fix prices in relation to the provision of residential estate agency services, with fines totalling £370,084.55 This followed the admission of liability by four other estate agents and their paying fines totalling £372,233 under a settlement agreement reached with the CMA on 2 March 2017. On the basis of information received during that investigation, the CMA has opened an investigation into estate agents in other locations across the UK, which are undisclosed at the time of writing.56 This case is still at an early stage, and the CMA has not reached a view on infringement – an update is due by the end of April 2019.57

55 See www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anticompetitive-arrangement-s.
56 See www.gov.uk/cma-cases/provision-of-residential-estate-agency-services.
57 See www.gov.uk/cma-cases/provision-of-residential-estate-agency-services.
**FCA**

In November 2017, the FCA issued its first SO as part of its investigation into information exchange in the asset management sector – an investigation that is ongoing at the time of writing.\(^58\) Four asset management firms are alleged to have shared information, generally on a bilateral basis, on prices they intended to pay in relation to one or more of two initial public offerings and one placing, shortly before the prices were set. This may lead to the FCA’s first CA98 infringement decision. Such a decision would be taken by a three-member Competition Decision Committee group within the FCA, but separate from the case investigation team, similar to the procedure followed by the CMA. Further SOs and eventually decisions are to be expected in the future as the FCA seeks to cement its role as a concurrent competition enforcer. In that regard, the FCA also opened a CA98 investigation into alleged collusion in the aviation insurance market. This was subsequently transferred to the Commission, whose investigation is ongoing.\(^59\)

**Balmoral Tanks**

In respect of the CMA’s cartel enforcement, in 2017 the CAT upheld a decision fining Balmoral Tanks (Balmoral) £130,000 for exchanging confidential information on prices and price intentions with competitors manufacturing galvanised steel tanks.\(^60\) The decision concerned a single meeting in July 2012 at which Balmoral was invited to join a long-running price-fixing cartel. Balmoral refused to take part in the cartel, but exchanged confidential information with competitors. The meeting had been covertly recorded by the CMA. The CAT confirmed that even sharing information on a single occasion, even when refraining from joining others in price fixing or market sharing, can constitute a breach of competition law. Balmoral subsequently challenged the CAT’s ruling in the Court of Appeal, but the decision was upheld in its entirety in February 2019.\(^61\)

**Trends, developments and strategies**

As part of its commitment to drive greater enforcement, the CMA continues to focus on raising awareness of competition law. In October 2018, the CMA launched a cartel awareness campaign which aims to educate businesses about illegal practices and to encourage whistle-blowing.\(^62\) Alongside this campaign the CMA released ICM research which showed that, out of 1,000 companies surveyed:

- only 57 per cent knew it was illegal to fix prices;
- nearly half either did not know or thought it was legal to discuss prices with competing bidders when quoting for new work (23 per cent said ‘don’t know, and 25 per cent actually thought it was legal); and

---


\(^{60}\) See [www.catribunal.org.uk/cases/127711217-1-balmoral-tanks-limited-and-2-balmoral-group-holdings-limited.](https://www.catribunal.org.uk/cases/127711217-1-balmoral-tanks-limited-and-2-balmoral-group-holdings-limited)


c significantly more than half (59 per cent) did not know or thought that dividing up and sharing customers with rivals was legal (24 per cent said ‘don’t know’ and 35 per cent actually thought it was legal).63

This campaign followed on from the CMA’s ‘Cracking Down on Cartels’ campaign, which promised anonymity and rewards of up to £100,000 for individuals reporting cartel activity.64 This campaign was followed by a 30 per cent rise in the number of tip-offs.65 The CMA has also introduced a new tool to spot bid rigging that procurement professionals can download and use free of charge.66

The CMA has noted that the cartel awareness campaign is designed to target industries including construction, manufacturing, recruitment, estate agents and property management and maintenance, as these sectors have been identified as being particularly susceptible to cartel behaviour. The CMA’s view is that compliance work of this sort is of increasing importance, as Brexit may distract businesses from competition compliance concerns.67

iii Outlook
At the time of writing the CMA is expecting an increased cartel workload post-Brexit, when it will be responsible for investigating and enforcing the UK elements of major international cartels. As mentioned above, the CMA is focusing on raising awareness of cartels at a time when competition law is at risk of being neglected by companies primarily concerned with Brexit.

III ANTI TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE
The prohibition in Chapter I of CA98 captures a range of restrictive agreements, including both cartels and those agreements (both vertical and horizontal) that do not constitute hardcore cartels but nevertheless damage competition. The most important such Chapter I cases for 2017/2018 are outlined below, together with Chapter II cases (dealing with the abuse of a dominant position).

i Significant cases

Restrictive agreements under Chapter 1

Ping
The most significant development in 2018 was the CAT’s decision in Ping Europe Limited v. Competition and Markets Authority.68 The CMA had fined Ping, a golf club manufacturer,
£1.45 million for banning two UK retailers from selling its golf clubs online, and ordered Ping to bring the online sales ban to an end.\(^{69}\) Ping appealed the decision, arguing that the sales ban was justified on the grounds that:

\(a\) Ping’s freedom to sell the kind of product it wanted to sell (e.g., customised golf clubs) was infringed by forcing it to sell non-customised clubs online, contrary to the European Union Charter on Fundamental Rights;

\(b\) the online sales ban was not a restriction of competition by object;

\(c\) the CMA’s finding that the online sales ban was disproportionate because ‘less restrictive’ options were available was wrong because those less restrictive options would be impractical and less effective than the ban;

\(d\) the online sales ban fell within the ‘ancillary restraint doctrine’ or was exempt under Article 101(3) TFEU and Section 9 of the CA 1998, as it produced real benefits to consumers that could not be achieved any other way;

\(e\) the CMA should not have imposed a fine as the alleged infringement was not committed intentionally or negligently; and

\(f\) the fine was excessive and should be reduced.

The CAT dismissed the human rights argument, and upheld the CMA’s finding that the ban was a restriction of competition ‘by object’. The CAT also dismissed Ping’s arguments around proportionality and objective justification, but the fine was reduced by £200,000 because the CMA had erred in treating director involvement as an ‘aggravating factor’.

**Conduct in the transport sector (facilities at airports)**

The CMA fined Heathrow £1.6 million for restricting competition parking prices in a lease with the operator of a Terminal 5 hotel. The pricing restriction prevented the hotel group from charging non-hotel guests prices that were cheaper than those offered at other Heathrow car parks. The hotel group was granted immunity for coming forward under the CMA’s leniency programme and was not fined.\(^{70}\)

**Atlantic joint business agreement investigation**

In October 2018, the CMA opened an investigation into the Atlantic Joint Business Agreement, which was signed by American Airlines, British Airways, Iberia and Finnair. The Commission accepted commitments in 2010 in relation to six routes, and the CMA has now decided to ‘review afresh the competitive impact of the agreement in anticipation of the expiry of the commitments’.\(^{71}\) Ordinarily this could be left to the Commission but in light of Brexit (and the fact that five of the six routes in question are from the UK) the CMA has launched what it describes as its ‘first ‘Brexit’ case’.\(^{72}\)

**Abuse of dominant position under Chapter II**

No abuse of dominance cases reached a decision at CMA level in 2018, but the CAT handed down judgments in the appeals against the CMA’s pay-for-delay (GlaxoSmithKline) and

---


excessive drug pricing (Pfizer/Flynn) cases. In respect of Pfizer/Flynn, the CAT in June 2018 quashed the record £84.2 million and £5.2 million fines that were imposed on Pfizer and Flynn respectively, after finding that the CMA’s test for unfair pricing had been wrongly applied. In the GSK paroxetine pay-for-delay case, the CAT issued an intermediate judgment dismissing a number of the grounds for appeal and referring a number of legal questions to the CJEU.

ii Trends, developments and strategies

Although no decisions were rendered in 2018, the pharmaceutical sector remains high among the CMA’s antitrust enforcement priorities, particularly given that by far the largest customer of pharmaceutical products in the UK is the taxpayer-funded National Health Service. A number of the CMA’s open cases are in the pharmaceutical sector. A supplementary statement of objections was issued in January 2019 in the CMA’s Liothyronine Tablets investigation and the Hydrocortisone Tablets investigation is ongoing. The CMA’s wide-ranging investigation into suspected anticompetitive agreements and concerted practices and suspected abuse of dominance in relation to the supply of generic pharmaceutical products is also ongoing (currently in the information gathering stage).

iii Conclusion

Increased antitrust and cartel enforcement should be expected post-Brexit, as the CMA and sectoral regulators become the sole authorities able to review conduct in and affecting the UK. Key areas of interest are likely to continue to be pharmaceuticals and the digital commerce sector.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The CMA and concurrent regulators have wide powers to study and investigate markets that they consider may not be working properly, and to make recommendations and impose remedies to improve the operation of competition in those markets. Market studies and investigations are a particular feature of the UK system, with previous investigations being high-profile and tending to focus on consumer-facing industries. Until the recent increase in enforcement activity, much of the competition regulators’ efforts were concentrated on such investigations.

75 See www.gov.uk/cma-cases/pharmaceutical-sector-anticompetitive-conduct.
Significant investigations

Investment consultants market investigation

The CMA published its final report in its investment consultants market investigation in December 2018. The CMA uncovered competition uses within the investment consultancy and fiduciary management markets. In the fiduciary market, for example, it was found that many pension schemes use the same provider that they use for investment consultancy.

Care homes, funerals sector

One of the CMA’s key areas of ongoing concern is the protection of vulnerable consumers. The market investigation into care homes, which tied into this theme, concluded in November 2017 and was followed by a specific consumer enforcement action in which more than £2 million in compensation was secured for care home residents who had paid ‘upfront fees’. In the same vein the CMA launched an investigation into the funeral market after identifying serious concerns, which is understandable as a funeral purchaser is typically a distressed consumer with no previous experience of the market.

Statutory audit

In October 2018, the CMA launched a market study into the statutory audit market. This investigation will be of interest as it will focus closely on the current collective dominance of the ‘Big Four’ audit providers, KPMG, PwC, EY and Deloitte.

Super-complaint

Although not technically a market investigation, there is an ongoing ‘super-complaint’ submitted by Citizens Advice under EA02 which makes provision for designated consumer bodies to make super-complaints where it considers that a market is or appears to be ‘significantly harming the interests of consumers’. The super-complaint is focused on loyalty penalties across ‘essential markets’ (savings accounts, mortgages, household insurance, mobile and broadband) following the finding that eight out of 10 bill payers are charged significantly higher prices for staying with their existing supplier in at least one essential market. The cost to consumers is estimated at several billion pounds a year. As a result of this super-complaint the CMA began a consumer law investigation into the anti-virus software market and whether the business practices and terms and conditions associated with the automatic renewal of subscriptions are fair.

77 See www.gov.uk/cma-cases/investment-consultants-market-investigation.
81 See www.gov.uk/cma-cases/statutory-audit-market-study.
84 See www.gov.uk/cma-cases/anti-virus-software.
ii Outlook

The 2019–2020 annual plan mentions that, in the event of a ‘no deal’ Brexit, ‘taking on new and mandatory cases ... will heavily constrain [the CMA’s] ability to launch other new, but more discretionary work using our markets and enforcement powers.’

While market investigations therefore remain an important part of the CMA’s suite of powers, the extent to which the CMA has the time and resources to carry out investigations will hinge on the outcome of Brexit negotiations.

In terms of ongoing cases, the CMA is minded not to initiate a market investigation following the statutory audit market study as it considers recommendations to the government to change the law as likely to be more effective. Elsewhere the conclusions in the funeral market study are expected in the middle of the year.

V MERGER REVIEW

The CMA carries out both Phase I and, if warranted, in-depth Phase II merger investigations in the UK. Save for a limited category of investigations (in which the government makes the final decision), decisions at Phase II are made by a panel independent from the case so as to avoid any ‘confirmation bias’. The UK regime is also unusual in that merger notifications are voluntary, but the CMA has the ability to investigate non-notified transactions, and it has an active Merger Intelligence Committee that monitors merger and acquisition activity for transactions that may raise competition concerns.

i Significant cases

Sainsbury/Asda

Arguably the most significant ongoing case is the anticipated J Sainsbury Plc/Asda Group Ltd merger. The merger was referred to Phase II under the fast-track procedure at the request of the parties. Sainsbury’s and Asda are respectively the second and third largest grocery retailers and overlap in a number of other areas including procurement of groceries, retail supply of fuel, and supply of general merchandise. The merger would create the UK’s largest supermarket group.

The parties are the first to successfully challenge the CMA in court over the timetable of a merger investigation: after being given limited time in which to respond to the CMA’s numerous ‘working papers’ the CAT ruled that the timetable for responding to the material and attending a hearing was unfair.
21st Century Fox/Sky
The final decision in the Fox/Sky investigation was published in June 2018, following an intervention by the Secretary of State over concerns in relation to media plurality and broadcasting standards. The Secretary of State accepted the CMA’s recommendation that the acquisition was not in the public interest and that a proportionate remedy would be the divestment of Sky News to a third party.90 In the event Fox was ultimately outbid by Comcast.91

SSE Retail/Npower
In October 2018 the CMA cleared SSE Retail’s merger with Npower after a Phase II investigation, although the deal was ultimately abandoned.92 The merger would have created the second largest energy supplier in the UK, but the CMA found that consumers would still have plenty of choice in relation to standard variable tariffs.

Electro Rent Corporation/Test Equipment Asset Management and Microlease
In May 2018, the CMA ordered that Electro Rent sell its UK division after a Phase II investigation. The case gained extra significance because it involved the CMA’s first ever fine for breach of an interim order. As the merger was already completed at the time the CMA began its investigation, an interim enforcement order (IEO) was put in place to prevent Electro Rent from taking any ‘pre-emptive’ steps (e.g., beginning to integrate the two businesses). At the beginning of the Phase II investigation the IEO was replaced by a similar interim order (IO).

In June 2018, the CMA fined Electro Rent £100,000 after it terminated the lease over its UK premises whilst the IO was in force.93 The monitoring trustee (appointed to ensure compliance with the IO) was informed of Electro Rent’s intention to terminate the lease did not object (partly on the basis of incorrect information provided in good faith), but did not receive all the relevant information and in any event had no authority to consent on behalf of the CMA (who were not informed). Taking into account all the circumstances the CMA did not consider that acting following approval from the monitoring trustee constituted ‘reasonable excuse’. The CMA considered the fine was appropriate, reasonable and proportionate, and that it would act as a specific and general deterrent. The decision was appealed by Electro Rent but was upheld by the CAT.94 The fine may be viewed as part of the wider trend towards increased enforcement by the CMA, which now also appears to be targeting breaches of IEOs and IOs.

Electro Rent was fined a further £200,000 in February 2019 for a separate failure to comply with the interim order, after it failed to obtain the consent of the CMA before appointing the CFO of Electro Rent as director of Test Equipment Asset Management Limited and its subsidiaries.95

93 See https://assets.publishing.service.gov.uk/media/5b1fb924e5274a18e8bf5230/Decision_on_Penalty.pdf.
95 See https://assets.publishing.service.gov.uk/media/5c66a73ee5274a72c19f7c54/190212_Final_Decision_on_Penalty.pdf.
ii  Trends, developments and strategies

The most significant development in 2018 related to mergers that may raise national security concerns. Following a government consultation the intervention thresholds were lowered in three key sectors:

- the development or production of military or dual-use goods;
- the design and maintenance of computing hardware; and
- the development or production of quantum technology.

Following changes implemented in June 2018 the government can now intervene in these areas if the annual UK turnover of the target is over £1 million (the threshold in all other sectors is £70 million) or if the target alone accounts for 25 per cent or more of purchases or sales of any goods or services in the UK (in all other sectors the parties have to overlap such that there is an increment leading to a combined share of supply of 25 per cent or more).96

Long-term changes are also expected, with draft legislation due in 2019. Under the proposals set out in a June 2018 White Paper, the government will be able to call in transactions that are not notified if it believes the transaction raises national security concerns. The paper suggests a number of ‘trigger events’ that would allow the government to review the transaction regardless of market share or revenue.97

iii  Outlook

As discussed in the introduction, the CMA expects a significant increase in the number of merger investigations carried out post-Brexit given its widened jurisdiction. In addition, the government anticipates that between five and 29 additional cases per year will be caught by the national security amendments introduced in June 2018 (see above). If the long-term changes are implemented as currently proposed this will materially increase the number of cases expected to be reviewed on national security grounds: the Department for Business, Energy & Industrial Strategy has estimated 100 cases will be subject to detailed review of which around half are likely to be subject to some form of remedy.98 It is therefore to be expected that the CMA will spend a greater proportion of its time on merger work in 2019 and beyond.

VI  CONCLUSIONS

Despite the impending deadline for Britain’s departure from the EU, at the time of writing there is still a considerable lack of clarity surrounding the Brexit process. Whether or not the government can agree a deal with the EU is unclear, and there is an increasing possibility that Brexit will be delayed. The status, or indeed existence, of any transition period in which European competition law might continue to apply, is therefore unknown. The CMA’s draft ‘no deal’ guidance has gone some way towards clarifying the position in the event that Britain leaves the EU without a deal, and there is now legislation in place that sets out the extent to which European competition law would be either dis-applied or retained post-Brexit.

98  Ibid.
Regardless of the outcome it seems clear that Brexit will expand the CMA’s jurisdiction and increase its workload, particularly in merger control and competition enforcement. The CMA will also take responsibility for enforcing a new UK state aid regime. The CMA continues to view Brexit as an opportunity, albeit a challenging one. The CMA envisions a close relationship with the Commission and other international competition authorities post-Brexit, but also sees an opportunity to expand its remit and increase its presence and power as a competition law enforcer.

I OVERVIEW

In 2018, the United States Federal Trade Commission (FTC) regained its full slate of five commissioners, as Chairman Joseph J Simons and Commissioners Noah Joshua Phillips, Rohit Chopra, Rebecca Kelly Slaughter and Christine S Wilson were sworn in. In September, the FTC began holding a series of wide-ranging public hearings on a number of important competition and consumer protection topics, including merger enforcement and competitive issues related to technology and digital platforms. These hearings have the potential to inform the FTC’s approach to enforcement for years to come. Meanwhile, the leadership of the Antitrust Division of the United States Department of Justice (DOJ) has been vocal in setting forth its views in a number of areas which we discuss below, including competitive issues related to patent licensing, merger review processes and merger remedies.

The agencies continued to investigate numerous mergers, settling several investigations with divestiture remedies and litigating others (most notably AT&T’s acquisition of Time Warner). The DOJ continued aggressively to pursue price-fixing investigations in several industries, including London Interbank Offered Rate (LIBOR), foreign exchange markets, e-commerce, auto parts, electrolytic capacitors, packaged seafood and generic drugs. It also pursued bid-rigging investigations in real estate foreclosure auctions, ocean shipping and various other areas. The agencies were also involved in matters involving pharmaceutical ‘pay for delay’ allegations, ‘steering’ restrictions and market allocation.

The agencies’ attention to international matters also continued. Both the FTC and DOJ participated in several international meetings and conferences, including meetings with enforcers from the European Union and China, and meetings of the International Competition Network. In a late summer speech, the head of the Antitrust Division noted that ‘international engagement and global dialogue [are] . . . of significant importance to’ him. He also reported on efforts related to the DOJ’s Multilateral Framework on Procedure in Competition Law Investigation and Enforcement initiative, which seeks international agreement on procedural norms, noting ‘that the areas of consensus far outweigh those that require additional discussion.’

---

1 Aidan Synnott and Bill Michael are partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors thank Maxwell Kosman, Mark R Laramie and Jonathan Silberstein-Loeb for their invaluable assistance in preparing this chapter.

II CARTELS

i Significant cases

LIBOR

The DOJ’s long-running investigation of LIBOR and other interbank offered rates continued, with two significant developments in 2018. First, in June 2018, the DOJ entered into a deferred prosecution agreement with Société Générale SA, pursuant to which Société Générale admitted that, between May 2010 and at least October 2011, the company promulgated falsely deflated US dollar LIBOR submissions in order to project a false image of the bank’s health.3 By the terms of the agreement, Société Générale paid a LIBOR-related fine of US$275 million.4 Second, in October 2017, a former supervisor of Deutsche Bank’s Pool Trading Desk and a former derivatives trader were convicted in the Southern District of New York of conspiracy and wire fraud for their participation in a scheme to manipulate LIBOR.5

Foreign exchange markets

There were also several developments in the DOJ’s long-running investigation into alleged collusion with respect to foreign currency exchange (FX). In January 2018, BNP Paribas USA (BNPP USA) pleaded guilty to participating in a price-fixing conspiracy in the FX market.6 According to the court papers, BNPP USA conspired to fix prices in Central and Eastern European, Middle Eastern and African (CEEMA) currencies.7 In May 2018, a former currency trader from a US-based financial institution was indicted for allegedly conspiring to fix prices and rig bids and offers in CEEMA currencies.8 And in October 2018, three London-based traders, who were members of a chatroom that was at one point called the ‘cartel’, were acquitted after a three-week trial in New York in which they were alleged to have conspired to fix prices in the foreign exchange market.9

E-commerce

The DOJ carried forward its prosecution of price-fixing conduct in the e-commerce sphere. The former director and part owner of T rod Limited had previously been indicted for conspiring to fix the prices of posters sold online.10 A UK resident, he remained a fugitive

4 Id.
7 Id.
until his arrest in May 2018. Also in January 2019, a federal grand jury in Houston returned an indictment against Taiwan-based G Nova corporation and its CEO for participating in a conspiracy to fix prices of Koozies, and the DOJ announced that it had filed criminal charges against Netbrands Media Corporation and two executives for their roles in a separate conspiracy to fix prices of wristbands, lanyards, temporary tattoos and buttons sold in the United States. Netbrands and the executives all agreed to plead guilty or entered guilty pleas. Speaking of these developments, Assistant Attorney General Delrahim said:

_The results announced today are the latest in a series of charges against eleven defendants filed in the Division’s ongoing investigation into conspiracies that corrupted the online marketplace and deprived consumers of the benefits of competition . . . Whether the conspiracy takes place in smoke-filled rooms that are real or virtual, the Department of Justice and its law enforcement partners are committed to uncovering and prosecuting collusion._

### Auto parts

The now nine-year DOJ investigation into auto part prices carried on into 2018. In May 2018, Maruyasu Industries Co Ltd (Maruyasu) agreed to plead guilty and pay a US$12 million criminal fine for its role in a conspiracy to suppress and eliminate competition by agreeing to fix prices, allocate customers and rig bids for automotive steel tubes. Concurrent with the Court’s imposition of the sentence against Maruyasu, the DOJ moved to dismiss the indictments against Maruyasu’s US subsidiary and three Maruyasu sales executives. As of 31 May 2018, and including Maruyasu, the Antitrust Division’s prosecution of collusion in the auto parts industry has resulted in more than US$2.9 billion in fines, and the convictions of 46 corporations and 32 executives.

### Electrolytic capacitors

The DOJ’s pursuit of charges in connection with price fixing, bid rigging and other anticompetitive conduct in the electrolytic capacitors industry continued, but slowed slightly, in 2018. Electrolytic capacitors store and regulate electrical currents in a variety of electronic products, including computers, televisions, car engine and airbag systems, home appliances and office equipment. The government resolved several cases in this investigation in 2018.
Packaged seafood

The DOJ continued its antitrust investigation in the packaged seafood industry. In May, a federal grand jury returned an indictment against the President and CEO of Bumble Bee Foods LLC, alleging that he participated in a conspiracy involving prices of packaged seafood from November 2010 to December 2013. He was the fourth individual charged in the ongoing investigation. In October 2018, StarKist Co pleaded guilty to a one-count felony charge for its role in the alleged conspiracy, exposing it to a potential criminal fine of up to US$100 million. It was the second organisation to plead guilty in connection with the DOJ’s investigation.

Generic drugs

The DOJ has publicly stated that the Antitrust Division’s investigation into potential collusion and market allocation in the generic pharmaceutical industry is ‘ongoing’. In December 2018, an Assistant Attorney General for the State of Connecticut said that state attorneys general were also involved in an investigation of alleged price fixing in the generics industry involving ‘at least 16 companies and 300 drugs’.

Bid rigging

Defence fuel supply contracts

In November 2018, three South Korean-based companies – SK Energy Co Ltd, GS Caltex Corporation, and Hanjin Transportation Co Ltd – pleaded guilty to criminal charges, and agreed to collectively pay US$82 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to the US Army, Navy, Marine Corps and Air Force bases in South Korea. In particular, the three filed felony charges allege that beginning at least in or around March 2005, and continuing into 2016, South Korean petroleum and refinery companies ‘participated in a combination and conspiracy to suppress and eliminate competition during the bidding process for . . . fuel supply contracts’ pertaining to the numerous US military bases throughout South Korea. The DOJ stated that the charges are part of ‘an ongoing federal investigation’.

19 Id.
21 Id.
25 Id.
26 Id.
Division also filed a civil antitrust complaint against the same defendants, and, at the same time, proposed settlement that, if approved by the court, would resolve that lawsuit. The aggregate settlements would exceed US$150 million. The litigation resulted from a whistle-blower action.

Real estate foreclosure auctions
The DOJ continued to aggressively investigate bid rigging and fraud in public foreclosure auctions, bringing charges or securing guilty pleas in 2018 against individuals in California, Mississippi and Florida. The charges allege that the defendants conspired among themselves and with others not to bid against one another, and to designate winning bidders for properties at public real estate foreclosure auctions conducted both in-person and online. In many cases, the real estate properties bought at non-competitive prices were then awarded to the conspirators who submitted the highest bids at a second, private auction. Because the proceeds of the original real estate auctions are used to pay off the mortgage and other debt attached to a property, with the remaining proceeds being paid to the homeowner, the conspirators paid and received money that otherwise would have gone to pay off the mortgage and other debt and, in some cases, the defaulting homeowner. As of November 2018, over 100 individuals had been convicted or pleaded guilty for rigging public mortgage foreclosure auctions in six different states.
Foreclosed home repair

The DOJ continued its investigation into fraud and kickbacks relating to repair contracts in the Minneapolis area. In August 2018, a federal grand jury returned an indictment against a real estate company, and a realtor and his accountant for participating in a ‘conspiracy to defraud companies, including financial institutions, in connection with foreclosed properties’. The indictment alleges that defendants devised a scheme requiring repair contractors to pay kickbacks in return for the steering of housing repair contracts to the contractors who paid the kickbacks. This is the second case involving this type of conduct.

Ocean shipping

There were no significant public developments in the DOJ’s investigation into the alleged conspiracy to fix prices, allocate customers and rig bids for international ocean shipping services for roll-on, roll-off cargo such as cars, trucks and agricultural equipment to and from the United States and elsewhere. As of September 2017 a total of five companies had pleaded guilty in the investigation, resulting in criminal fines of over US$255 million. Four executives had also pleaded guilty, and an additional seven had been indicted.

Public school bus auction

In February 2018, four owners of school bus transportation companies were sentenced for participating in bid rigging and fraud conspiracies related to school bus transportation contracts in Puerto Rico. The four individuals had been convicted after trial in 2017. The convictions arose from a federal antitrust investigation being conducted by the Antitrust Division, the District of Puerto Rico US Attorney’s Office, the FBI’s Puerto Rico Field Office and the US Department of Education Office of Inspector General.


40 Id.


43 Id.
Freight forwarding

Two executives were arrested on and then pleaded guilty to charges that they orchestrated a nationwide conspiracy to fix prices for international freight forwarding services.44 According to the indictment and their guilty pleas, the conspiracy lasted from at least September 2010 to March 2015.45 The two individuals – the first to be convicted in the investigation – have agreed to cooperate in the ongoing investigation into price fixing in the international freight forwarding industry, which is being conducted by the Antitrust Division, the FBI’s International Corruption Unit and the FBI’s New Orleans Division.46

Anti-poaching

In April 2018 the DOJ reached a settlement with Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (Wabtec), two of the world’s largest rail equipment suppliers, to resolve a civil lawsuit alleging that the companies had maintained unlawful agreements not to compete for each other’s employees.47 The DOJ alleged that Knorr and Wabtec ‘compete with each other to attract, hire, and retain various skilled employees,’ and that the companies had ‘reached agreements not to solicit, recruit, hire without prior approval, or otherwise compete with one another for employees.’48 The settlement prohibits Knorr and Wabtec ‘from entering, maintaining, or enforcing no-poach agreements with any other companies, subject to limited exceptions.’49

Heir-location services firms

In 2018, litigation pertaining to the criminal heir-location services trial continued. As background, in August 2017, the United States District Court for the District of Utah dismissed bid-rigging charges against a Salt Lake City-based heir-location services provider and its co-owner.50 The defendants had been charged with violating Section 1 of the Sherman Act for allocating customers with another heir-location services firm.51 The Court ruled that the conspiracy had effectively ceased in July 2008, and that the prosecution was therefore barred by the statute of limitations.52 On 22 December 2017, the DOJ appealed the Court’s ruling to the United States Court of Appeals for the Tenth Circuit.53 In October 2018, the Tenth Circuit ruled that the case did not fall outside the statute of limitations, while at the

45 Id.
46 Id.
48 Id.
49 Id.
53 Id.
same time declining to reverse the district court’s decision tying the case to a rule-of-reason standard. In January 2019, the DOJ sought reconsideration of the district court’s prior ruling that the court should be evaluated as a rule of reason (rather than per se) case. The issue is significant, as DOJ policy only permits prosecutors to pursue as criminal cases those subject to the per se standard.\textsuperscript{54} The district court granted the DOJ’s motion for reconsideration on 21 February 2019, holding that the charged conduct is indeed to be tried under the per se approach.\textsuperscript{55}

**Water treatment chemicals**

The DOJ continued its investigation into alleged collusion to circumvent competitive bidding and independent pricing for liquid aluminium sulphate contracts. In January 2018, a former executive pleaded guilty for his role in a conspiracy to eliminate competition by rigging bids, allocating customers, and fixing the price for liquid aluminium sulphate sold to municipalities and paper companies in the United States.\textsuperscript{56} According to court documents, the executive and his co-conspirators agreed not to pursue each other’s historical customers, and submitted intentionally losing bids to effectuate those agreements.\textsuperscript{57} As of January 2018, two other individuals and one company had pleaded guilty to charges arising out of the federal investigation of collusion in the liquid aluminium sulphate industry.\textsuperscript{58}

**ii  Trends, developments and strategies**

The new DOJ Antitrust Division leadership continued its focus on the prosecution of responsible individuals. The DOJ believes such convictions and pleas are likely to have strong deterrent effects as the average number of individuals sentenced to jail and the average length of sentences continue to increase. A number of prosecutions and guilty pleas secured in 2018 were still connected to investigations that were initiated under prior leadership, such as LIBOR, Automotive Parts, Electrolytic Capacitors and Real Estate Foreclosure. While the activity in these investigations has declined from its peak, it would not be surprising for additional charges in these investigations to be filed into 2019. Given the emphasis the DOJ has placed on large international collusion investigations in the past, it would also not be surprising to see the DOJ announce new international investigations in the coming year.

**iii  Outlook**

The DOJ investigations and criminal antitrust prosecutions will likely continue at a high volume in 2019, particularly in areas that appear to align with the current administration’s enforcement priorities. The DOJ has stated that a number of relatively new investigations (e.g., Generic Pharmaceuticals, E-commerce, Defence Fuel Supply, Freight Forwarding and Anti-Poaching) remain ongoing, suggesting that further charges may emerge out of those spheres.

\textsuperscript{54} See footnote 52.
\textsuperscript{55} *U.S. v. Kemp & Assoc.*, No. 16-cr-403 (D. Utah 21 February 2019).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

Market allocation

In June 2015, the DOJ and the State of Michigan filed suit in Michigan against four hospital systems. The case alleged that the systems illegally made a ‘gentlemen’s agreement not to market services’.\(^{59}\) Three of the four systems settled, but the fourth is litigating.\(^{60}\) The case was initially scheduled to go to trial in April 2017.\(^{61}\) In June 2017, Judge Judith E Levy, of the US District Court for the Eastern District of Michigan, denied cross motions for partial summary judgment.\(^{62}\) After several delays, trial was scheduled for March 2018. In the interim, the case was referred to mediation,\(^{63}\) and in February 2018 the parties settled the case in the form of a proposed final judgment. Among other things, the settlement prohibits the hospital system from entering into any agreement with any other hospital system that prohibits or limits marketing or otherwise allocates any service, customer, or geographic market. The settlement also requires the hospital system to appoint an antitrust compliance officer.\(^{64}\)

Separately, in April 2018, following a public comment period, the FTC approved a negotiated final order prohibiting Oregon Lithoprint Inc from making or attempting to make any agreement to refuse publication of legal notices or to allocate customers who wish to publish these notices. According to the FTC’s complaint, Oregon Lithoprint, Inc, the owner of the Yamhill, Oregon News-Register, a bi-weekly community newspaper, invited The Newberg Graphic, its closest rival in Yamhill County, to divide geographic markets for printing foreclosure notices, thereby inviting collusion that endangered competition and violated Section 5 of the FTC Act.\(^{65}\)

In a potentially significant case concerning online advertising, the FTC issued an opinion, affirming the initial decision of an Administrative Law Judge, that 1-800 Contacts, the largest online retailer of contact lenses in the US, unlawfully entered into anticompetitive agreements with rival online contact lens sellers that suppressed competition in certain online search advertising auctions, thereby restricting truthful and non-misleading internet advertising to consumers. According to the administrative complaint filed by the FTC, as part of a settlement of a trademark dispute, 1-800 Contacts entered into bidding agreements with at least 14 competing online contact lens retailers providing that they would not bid against one another in certain search advertising auctions. The major online search engine


\(^{63}\) Id., Order (Dkt. 119) (21 January 2018).


companies, such as Google and Bing, sell advertising space on their search engine results pages through computerised auctions. Following a 19-day administrative hearing involving testimony from 43 witnesses and more than 1,250 exhibits, Chief Administrative Law Judge Michael D Chappell issued an initial decision holding that the advertising restraints at issue unreasonably harmed competition and costumers in the market for the sale of contact lenses online. Respondents appealed and the Commission issued at 59-page opinion upholding Judge Chappell’s initial decision. The Commission’s order requires 1-800 Contacts to cease and desist from enforcing the unlawful provisions in its existing agreements and from entering into similar agreements in future. In December 2018, 1-800 Contacts applied to the Commission to stay its order in part pending review by a US Court of Appeals, and that application remains pending.

Steering restrictions

The DOJ’s civil antitrust lawsuit against Carolinas HealthCare System (CHS) appears likely to settle soon. In June 2016, the DOJ filed suit against CHS accusing it of improperly using its market share in the Charlotte, North Carolina, area to prevent commercial health insurers from steering patients to lower-cost hospitals. CHS is the largest healthcare system in North Carolina and one of the largest not-for-profit healthcare systems in the United States. In August 2016, CHS moved for judgment on the pleadings and in March 2017, Judge Robert J Conrad, Jr of the US District Court for the Western District of North Carolina denied CHS’s motion for judgment on the pleadings. The case was subsequently stayed and, in December 2018, Judge Conrad preliminarily approved a proposed final judgment, which according to his order may be filed and entered by the court on motion of either party or on the court’s own action. The proposed final judgment prohibits CHS from enforcing steering restrictions in its existing contracts with major insurance companies and expressly prohibits steering, requirements of prior approval for the introduction of new benefit plans, requirements that CHS be included in the most-preferred tier of benefit plans, and any actions that penalise, or threaten to penalise, an insurer for providing a steered plan.

---


72 Id., Joint Stipulation and Order (Dkt. 92) (14 December 2018).

‘Pay for delay’ and ‘sham litigation’

The FTC has continued its efforts to prohibit ‘pay for delay’ settlements, in which brand-name drug manufacturers settle patent infringement suits against potential generic manufacturers by making payments to generic manufacturers as long as the manufacturer remains out of the market for some period of time. As we reported in 2018, following the Supreme Court’s decision in FTC v. Actavis, Inc, the FTC was active in prosecuting such agreements and the total number of potential pay-for-delay patent dispute settlements dropped. In the past two years, however, the FTC’s broad interpretation of what constitutes an actionable ‘pay for delay’ settlement has encountered some judicial resistance.

The FTC has brought antitrust claims against Endo Pharmaceuticals, Inc, the manufacturer of Lidoderm, an anaesthetic and antiarrhythmic, and against Impax Laboratories, Inc, the manufacturer of Opana ER, an extended-release opioid. Although the claims against Endo have settled, the case against Impax was dismissed. In 2016, the FTC filed a complaint against Endo and other pharmaceutical companies alleging that Endo paid the first generic companies that filed for FDA approval to eliminate the risk of competition for the drugs and in violation of the FTC Act. The enforcement action was the first FTC case challenging an agreement not to market an authorised generic drug – often called a ‘no-AG commitment’ – as a form of reverse payment.

A court in Philadelphia, however, granted defendants’ motion to sever the claims against the several drug companies, causing the FTC to dismiss its complaint against Endo voluntarily. In January 2017, the FTC refiled its complaint in federal court in California and filed a proposed order to resolve the charges. The FTC also refiled charges against Watson Laboratories, Inc, and its former parent, Allergan plc, alleging illegal blocking of a lower-cost generic version of Lidoderm when it entered into a pay-for-delay agreement with Endo. Thereafter Endo agreed to settle the charges in a stipulated order. Under the order, Endo agreed to the appointment of a monitor and agreed not to enter into anticompetitive patent settlements used to delay generic competition.

Additionally, the Commission issued an administrative complaint against Impax Laboratories, Inc for engaging in similar conduct with respect to Opana ER. In May 2018, an administrative law judge dismissed the FTC’s complaint against Impax. Chief


Administrative Law Judge D Michael Chappell concluded that the FTC had failed to prove that the agreement between Impax and Endo violated the FTC Act. Having found it unlikely that generic manufacturers would have been able to enter the market earlier absent the challenged agreement, the magnitude and extent of any anticompetitive harm was theoretical. The FTC’s complaint counsel has filed a notice of appeal seeking a full review by the FTC.79

Likewise, the District Court of Delaware dismissed the FTC’s action against Shire ViroPharma Inc. In February 2017, the FTC filed a complaint in federal district court charging the company with violating the antitrust laws by abusing government processes to delay generic competition to its branded prescription drug, Vancocin HCI Capsules, which are used to treat diarrhoea associated with bacterial infection. According to the FTC’s complaint, between 2006 and 2012, ViroPharma made 43 ‘sham’ filings with the US Food and Drug Administration (FDA) and filed three lawsuits against the FDA to delay the FDA’s approval of generic Vancocin Capsules and to exclude competition. The FTC alleged that ViroPharma failed to provide any clinical data to support the arguments advanced in its filings.80 In September 2018, District Judge Richard Andrews dismissed the case on grounds that the FTC lacked authority to bring the proceedings absent allegations that ViroPharma’s conduct violated, or was about to violate, the law.81 In April 2018, the FTC appealed to the Court of Appeals for the Third Circuit, which heard oral argument this past December.82

In the FTC’s case against pharmaceutical company AbbVie, Inc, however, the District Court for the Eastern District of Pennsylvania ruled that AbbVie had used so-called ‘sham litigation’ illegally to maintain its monopoly over Androgel, a testosterone replacement drug, and ordered US$448 million in monetary relief to consumers who were overcharged for Androgel as a result of AbbVie’s conduct. The FTC filed its complaint in 2014 alleging that AbbVie and Besins Healthcare Inc had illegally blocked consumers’ access to lower-cost generic alternatives to Androgel by filing baseless patent infringement lawsuits against potential generic competitors.83 AbbVie has appealed to the Third Circuit.84

Relatedly, the FTC responded to the FDA’s request for comment on its revised draft guidance aimed at deterring pharmaceutical companies from abusing the citizen petition process to delay approval of and competition from generic drugs. The FTC, referring to its case against Shire ViroPharma, expressed concerns about patient access to lower-cost drugs and a readiness to work closely with the FDA on citizen-petition abuse and other issues that may harm competition.85


**Vertical restraints**

*Payment card acceptance rules*

In June 2018, the US Supreme Court decided *Ohio v. American Express Co*, holding that American Express’s so-called anti-steering provisions in its merchant contracts, which allegedly prohibit merchants from avoiding fees by discouraging customers’ card use at the point of sale, do not violate federal antitrust law.86 American Express, like other credit-card companies, provides services to two different groups – cardholders and merchants – who use the credit-card companies to intermediate between them. In such two-sided markets, it is important to strike a balance in the prices charged to the parties on each side of the transaction. American Express, unlike its competitors Visa and Mastercard, provides better rewards to encourage consumer spending rather than focusing on consumer lending. To fund investments in its rewards programme, American Express charges merchants higher fees than Visa and Mastercard. To avoid these higher fees, merchants sometimes attempt to dissuade customers from using American Express. To counteract this tendency, American Express places anti-steering provisions in its contracts with merchants. The United States and several states sued American Express claiming that its anti-steering provisions violated Section 1 of the Sherman Antitrust Act.

In the proceedings below, the DOJ prevailed in the trial court in its antitrust challenge to certain ‘non-discrimination provisions’ in American Express’s merchant acceptance agreements. The district court found after trial that the specific challenged rules had anticompetitive effects by, among other things, allowing American Express to charge supra-competitive rates to merchants and that American Express had failed adequately to prove countervailing pro-competitive justifications.87 The court treated the credit-card market as two separate markets – one for merchants and one for cardholders – and found that American Express’s anti-steering provisions were anticompetitive because they resulted in higher merchant fees.

American Express appealed to the United States Court of Appeals for the Second Circuit, which reversed and remanded the case with instructions for the court to enter judgment in favour of American Express. According to the appellate court, the government failed to demonstrate that American Express possessed sufficient market power to affect competition adversely in the relevant market, which the appellate court defined as the market for cardholders generally as opposed to the narrower, more specific market for network services that the district court employed.88

The Supreme Court held that the both sides of the two-sided credit-card market – merchants and cardholders – had to be considered. The Court went on to hold that evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that

---

the alleged anticompetitive practice increases the cost of credit-card transactions generally above a competitive level, reduce the number of credit-card transactions, or otherwise stifle competition in the two-sided credit card market.\(^8\)

### ii Trends, developments and strategies

Under President Trump the FTC and the DOJ, albeit perhaps to a lesser extent than the FTC, have continued to pursue restrictive agreements. As expected, the FTC remained vigilant in its policing of ‘pay for delay’ settlements and the related abuse of sham petitioning. The far-reaching implications of the Supreme Court’s decision in *Actavis*, although decided in 2013, are still being determined in ongoing court cases, including those directly related to ‘pay for delay’ as well as the rule-of-reason more generally, as the *1-800 Contacts* case demonstrates.

In addition, in the area of patent law and dominance, the head of the Antitrust Division of the DOJ, in several recent speeches, has expressed his view ‘why an antitrust cause of action premised on a failure to abide by FRAND [fair, reasonable and non-discriminatory patent licensing] commitments would be inconsistent with Section 2 of the Sherman Act.’ Instead, he suggested that such disputes are properly the province of contract law. FRAND licensing commitments are often made by patent holders when their patents are incorporated into technology standards set by standard-setting organisations. In certain cases, licensees have brought Section 2 monopolisation actions wherein they allege – as evidence of exclusionary or predatory conduct – that patent holders have failed to live up to alleged FRAND commitments or allegedly deceived the standards organisation ‘by making a commitment to license on FRAND terms when [they] purportedly never had any intention of granting such a license.’ Noting the threat of treble damages under the antitrust laws, he stated: ‘It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act . . . [and to so allow] would contravene the underlying policies of the antitrust’ and patent laws, which include ‘increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.’\(^9\) The DOJ has begun to file statements of position in private litigations raising these issues. We will watch with interest to see how these cases develop in light of the DOJ’s expressed views. The FTC, for its part, may take a different view on these issues. It continues to litigate a case against Qualcomm concerning certain of its patent licensing practices. The bench trial in that case concluded at the end of January, but a decision has not yet been issued.

### iii Outlook

As we anticipated last year, the agencies have continued to pursue civil non-merger investigations of potentially anticompetitive conduct, but the full implications of the cases brought by the FTC, many of which are on appeal, will depend on the rulings of the appellate courts. In particular, the FTC’s broad interpretation of ‘pay for delay’ and ‘sham petitioning’ is now subject to multiple appeals. Likewise, the *1-800 Contacts* decision may have far-reaching implications, and may presage further developments in the FTC’s policing of anticompetitive conduct on the internet, but it remains to be seen whether the Commission’s opinion will

---

\(^{8}\) *Ohio et al. v. American Express Co.*, 138 S.Ct. at 2287-90.

be upheld. Although it may be some time before these cases are finally adjudicated, for now at least the Supreme Court’s decision in Ohio v. American Express has established how lower courts will apply the rule of reason in cases involving two-sided markets.

**IV MERGER REVIEW**

2018 was another active year for the DOJ and FTC in merger review and enforcement. Both agencies investigated numerous proposed acquisitions and required divestitures or sued to enjoin several transactions. Perhaps most notably, the DOJ lost its bid to block AT&T’s acquisition of Time Warner. The FTC prevailed in securing injunctions against mergers in the paint pigment industry and the marine water treatment products industry. In addition, both the DOJ and FTC settled several challenges with consent decrees.

**i Significant cases**

**Litigated merger challenges**

*AT&T and Time Warner*

On 20 November 2017, the DOJ filed suit to block AT&T’s acquisition of Time Warner. The DOJ alleged that AT&T, a video programming distributor, ‘would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner’s networks, and it would use its increased power to slow the industry’s transition to new and exciting video distribution models that provide greater choice for consumers’.91 AT&T and Time Warner argued that the proposed merger ‘is a procompetitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace’; that ‘no competitor will be eliminated by this merger’; and that the ‘transaction is . . . a classical vertical deal, combining ... content with . . . distribution platforms so that the merged company can compete more effectively against market-leading cable incumbents and insurgent tech giants’.92 On 12 June 2018, the judge hearing the case denied the DOJ’s request for an injunction.93 In his opinion, the district judge wrote that the government did not meet its burden of showing, among other things, that Time Warner would be able to increase its bargaining leverage in negotiations for the carriage of its networks on rival video distribution systems.94 On 26 February, the United States Court of Appeals for the District of Columbia Circuit held that the DOJ failed to show that the district court clearly erred in denying the government’s request for a permanent injunction to block the AT&T/Time Warner merger.95

*Tronox Limited and Cristal USA Inc*

In December 2017, the FTC filed an administrative complaint seeking to block Tronox’s acquisition of Cristal USA Inc. According to the complaint, the merger ‘would combine two of the three largest producers of titanium dioxide . . . manufactured through the chloride process . . . in the United States and Canada’.96 Titanium dioxide ‘is an essential pigment

---

94 Id. at 68-149.
95 US v. AT&T Inc., No. 18-5214 (DC Cir 28 February 2019).
used to add whiteness, brightness, and opacity to paints, industrial and automotive coatings, plastics, and other specialty products.\textsuperscript{97} The FTC’s complaint alleges that the merger, if it were allowed to proceed, would both increase the likelihood for coordination and may lead to a reduction in output – two possible anticompetitive effects.\textsuperscript{98}

In a break from typical practice, the FTC did not seek relief in federal court in the \textit{Tronox} case simultaneous with commencing an administrative proceeding, citing an ongoing investigation at the European Commission (EC) pending which the parties could not close the transaction.\textsuperscript{99} Instead, the FTC held an administrative trial in the spring of 2018. However, once the EC conditionally cleared the transaction,\textsuperscript{100} the FTC filed suit for an injunction in federal district court, as the administrative action was still pending.\textsuperscript{101}

In September 2018, the federal district judge hearing the suit issued an injunction, holding that ‘chloride-process TiO\textsubscript{2} sold in North America’ is the proper relevant market. The judge excluded ‘sulfate-process TiO\textsubscript{2}’ – which defendants argued should be included – citing ‘the economic realities of the industry, as described by TiO\textsubscript{2} producers and consumers, and the evidence presented by the expert economists,’ including ‘a lack of significant interchangeability between chloride and sulfate TiO\textsubscript{2}.’ The judge was not convinced by defendants’ argument that both types of TiO\textsubscript{2} were in the same market because their prices tended to move together, holding that ‘the mere fact that the prices of two goods move upward or downward together need not mean that they are substitutes.’ However, in finding the geographic market to be limited to North America, the court noted, among other things, the divergence between prices in North America and Europe. After defining the relevant market, the court held that the FTC met its burden in demonstrating that the proposed transaction would increase market concentration and likely lead to a reduction in output; and that the defendants’ arguments concerning future market entry and transaction-related efficiencies did not overcome the FTC’s \textit{prima facie} case.\textsuperscript{102}

In December 2018, the FTC’s in-house administrative law judge also sided with the FTC and found that the proposed acquisition ‘may substantially lessen competition in the relevant market for the sale of chloride TiO\textsubscript{2} in North America, by creating a highly concentrated market and increasing the likelihood of coordinated effects.’ Similar to the district judge, Judge D Michael Chappell found that chloride TiO\textsubscript{2} is the relevant product market and North America is the relevant geographic market. The administrative law judge cited a litany of evidence which he found established the ‘distinct characteristics’ of chloride TiO\textsubscript{2} as compared to sulphate TiO\textsubscript{2}, including its relative brightness, usage by manufacturers, the form in which it is sold and price differential. The judge also cited regional pricing differences, among other things, in holding that North America was the relevant geographic market; this is also in line with the district judge’s earlier ruling. The judge went on to find that the proposed acquisition would raise concentration in the relevant market to a level such that the transaction is ‘presumptively anticompetitive’ and that ‘anticompetitive coordinated

\textsuperscript{97} Id. Paragraph 14.
\textsuperscript{98} Id. Paragraphs 42–54.
\textsuperscript{102} \textit{FTC v. Tronox Ltd.}, No. 18-cv-01622 (D.D.C. 12 September 2018).
effects are in fact likely.’ Finally, the judge found that, contrary to the respondents’ arguments, entry by alternate producers was not likely, nor were ‘claimed cost savings [resulting from the acquisition] cognizable.’

**Abandoned transactions**

**Wilh. Wilhelmsen and Drew Marine**

In July 2018 a federal court granted the FTC’s motion for preliminary injunction which blocked the Wilhelmsen/Drew Marine merger and which led the parties to abandon the transaction. The court found that the FTC had met its burden in demonstrating that it would be likely to succeed in proving that the proposed transaction may substantially reduce competition in the market for ‘the supply of marine water treatment products and services to Global Fleet Customers’. In so holding, the court approved of the FTC’s use of ‘cluster markets’, which group similar products and services together ‘for analytical convenience’. The court also accepted the FTC’s definition of the market with reference to customers with particular characteristics.

**J.M. Smucker Co and Conagra Brands, Inc**

In March 2018, the FTC announced that it had initiated administrative proceedings to halt J.M. Smucker Co’s proposed acquisition of Conagra Brands, Inc, citing the likelihood of a substantial lessening of competition in the market for canola oil and vegetable oils. A day after the announcement of the initiation of these proceedings, the parties to the deal announced that they would abandon the transaction.

**Divestiture and conduct remedies**

The DOJ required divestitures in several proposed mergers, including:

- United Technologies Corporation and Rockwell Collins (divestiture of certain aerospace businesses);
- CVS Health Corporation and Aetna Inc (divestiture of a certain prescription health insurance plan business);
- Gray Television Inc and Raycom Media Inc (divestiture of certain television stations);

The FTC similarly required divestitures in a number of deals, including:

- Penn National Gaming and Pinnacle Entertainment (divestiture of certain casinos);\(^\text{112}\)
- Linde AG and Praxair Inc (divestiture of various businesses or plants related to ‘nine industrial gases product markets in numerous geographic markets in the United States’);\(^\text{113}\)
- Amneal Pharmaceuticals LLC and Impax Laboratories Inc (divestiture of certain generic pharmaceutical products);\(^\text{114}\) and
- Grifols SA and Biotest US Corporation (divestiture of certain blood plasma collection centres).\(^\text{115}\)

In addition, the FTC required the restructuring of a joint venture in a transaction involving the acquisition of a polyethylene terephthalate (PET) resin production facility. Here, three entities that formed a joint venture to acquire an under-construction facility to produce PET resin used in the manufacture of bottles and food packaging ‘agreed to restructure their transaction and to accept certain other conditions’. According to the FTC, the parties agreed to a consent order the provisions of which will ‘prevent [them] . . . from using their joint ownership of the assets to act alone or in concert to exercise market power, or to transmit competitively sensitive information beyond what is necessary to accomplish the legitimate purposes of the joint venture’. The FTC’s decision and order will require, among other things, that the co-venturers do not acquire more than one-third of the joint venture, and that the plant operate as a ‘tolling’ facility whereby the venturers will supply their own inputs to the manufacturing process run by the plant. The under-construction plant was purchased


out of bankruptcy, and the FTC noted that ‘[c]ompletion of this more efficient facility will significantly expand PET and PTA [a related product] capacity and output in North America, benefiting consumers.’\textsuperscript{116}

The FTC also required that Northrop Grumman agree ‘to supply solid rocket motors, or SRMs, to competitors on a non-discriminatory basis’ and to erect a firewall around its SRM business in order for it to proceed with its acquisition of Orbital ATK, Inc.\textsuperscript{117} According to the FTC, SRMs ‘propel missiles to their intended targets and are an essential input for missile systems’.\textsuperscript{118}

\section*{ii Trends, developments and strategies}

Merger enforcement remains robust and the agencies continue to focus on thorough investigation of the matters before them. The agencies say they will seek to tailor divestitures to address their competitive concerns, and will not shy from challenging transactions that are unable to be remedied by divestitures.

Notably, in 2018, the DOJ announced reforms to its merger review process designed to decrease the time it takes the DOJ to investigate transactions. Pursuant to these reforms, the DOJ will generally aim to complete investigations within six months of filing.\textsuperscript{119} Consistent with its view that divestiture remedies are highly preferred and conduct (or ‘behavioural’) remedies are disfavoured, the DOJ also withdrew its 2011 Policy Guide to Merger Remedies and will release an updated policy. In the meantime, the 2004 Policy Guide has been reinstated. The now-withdrawn Policy Guide contained a significant discussion of conduct remedies, whereas the currently-effective guide notes that ‘structural merger remedies are strongly preferred to conduct remedies’.\textsuperscript{120}

\section*{iii Outlook}

We expect the agencies to continue to devote substantial resources to merger investigations. We will watch with interest to see whether the DOJ’s recent process reforms will lead to a noticeable reduction in the time it takes for it to complete these investigations. Moreover, we note that issues surrounding the potential competitive effects of vertical mergers have been gaining increased attention, particularly among certain FTC commissioners. We will therefore be quite interested to see how the agencies address these types of mergers in the coming years.

\begin{itemize}
\item \textsuperscript{118} Id.
\end{itemize}
V  CONCLUSIONS

We expect the agencies’ resources will continue to be devoted to merger enforcement and cartel investigations and prosecutions. The FTC’s hearings on competition and consumer protection in the 21st century will conclude this year, and we will watch with interest to see how the issues discussed at those hearings might inform the FTC’s enforcement action in the years to come. We also anticipate seeing how the DOJ will continue to influence competition policy, including possibly by making filings in private litigations concerning issues such as patent licensing, and alleged employee ‘no-poach’ agreements – actions that it has already begun to take.
I  OVERVIEW

Fundamental considerations for understanding the Venezuelan economy
Prior to explaining and analysing the antitrust and free competition framework in Venezuela, it is of utmost importance to understand the current situation of the Venezuelan economy and the legal contrast between Venezuela’s National Constitution (NC) and its economic regulations.

The NC establishes certain rules, principles and rights to foster an economic system that allows for private initiative and free association, within a market directed to promote and protect free competition, guaranteeing access to goods and services by all citizens.2 In accordance with those constitutional parameters, the Executive Power, in subordination to the law, must regulate, organise and develop the economy in Venezuela.

Nevertheless, the economic legal regulations created in the past 20 years – basically through legislative delegation from the National Assembly (Legislative Power) to the Executive Power – has changed the constitutional foundations of Venezuela’s economy, creating a new model that the former President and the current President have called ‘Socialism of the XXI Century’, where the market of goods and services is – practically – under the control of the government using following main methods: price fixation; foreign currency exchange control;3 confiscations of companies and properties; and regulation of the profit margin for goods and services.4

As a consequence, this has brought about a significant reduction of free competition, since economic agents do not have enough room for manoeuvre, because the economic conditions have been reducing the number of productive companies as a result of a lack of raw materials, the inconvenience of access to foreign currency (thus reducing imports of any kind), and the absence of legal protection for both domestic and foreign companies, creating negative economic conditions where economic agents cannot assess the risks of new investments, keeping their cost structure to a minimum and putting all their effort into preserving their business in a country where inflation (reaching 1,698,488.2 per cent in 20185) and the devaluation of the bolivar has been reducing the purchasing power of producers, merchants, providers and consumers.

1 Alejandro Gallotti is a junior partner at LEGA Abogados.
2 See Articles 112, 113 and 114 of the NC.
3 Foreign Exchange Regime and Crimes Decree-Law.
4 Organic Law of Fair Prices.
5 Extra-official information from the National Assembly Deputy Rafael Guzman, see https://noticiasbancarias.com/economia-y-finanzas/11/01/2019/venezuela-cierra-2018-con-una-inflacion-del-1-698-4882/172036.html (there is no official information from the government).
In May 2017, the President unilaterally called a National Constitutional Assembly (NCA) with the aim of changing the NC, the state and our legal framework. Nevertheless, since the formal establishment of the NCA in August 2017, we have been observing the creation of different types of decrees and laws, even in the economic field, such as the Constitutional Law of Agreed Prices.

Another relevant economic decision has been the creation of a new currency in August 2018, called bolivar soberano (VES). This change in the currency has implied the elimination of five zeros (100,000) from the former bolivar fuerte (VEF) to the VES. As a consequence, the foreign currency exchange control regime has suffered an important impact through the Central Bank of Venezuela (CBV) determining the exchange rate through a system called ‘DICOM’ (this system is under the control of the government). The exchange rate has gone from approximately 2.5 VES per dollar to approximately 3,500 per dollar on February 2019. Moreover, the government has created another currency called petro without the authorisation of the National Assembly and outside the constitutional scenarios; the government considers that the petro is a cryptocurrency, but it is not created within blockchain, the government is the issuer and the value is also set by the government.

All of these changes have been creating more confusion and economic uncertainty, a situation that, directly and indirectly, affects the economic market. 2019 is expected to be another difficult year: Venezuela is in an unprecedented political and humanitarian crisis, where the priority for economic agents is survival in the market and not competition, investments are the minimum necessary and all are waiting for the outcome of the political crisis.

In accordance with the above, we consider that the Venezuelan economy has a free competition regime from a constitutional and strictly formal point of view, but a controlled economy – through the Public Power – from a legal and material point of view. In these terms, we discuss the free competition regime in Venezuela.

ii The Antitrust Law and antitrust authorities

The legal regulation for free competition has been determined through Decree No. 1,415, which enacted the Antitrust Law. The purpose of the Law, as established in Article 1 thereof, is to promote, protect and regulate fair economic competition so as to ensure democratisation of productive economic activity with social equality, strengthen national sovereignty and foster endogenous and sustainable development, to satisfy social needs and build a fair, free, solidary and co-responsible society by means of the prohibition and sanctioning of monopolistic and oligopolistic behaviours, as well as abuse of dominant position, agreed-upon claims, economic concentration, and any other anticompetitive or fraudulent practices. Nevertheless, Article 3 states that the following are excluded from the application of the Law: grassroots organisations of popular power governed by the Organic Law of the Communal Economic System; public or mixed strategic companies; and national state-owned companies for the provision of public services.

---

6 See Articles 347 and 348 of the NC.
8 For more information see www.bcv.org.ve/estadisticas/tipo-de-cambio.
9 Remember that the government removed five zeros to the former VEF.
10 See official government website www.dicom.gob.ve.
11 Special Official Gazette No. 6,151, dated 18 November 2014.
The Antitrust Superintendency is the main authority in this regard. It is considered an administrative unit of the National Executive Power with budget autonomy but without legal personality (it is part of the state legal entity), and it has the power to investigate and enforce the Antitrust Law. In this sense, the Superintendency has the faculty to investigate whether there has been an infringement of the Antitrust Law, either by acting on a complaint or upon its own initiative. However, before reaching a decision, the Superintendency must rely on sufficient evidence upon which to base its conclusions.

In the resolution that brings a procedure to a conclusion, the Antitrust Superintendency shall resolve upon the existence or non-existence of prohibited practices under the Antitrust Law. In the event that the existence of prohibited practices is determined, the Antitrust Superintendency, in accordance with Article 38, may:

- order the cessation of the prohibited practices within a given time;
- impose certain conditions or obligations on the infringer;
- order the elimination of the effects of prohibited practices; and
- impose sanctions provided by the Antitrust Law.

The lack of payment of a fine or payments made after the deadline has expired for that purpose results in an obligation to pay default interest until clearance of the debt. The interest rate is calculated at 6 per cent over the average rediscount rate established by Banco Central de Venezuela during the delay period.

The Superintendency may impose on undertakings any behavioural or structural remedies that are proportionate to the gravity of the infringement committed.

Penalties start with the prohibition of the anticompetitive agreement and a fine that shall not exceed 10 per cent of the total turnover in the preceding business year.

II CARTELS

As a general principle, the Antitrust Law establishes that ‘Conduct, practices, agreements, contracts or decisions that hinder, restrict, distort or limit economic competition are prohibited’ (Article 4).

In accordance with Article 9 of the Antitrust Law, agreements between undertakings, decisions of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition are prohibited, especially when:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- limiting or controlling production, markets, technical development or investment;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- sharing markets, territorial areas, supply sectors or sources of supply between competitors; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

These regulations are considered by the Antitrust Law as ‘general obligations’ for every economic agent. Nevertheless, grassroots organisations, public or mixed strategic companies, and national state-owned companies for the provision of public services are excluded from the application of the Law (see Section I).
The aforementioned activities must be analysed in conjunction with the Organic Law of Fair Prices (OLFP), which is the main law governing economic activities in Venezuela, indicating the following, among others, as its purposes:

- **a** economic order;
- **b** protection of consumers and users;
- **c** fair, equitable, productive and sovereign development of the national economy through the determination of fair prices for goods and services, considering the analysis of cost structures;
- **d** the establishment of maximum profit; and
- **e** the effective oversight of the economic and commercial activity in order to protect the income of citizens.

The administrative entity responsible for enforcing the OLFP is the National Superintendency for the Defence of Socioeconomic Rights (SUNDDE).

In this sense, the OLFP and its administrative provisions provide that the maximum profit margin of each member of the commercialisation chain cannot exceed 30 per cent in general (we mention, as an exception, importers, with a 20 per cent profit margin for their activities) of the cost structure of the good or service. The cost structure shall be calculated according to the methodology set by SUNDDE, especially in accordance with Administrative Provision No. 003, which indicates the valid elements that will be recognised as costs and as expenses. A second act that must be taken into consideration is Administrative Provision No. 070, an administrative regulation of SUNDDE where the pricing criteria through the intermediation margin (MI) and the elements of price marking are established.

Following the above, in accordance with this price-fixing regulation and profit-margin regime, the Antitrust Law establishes some ‘exception rules’ when the President, heading the Council of Ministers, grants an exemption from the prohibitions contained in the Antitrust Law, when it is considered in the nation’s interest, in the following cases:

- **a** direct or indirect – individually or concerted – fixation of goods or services purchase or sale prices;
- **b** application of different conditions in trade relations for similar provisions or equivalent that may lead to inequalities in the competitive situation, especially if different from those conditions that would be demanded in the event a genuine competition concern exists in the market, except those cases of cash discounts, volume discounts, lower cost of money for the offering of reduced risk and other common advantages in business; and
- **c** having exclusive branches and franchises with prohibitions on trading with other products.

---

12 In force since 23 January 2014, last reform on 8 November 2015 according to the Decree Law with Rank and Force of Law No. 2,092 published through the Extraordinary Official Gazette No. 6,202 of the same date.

13 Administrative Provision No. 070.

14 Published in the Official Gazette No. 40,775 dated 27 October 2015 by the National Superintendency for the Defence of Socioeconomic Rights (SUNDDE).
The established exemptions shall comply with – in a concurrent way – the following: contributing to the production, commercialisation and distribution of goods, provisions of services and foster technical and economic progress; and bringing benefits for consumers or users.

These ‘exceptions’ to the prohibitions of the Law can only be applied in particular circumstances, considering that the legal regime of fair prices and profit margins applies as a general rule to all economic activities.

In the event the existence of prohibited practices is determined, the Antitrust Superintendency will be able to:

a. order the cessation of the prohibited practices within a given time;

b. impose certain conditions or obligations on the infringer;

c. order the elimination of the effects of prohibited practices; and

d. impose sanctions.

In this sense, Article 49 of the Antitrust Law establishes the sanctions that could be applied in the event it discovers prohibited practices or conduct set out in Sections 1, 2 and 3 of Chapter II of the Law. Thus, if the Antitrust Superintendency determines the existence of prohibited practices, the economic agent shall be sanctioned with a fine of up to 10 per cent of the value of its annual gross revenues in the event of extenuating circumstances; the amount may be increased up to 20 per cent in the case of aggravating circumstances. In the event of recurrence of the prohibited practices, the fine will be increased to 40 per cent.

The calculation of the annual gross revenues referred to in this chapter will correspond to the fiscal year prior to the imposition of the fine.

i. Significant cases

Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii. Trends, developments and strategies

Even if cartels are prohibited and price fixing as a general rule is prohibited, in accordance with Administrative Provision No. 070 every producer, importer and service provider must mark the price of goods and services according to a formula, whereby the maximum sell price to the public (consumers) (PMVP) divided by the maximum sell price for producers or importers (PMVPI) minus 1 and the result multiplied by 100 will give you the MI, which should not exceed 60.

This implies a ‘price-fixing’ obligation for producers, importers and providers over every product or service, eliminating the possibility of distributors and sellers establishing prices despite the prohibition of Article 9 of the Antitrust Law. In this sense, if the price fixing was made or established by producers, importers or providers in accordance with Administrative Provision No. 070 there is no sanction or consequence under the Antitrust Law.

This also affects vertical relationships between producers, importers, distributors, sellers and providers, because the regulations established in Administrative Provision No. 070 imply a price-fixing obligation with a profit margin for the whole economic chain; this means that the profit margin between the producer or importer and the final seller cannot exceed 60 per cent.

Additionally, the Constitutional Law of Agreed Prices gives the National Executive the possibility to determine the ‘priority’ character of some goods and services. In this sense,
the prices of those priority products will be determined through an agreement between the economic agents and the National Executive. Nevertheless, this is a new regulation, and the procedure is not clear enough. We are waiting for administrative criteria and results in order to proceed with a proper analysis.

iii Outlook

As a consequence of the controlled economic model imposed by the government, economic agents have been developing in a very restricted market, where the main issue is obtaining raw materials and foreign currency to maintain a business or an economic activity. Thus, even if the Antitrust Law is in force, it must coexist with the OLFP, which is the principal legal framework to regulate and control the economy in Venezuela, affecting economic agents and conditioning the circumstances surrounding the market for goods and services.

Many economic agents have been adapting their practices and commercial relationships to those special profit margin rules, creating strategies such as adjusting their cost structure to the sub-legal regulations of SUNDDE, trying to reduce the risks of penalties (e.g., fines, public interventions, confiscations of goods and imprisonment), avoiding certain activities that could be considered high risk (e.g., selling priority products) and avoiding needing to obtain foreign currency through the foreign currency exchange control regime.

Nevertheless, if an economic agent receives a notification – as a consequence of the initiation of an administrative procedure – from the Antitrust Superintendency, a possible strategy to consider could be the modification or cessation of an activity or operation that could be considered as prohibited, in order to reduce the risk of sanctions and the eventual imposition of a penalty.

Cooperation with the Antitrust Superintendency or any other public entity is a usual strategy in administrative procedures. In addition, the assistance of a public law or economic law specialist during the administrative procedure is highly recommended.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Restrictive agreements

As discussed in Section II, the Antitrust Law prohibits as a general principle any type of conduct that hinders, restricts, distorts or limits economic competition, but also prohibits the actions or conduct of those who, not holding a right protected by the Law, seek to prevent or hinder the entry or stay of companies, products or services in all or part of the market (Article 5).

Additionally, it is forbidden for parties subject to the application of the Antitrust Law to exercise actions that restrict economic competition among them, and encourage others not to accept the delivery of goods or the provision of services, to prevent their acquisition or provision, or not to sell raw materials or inputs or provide services to others. Consumers or users and their organisations will not be subject to these regulations (Article 6).

Article 7 of the Antitrust Law prohibits manipulative behaviours, considered as conduct tending to manipulate factors of production, distribution, commercialisation, technological development or investments to the detriment of economic competition.

Likewise, agreements or conventions that are held directly or through unions, associations, federations, cooperatives and other groups that are the subject of application of the Antitrust Law, and that restrict or hinder economic competition among its members, are prohibited.
Agreements or decisions taken in assemblies of the subjects of the application of the Law that restrict or hinder economic competition are null and void.

In accordance with Article 11 of the Antitrust Law, contracts between economic agents that establish prices and procurement conditions for the sale of goods and the provision of services to third parties that produce or may produce the effect of restricting, falsifying, limiting or hindering fair economic competition in the whole market or part of it are prohibited.

**ii Dominance**

Article 12 of the Antitrust Law establishes that the abuse of a dominant position, in all or part of the domestic market, by any or several of those subject to the enforcement of the Law is prohibited, and in particular the following practices are prohibited:

\[ a \] the discriminatory imposition of pricing and other commercialisation or service conditions;

\[ b \] the unjustified limitation of production, distribution, or technical or technological development to the detriment of companies and consumers;

\[ c \] the unjustified refusal to meet the demand on the purchase of products or provision of services;

\[ d \] the application – in trade or service relations – of unequal conditions for equivalent provisions that place competitors in a disadvantaged position in comparison with others; and

\[ e \] the subordination of the execution of contracts to the acceptance of additional services that, by their nature or in compliance with trade usages, are unrelated to the purpose of said contracts.

In this sense, in order to determine what a dominant position is, we must analyse Article 13 of the Antitrust Law, which indicates that there is a dominant position when a determined economic activity is performed by a single person or group of persons associated with each other, from their capacity as purchaser to their capacity as provider of services, as well as in their capacity as user thereof; or where there exists more than one person destined for the execution of a certain type of activity, there is no actual competition among them.

When there is a dominant position, the persons who are in said position shall comply with the provisions of the Antitrust Law, to the extent that there are no different conditions established by the regulatory bodies that govern them, in conformity with what is provided in Article 113 of the NC.

In the event the existence of prohibited practices is determined, the Antitrust Superintendency will be able to proceed in accordance with Articles 38 and 49 of the Antitrust Law.

**iii Significant cases**

Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

**iv Trends, developments and strategies**

As a consequence of the general economic regulations established through the OLFP and SUNDDE’s dispositions, economic agents are more focused on complying with the OLFP and SUNDDE regulations.
Outlook

Considering the economic model that the government has been developing over the past 18 years, we do not foresee significant changes in the local market in the near future.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Venezuelan framework presents a number of special regulations for certain industries. If an economic activity or industry has no special regulation, it will automatically be regulated by the OLFP (Article 2).

In this sense, special regulated activities include the following:

- insurance activity: the Superintendency of Insurance Activity;
- the banking sector: the Banking Superintendency;
- the oil industry: the Ministry of Oil and Energy and PDVSA;
- cement: the Venezuelan Corporation of Cement;
- the mining industry: the Ministry of Mining;
- electric power: the Ministry of Electric Power and CORPOELEC;
- telecommunications: the Ministry of Communications and CONATEL; and
- healthcare: the Ministry of Health and many public entities.

As a main principle, every economic activity will fall under the Antitrust Law framework except for those agents or undertakings within the cases established in Article 3 (see Section I.ii).

A lot of the special regulated industries are developed by public or mixed strategic companies or national state-owned companies. This is the case with companies involved in the oil industry. Moreover, the banking sector is considered by Article 8 of the Institutions of the Banking Sector Law as a public service, and the same legal situation applies for electricity, provision of domestic gas and many economic activities of public interest (telecommunications, construction, sale of food, medicines, some body care products, among others).

Economic concentration transactions of insurance, banking and telecommunications companies require prior authorisation from regulatory bodies.

i Significant cases

Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii Trends, developments and strategies

The high presence of state-owned companies and mixed strategic companies in practically every sector of Venezuelan industry has caused a distortion in free competition between those public companies and those private companies operating within the same market, because state-owned companies and mixed strategic companies usually receive privileged treatment, especially in the Exchange Administration (procedures to obtain foreign currency with subsidised rates), administrative permissions to import raw materials, and advantages in public finance and payments that private companies do not receive. In consequence, many transnational companies have been considering a public association with the national government to obtain those advantages and ensure their operations.
iii **Outlook**
Venezuela is suffering a significant political crisis right now, which could imply eventual economic changes in order to recover the economy. If the socialist government holds power during this year, we do not foresee significant changes in the local market in the near future.

V **STATE AID**
Venezuelan legislation does not regulate state aid provisions involving undertakings or regions in the jurisdiction. Nevertheless, there are some ‘mitigating circumstances’ that could be considered by the Antitrust Superintendency before determining legal or economic sanctions. In this sense, Article 52 of the Antitrust Law indicates that for the purpose of fixing the amount of sanctions, the following attenuating circumstances shall be taken into account:

*a* the performance of actions that put an end to the restriction of economic competition;

*b* the effective non-application of the prohibited behaviours set out in the Antitrust Law;

*c* the performance of actions tending to repair the damage caused; and

*d* active and effective collaboration with the Antitrust Superintendency in its administrative supervisory functions.

i **Significant cases**
Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii **Trends, developments and strategies**
Considering that the Venezuelan framework does not have ‘state aid’ dispositions, we have no major comments on this subject. Nevertheless, economic agents under investigation usually apply as a strategy cooperation with the Superintendency or any other action that allows them to mitigate the sanctioning risks.

iii **Outlook**
Venezuela is suffering a significant political crisis right now, which could imply eventual economic changes in order to recover the economy. If the socialist government holds power during this year, we do not foresee significant changes in the local market in the near future.

VI **MERGER REVIEW**
The Antitrust Law prohibits economic concentrations that may cause or enhance a dominant position in all or part of a market, or that may generate negative effects on competition, or democratisation of production, distribution or commercialisation of goods and services. Small and medium-sized enterprises, cooperatives and companies that form part of the communal economic system are exempt from this prohibition. The Law maintains the voluntary reporting status in cases of economic concentrations.

Economic concentration transactions of insurance, banking and telecommunications companies require prior authorisation from regulatory bodies.

---

15 An economic model that encourages domestic production in order to transition from the ‘Capitalist rentier state’ to the ‘Socialist economic productive system’.
Significant cases
Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

Trends, developments and strategies
The Guidelines for Economic Concentration Assessment (1999) will continue to be applied until the Antitrust Superintendency issues a regulation that includes a particular procedure.

A concentration is defined as a merger of previously independent undertakings; acquisition of sole control over another undertaking; or acquisition of joint control in a full function concentrative joint venture or existing undertaking.

The Antitrust Law defines ‘control’ as decisive influence over the activities of a company.

The revision of the threshold for economic concentrations transactions is the equivalent to 120,000 tax units (TU) (1 TU = 500 bolivars16). It is measured in terms of domestic business volume of the companies involved.

Outlook
Venezuela is suffering an significant political crisis right now, which could imply eventual economic changes in order to recover the economy. If the socialist government holds power during this year, we do not foresee significant changes in the local market in the near future.

CONCLUSIONS
The government has been developing a controlled economy using different kinds of regulations and parameters. As explained above, the administrative units and public entities of the National Power determine the priority products that may be imported and what raw materials should be supported with subsidised US dollars, and at the same time the use of methods such as price fixation, foreign currency exchange control, confiscation of companies and properties, and regulation of the profit margins for goods and services, all of which are a hindrance to free competition.

In consequence, even if the Venezuelan framework establishes free competition regulation, the ‘fair prices regime’ has practically changed our constitutional economic model, imposing price fixing and profit margin regulation as general rules. As a consequence, producers, importers and providers must follow the OLFP dispositions and SUNDDE regulations over every product or service, despite the prohibitions of the Antitrust Law. These kinds of regulations and economic politics have been creating a significant distortion in free competition, because some economic agents have gained an advantage over their competitors, especially state-owned companies, but also many private companies with a good relationship with the government.

Appendix 1

ABOUT THE AUTHORS

JUNYA AE
Baker & McKenzie (Gaikokuho Joint Enterprise)

Education: Duke University Law School (LLM), Tokyo University (LLB).

ENRIQUE ÁLVAREZ
Lloreda Camacho & Co
A partner at Lloreda Camacho & Co since 2001, Enrique Álvarez is the head of commercial and corporate law, where he is responsible for the areas of unfair competition and competition law, foreign investment and exchange law, privatisations, joint ventures and mergers and acquisitions.

Before joining Lloreda Camacho & Co, Mr Álvarez worked as counsel to the legal vice president and then as legal vice president of the National Association of Industries (ANDI). He was counsel to the exchange control superintendent and head of the sectional office at Medellín.

He has been a professor of international labour law and occupational health on specialisation courses in labour law at Medellín’s Universidad Bolivariana, as well as a speaker at seminars and author of several articles on corporate law, particularly on the Commercial Code reform on corporate regulations. Mr Álvarez has a law degree from the Universidad de los Andes and a specialisation degree in labour law from the Universidad Bolivariana. Similarly, he held an international fellowship in active labour policies from the International Institute of International Studies of the International Labour Organisation in Geneva. He is an active member of the International Bar Association and of the board of directors of the Chamber of Legal Services of ANDI. In addition, he has been a member of the board of directors of ANDI’s Bogotá sectional office.
SERBÜLENT BAYKAN
BaykanIdea Law Offices
Serbülent Baykan is the founder of BaykanIdea Law Offices. He graduated from Izmir Treasury Business High School and was educated at Dokuz Eylül University Faculty of Economics for two years. He worked as an inspector in various units of the Revenue Offices. He graduated from the Faculty of Law, Istanbul University (attending from 1992 to 1996). He worked as a trainee and judge from 1997 to 2000. He completed his LLM on the law of economics and competition law at Istanbul Bilgi University and his doctoral examination is still pending at Kadir Has University.

LUCIANA BELLIA
Cleary Gottlieb Steen & Hamilton LLP
Luciana Bellia is a senior attorney in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Ms Bellia’s practice focuses on antitrust law and energy law.

Ms Bellia joined the firm in 2006 and became a senior attorney in 2015. From 2006 to 2008, she was resident in the Brussels office. She graduated, summa cum laude, from the Law School of the University of Rome, Luiss Guido Carli in 2001. While at law school she was a visiting student at the Georgetown University Law Center for a semester on a scholarship granted by the University of Rome. From 2001 to 2005, Ms Bellia worked in Rome for Italian and international law firms, where she was primarily involved in competition law and energy law matters. In 2006, she received an LLM from the College of Europe, Bruges, in European legal studies with a specialisation in the economic analysis of law.

OLIVIER BILLARD
Bredin Prat
Olivier Billard, partner, is a member of the competition and EU law team of Bredin Prat. He represents French and international companies before French and European regulatory authorities and courts, with a particular focus on merger control, state aid and antitrust litigation (cartels, abuse of dominant position).

His experience spans a wide variety of sectors, including retail, financial services, energy, transport, pharmaceuticals, food, consumer goods, electronics, luxury goods, sport, media and entertainment.

He also has recognised expertise in distribution networks, in particular selective distribution of luxury and high-tech products.

DARÍO CADENA
Lloreda Camacho & Co
An associate at Lloreda Camacho & Co since 2014, Darío Cadena is the director of the competition and consumer practice area. He has worked in the commercial and corporate law departments, and his primary areas of practice are antitrust and consumer law.

He attended Universidad de Los Andes where he received his law degree in 2004, and UC Berkeley (Boalt Hall) where he obtained a master of laws (LLM) degree in 2008. Prior to joining Lloreda Camacho & Co, he worked in other law firms in Colombia, practising antitrust and consumer law.

Mr Cadena has been admitted to the practice of law in Colombia (2005) and the state of New York (2009).
VINICIUS DA SILVA CARDOSO

Veirano Advogados

Vinicius Cardoso is a junior lawyer in Veirano Advogados’ antitrust and competition law and corporate integrity departments. He holds an LLB degree from the Law School of Fundação Getulio Vargas in Rio de Janeiro.

ANISHA CHAND

Khaitan & Co

Anisha is a principal associate in the competition/antitrust law practice group of Khaitan & Co in Mumbai. Anisha has been involved in advising domestic and multinational companies on the full spectrum of competition matters, including cartel enforcement, abuse of dominance, merger control, leniency and competition audit/compliance in diverse sectors including pharmaceutical, cement, e-commerce, radio taxis, sports, telecoms, etc.

Anisha routinely writes for domestic and international journals and legal magazines including The Legal 500, Competition Law International (IBA publication), Competition Policy International, and International Antitrust Law (ABA publication). Anisha has been a resource person on merger control and abuse of dominance modules for the Indian Institute of Corporate Affairs. She has also been recognised three times for her expertise in Who’s Who Legal: Future Leaders (Non-Partners) in 2017, 2018 and 2019.

FABIO CHIOVINI

Cleary Gottlieb Steen & Hamilton LLP

Fabio Chiovini is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Chiovini’s practice focuses on European and Italian competition law.

Mr Chiovini joined the firm in 2013. From 2013 to 2014, he was resident in the Rome office. In 2015, he worked as an intern in the office of the Italian judge at the Court of Justice of the European Union. He graduated from the Università degli Studi in Milan and holds an LLM from the College of Europe in Bruges.

MIGUEL DEL PINO

Marval, O’Farrell & Mairal

Miguel del Pino joined Marval, O’Farrell & Mairal in 1998 and has been a partner since 2008. His area of specialisation is centred on competition, and mergers and acquisitions. His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anticompetitive investigations and general market investigations. Mr del Pino has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations.

He has published several works related to his area of expertise and has participated as a panellist and moderator in different conferences related to his area of expertise. He is an assistant professor of competition law on the postgraduate courses in business and economics law at the Universidad Católica. He graduated as a lawyer from the Universidad de Buenos Aires in 1994, and in 1997 obtained a master’s degree in law from the University of Pennsylvania (Philadelphia).
SANTIAGO DEL RIO

*Marval, O'Farrell & Mairal*

Santiago del Rio is a partner at Marval, O’Farrell & Mairal. He joined the firm in 2006 and has been involved in competition issues ever since. He regularly provides advice to companies regarding merger control regulations in Argentina over a wide range of markets, as well as providing counsel to companies that either undergo antitrust investigations or decide to initiate them, during both the Antitrust Commission’s investigation and the challenge of decisions before the appellate courts and the Supreme Court of Justice.

Between 2010 and 2011 he was seconded to the Spanish firm Uría Menéndez, where he dealt with both European Union and Spanish competition matters in the firm’s Brussels and Madrid offices. He participated in Phase I and II merger control proceedings, anticompetitive investigations under Articles 101 and 102 of the TFEU, as well as appeals before the European Court of Justice.

He graduated with honours in 2005 from the Universidad del Salvador, and holds a postgraduate diploma in economics for competition law from King’s College University.

MARCO D’OSTUNI

*Cleary Gottlieb Steen & Hamilton LLP*

Marco D’Ostuni is a partner in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr D’Ostuni’s practice focuses on competition law and regulation in the energy, telecommunications and media sectors.

Mr D’Ostuni has represented clients in some of the leading EU and Italian competition law cases, often in liberalised and heavily regulated sectors. He is widely published on antitrust matters and regularly lectures at numerous conferences and universities.

Mr D’Ostuni joined the firm in 2000 and, until June 2001, was based in the New York office. He became partner in 2009. Prior to joining Cleary, Marco was a trainee at an administrative law firm in Naples, from 1996 to 1997. From 1998 to 2000, he was an associate at a major international competition law firm in Brussels.

EMMANUEL DRYLLERAKIS

*Dryllerakis & Associates*

Emmanuel Dryllerakis is a senior partner and one of the administrators of Dryllerakis & Associates. He graduated from Law School of Lille II University (*DEUG en droit, licence en droit, maîtrise en droit, mention assez bien*) (1995) and Athens University Law School.

He joined the Athens Bar in 1998 and is qualified to practise before courts at all levels, including the Supreme Court. His practice focuses on corporate law, competition law, contracts, telecommunications legislation, corporate financing, privatisation and tax.

He is the head of the competition team, having handled numerous antitrust cases before the Hellenic Competition Commission and the courts. He is also active in corporate law, mergers and acquisitions.

He is a member of the International Bar Association.

In addition to native Greek, he is fluent in English and French.
JOAQUIM CAIMOTO DUARTE

*Uría Menéndez Proença de Carvalho*

Joaquim Caimoto Duarte is a counsel in the Lisbon office of Uría Menéndez Proença de Carvalho, where he heads the EU and Portuguese competition practice area.

He has advised on matters in various sectors, including pharmaceuticals, air transport, motor vehicles, energy, telecommunications, media and large retailer industries.

He is regularly involved in mergers and infringement proceedings for abusive conduct and restrictive agreements before the European Commission, the Portuguese competition authorities and the Court of Justice of the European Union and the Portuguese Competition, Regulation and Supervision Court. He also has considerable experience in advising firms on agreements, strategic alliances and state aid.

LEONARDO MANIGLIA DUARTE

*Veirano Advocados*

Leonardo Maniglia Duarte is a partner of Veirano Advocados’ antitrust and competition law department. He focuses his practice in the areas of competition and regulatory law in Brazil. Leonardo holds an LLM degree in comparative law, with a concentration in antitrust law and mergers and acquisitions from the University of Miami (School of Law, Coral Gables-FL, United States); and a specialisation degree in competition law and regulatory law from the University of Lisbon (Lisbon, Portugal).

TÂNIA LUÍSA FARIA

*Uría Menéndez Proença de Carvalho*

Tânia Luísa Faria is a managing associate in the Lisbon office of Uría Menéndez Proença de Carvalho. She joined the firm in 2004, having worked both in the Lisbon and Brussels offices. She is also a teaching assistant at the University of Lisbon.

Her practice area is EU and Portuguese competition law, covering, in particular, merger control issues, cartels and abuses of dominant position. She acts for clients in various sectors, including financial institutions, telecommunications and media, air transport, energy, retail distribution and other industrial sectors, and regularly advises leading multinational companies in the pharmaceutical sector, including proceedings before the European Commission, the Portuguese competition authorities, the Court of Justice of the European Union and the Portuguese Competition, Regulation and Supervision Court.

PETER FORSBERG

*Hannes Snellman Attorneys Ltd*

Peter Forsberg is a partner and head of the competition and procurement practice group at Hannes Snellman in Stockholm. He advises Swedish and international companies on competition law and public procurement issues. In particular, he has solid experience of domestic and international merger control, competition law disputes and compliance work. He regularly represents clients in proceedings before national competition authorities as well as before the European Commission. He has recently been involved in matters in the following sectors: financial services, food and consumer products, forest products, and pharmaceuticals and telecommunications.
ALEJANDRO GALLOTTI

LEGA Abogados

Alejandro Gallotti is a public law and constitutional law expert with 16 years of work experience in legal advice and litigation in different branches of the Venezuelan legal system such as procedural law, administrative contentious, public finances, constitutional law and arbitration. He has been a law professor of many of the most important law schools in Caracas (UCAB, UCV, UMA and UJMV), he is also a guest professor of the chair of comparative law at Foggia University in Italy and he is very well known in the academic field for his participation in the legal doctrine of Venezuela, having authored many books (including The Power of Substitution of the Judge in the Administrative Function, The Right to Defence in Administrative Proceedings and State Prerogatives in Administrative Procedural Law) and articles, and he is a member of the editors’ council of the Digital Magazine of Legal Advice of the National Assembly and of the jury of the Postgraduate Law Magazine of Andrés Bello Catholic University). Alejandro Gallotti has been recognised in public law as an up-and-coming individual in the Chambers Latin America directory and in The Legal 500.

LUIS GERARDO GARCÍA SANTOS COY

Creel, García-Cuéllar, Aiza y Enríquez

Luis Gerardo García Santos Coy is a partner of Creel, García-Cuéllar, Aiza y Enríquez in the Mexico City office, head of the competition practice group and member of the firm’s executive committee.

Mr García specialises in antitrust and competition law, participating in all types of cases before the competition authorities, from complex pre-merger filings, to investigations, administrative procedures, constitutional (amparo) proceedings, as well as leniency applications.

He is a frequent speaker and has authored multiple articles and papers on antitrust and other legal subjects, ranked Band 1, Tier 1 or equivalent in antitrust and competition by many publications, including: Chambers and Partners, Global Competition Review, The Legal 500, Best Lawyers and Who’s Who Legal.

MICHAEL GU

AnJie Law Firm

Michael Gu is a founding partner and a principal competition partner of AnJie Law Firm based in Beijing. Prior to forming AnJie Law Firm in 2012, Mr Gu was a principal competition partner of another leading PRC firm. Mr Gu also spent five years at the competition practices of Linklaters and Allen & Overy. He is among the few top practitioners in China who can provide clients with a full range of cutting-edge legal advice on all types of antitrust matters in China, covering merger filings, antitrust investigations, antitrust civil litigations and compliance audit and trainings.

Michael Gu has a strong background in both legal education and economic research. He studied EU competition law under the EU–China Legal and Judicial Co-operation Programme, sponsored by the PRC Ministry of Justice and European Commission, from 2002 to 2003. He also holds a master’s degree from the China Center for Economic Research at Peking University.

As a competition law pioneer in China, Mr Gu has secured merger clearance from the Ministry of Commerce of the PRC (MOFCOM) for more than 60 merger transactions.
Particularly in 2008, Mr Gu successfully submitted the first merger filing under the Anti-Monopoly Law, which also received the first approval from the Anti-Monopoly Bureau of the MOFCOM. Mr Gu has also represented clients in high-profile antitrust investigation proceedings, antitrust civil litigations and leniency programmes. In addition, Mr Gu frequently provides strategic preventive advice to clients with respect to the potential antitrust risks associated with distribution agreements, IP licensing, restrictive measures, marketing events, pricing and bidding process, etc.

Michael Gu has actively participated in the drafting process of the China Anti-Monopoly Law and its implementing rules. He has submitted numerous suggestions and comments to the relevant legislative authorities. Michael Gu has been recognised as a leading lawyer in antitrust and competition by many international guides including Chambers, Who’s Who Legal, The Legal 500, AsiaLaw and Global Competition Review. Mr Gu is a frequent contributor to many legal journals, and his publications regarding China antitrust law are well received, widely reproduced and quoted. Michael is also an expert engaged by LexisNexis and Law Business Research. In addition, Mr Gu is the co-managing editor of the China Antitrust Law Journal published by LexisNexis.

SARA Gutiérrez Ruiz de Chávez
Creel, García-Cuéllar, Aiza y Enríquez

Sara Gutiérrez is a counsel of Creel, García-Cuéllar, Aiza y Enríquez in the Mexico City Office and part of the competition practice group, specialising in antitrust investigations and compliance.

Sara has participated in many of the landmark cases that have paved the way for how antitrust provisions are interpreted and applied in Mexico. She focuses mainly on antitrust investigation proceedings of all kinds and related judicial litigation, along with preventive advise and compliance of antitrust and related matters.

Sara has been recognised as a leading practitioner by specialised publications and rankings, including Chambers and Partners Latin America. She is an active member of the Mexican Bar and a non-governmental adviser for the Mexican Authority at the International Competition Network. She has also been recognised for her research by the Competition Authority.

ARTHUR HENDERSON
White & Case LLP

Arthur is a trainee at the firm. He spent six months in the antitrust practice assisting with a wide range of competition law matters.

JOHAN HOLMQVIST
Hannes Snellman Attorneys Ltd

Johan Holmquist is an associate at Hannes Snellman in Stockholm and specialises in competition law. He also advises on public procurement and intellectual property matters. He previously served as an associate judge at the Patent and Market Court of Appeal in Stockholm. He holds a law degree from Stockholm University and an LLM from New York University School of Law.
About the Authors

REBECCA HSIAO

Lee and Li, Attorneys-at-Law

Rebecca Hsiao is an associate partner at Lee and Li. She began her practice when she joined Lee and Li in 2001, and has practised in the areas of antitrust and competition law, mergers and acquisitions, securities, and corporate and investment laws.

MARC ISRAEL

White & Case LLP

Marc is a partner in the firm’s global antitrust practice. He has considerable experience in a wide range of antitrust work, and has been involved in some of the most high-profile UK and European cases in recent years in the fields of M&A, cartels and antitrust litigation. A number of cases in which Marc has advised have set long-standing legal precedents such as IBA Health v. Office of Fair Trading or clarified important legal principles as in Federation of Wholesale Distributors v. Office of Fair Trading and Pernod Ricard/Allied Domecq.

Much of Marc’s work involves dealing with cross-border cases (both for UK and overseas clients), and he regularly represents clients before the UK and European competition authorities, and has also appeared before the UK and European courts in competition cases.

Marc is recommended in the Global Competition Review 100 and is ranked by Chambers and Partners in the field of competition law.

He is admitted to the Bar in England and Wales and Roll of Solicitors in Ireland.

He took the legal practice course and common professional examination at the College of Law, London, and he holds a master of arts from the University of Cambridge and studied modern and medieval languages at St John’s College, University of Cambridge.

Marc is fluent in English and French.

JUSTINE JOHNSTON

Goodmans LLP

Justine Johnston is an associate in the competition, antitrust and foreign investment group. She provides strategic advice on all aspects of Canadian competition law, including domestic and multinational mergers and acquisitions, criminal and civil investigations, and compliance matters, and provides advice under the Investment Canada Act. She is actively involved in the competition community, serving on the executive of the competition bar association’s Young Lawyers Committee and as a young lawyer representative for the ABA. She was called to the Ontario Bar in 2015.

EBAAD NAWAZ KHAN

Khaitan & Co

Ebaad is an associate in the competition/antitrust law practice group of Khaitan & Co in New Delhi. Ebaad provides legal advice on all aspects of Indian competition law and represents clients before the Competition Commission of India, the National Company Law Appellate Tribunal and other higher courts in India.
MICHAEL KOCH

*Goodmans LLP*

Michael Koch is a partner in the competition, antitrust and foreign investment group whose practice focuses on regulation and public law litigation, including communications, competition, foreign investment and copyright law at Goodmans LLP. He has been involved in major competition and foreign investment matters, and has played a role in each major CRTC proceeding to establish the competitive framework for the Canadian telecommunications industry since serving as counsel to the CRTC in 1994. He is a frequent lecturer on competition law, and has been recognised by numerous publications including *Chambers Global*, *Lexpert*, *Who's Who Legal* and *Euromoney*. He was called to the Ontario Bar in 1988.

ANNA LASZCZYK

*Linklaters C Wiśniewski i Wspólnicy sp k*

Anna Laszczyk is an associate in Linklaters’ Warsaw competition practice. She has over six years’ experience in the fields of antitrust, merger control and consumer protection gained as a member of Linklaters’ Warsaw and Paris competition teams. She advises on proceedings before the Polish Competition Authority and the European Commission.

Anna graduated from the University of Warsaw.

ANETTE LAULAJAINEN

*Hannes Snellman Attorneys Ltd*

Anette Laulajainen is an associate in the competition and procurement group of Hannes Snellman’s Helsinki office. She regularly advises clients on national and EU competition law matters in transactions, public and private enforcement, commercial agreements and day-to-day business practices. She graduated from the University of Helsinki in 2016.

FRÉDÉRIC LOUIS

*Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale)*

Frédéric Louis focuses on all aspects of EU competition law, including cartel, parallel imports and abuse of dominance investigations (including internal investigations and leniency applications); complaints and litigation; merger clearance; state aid investigations; and complaints and counselling. He advises clients across a wide variety of industry sectors, from basic industries (construction materials, chemicals) to consumer goods, including service industries (telecommunications, transport, banking, media and sports).

Mr Louis also advises on other aspects of EU regulatory law, including product regulations and data protection. He has been centrally involved in pioneering transparency litigation, having won a series of cases mandating freedom of access to information held by the EU institutions. He also litigates and represents clients before Dutch, French and Belgian courts (including antitrust damages claims) and competition authorities.

Mr Louis’s litigation experience before the EU courts ranges over various aspects (including freedom of commerce and constitutional issues) with a focus on competition litigation. Mr Louis has argued cases before the Grand Chamber of both the GC and the ECJ of the EU.
Mr Louis is antitrust and regulatory counsel to a dozen European and worldwide industry associations. He has represented the European Commission and is adviser to the European Central Bank and the Single Resolution Board.

TAPANI MANNINEN
Hannes Snellman Attorneys Ltd

Tapani Manninen is a senior adviser in Hannes Snellman's competition and procurement group. His field of expertise includes various aspects of EU and domestic competition law, including antitrust, merger control and compliance programmes. Mr Manninen has published several articles and contributed to international publications on competition law and merger control. He is, for example, the co-author of ‘From Negotiation to Antitrust Clearance’ and ‘Views on the Amendment of the Finnish Competition Act’ (with Mikael Wahlbeck, in Defensor Legis 3/2004). Mr Manninen has been recommended for competition law expertise, inter alia, in the following international publications: Chambers Global, The Legal 500, PLC Which Lawyer?, Who's Who Legal, European Legal Experts and IFLR 100 Experts Guide. Mr Manninen graduated from the University of Helsinki in 1987 and holds a degree in EU law from the Centre Européen Universitaire de Nancy in France.

CARLOS MENA-LABARTHE
Creel, García-Cuéllar, Aiza y Enríquez

Carlos Mena-Labarthe is a partner of Creel, García-Cuéllar, Aiza y Enríquez in Mexico City. He is the co-head of the investigations and compliance practice in the firm. Before joining the firm, he served for 10 years at the Mexican competition authority where he was the first Chief Prosecutor (Investigative Authority). He was also head of cartel investigations and head of the planning, institutional and international relations unit and was the leader of many guidelines and processes at the Commission. He was also in charge of negotiating a new competition law with Congress in 2014.

He has co-authored eight books on competition and regulation and is a lecturer at ITAM University. He has been recognised as one of the best competition lawyers in the world by Global Competition Review.

WILLIAM B MICHAEL
Paul, Weiss, Rifkind, Wharton & Garrison LLP

A partner in the litigation department of Paul, Weiss, Bill Michael has extensive experience in antitrust litigation, including civil and criminal government investigations, private litigation and appellate matters. His experience includes defending public and private companies at trial and on appeal against claims of monopolisation, exclusive dealing and predatory pricing. He has also defended companies in bid-rigging and price-fixing investigations at the federal and state levels. In addition, he regularly counsels clients on antitrust issues in a variety of industries, including medical devices, media and entertainment, energy and others.

Bill joined Paul, Weiss, from the Antitrust Division of the United States Department of Justice, where he served as a trial attorney focusing on civil merger and non-merger investigations in the telecommunications and media sector.

He was previously chair of the editorial board of The Antitrust Practitioner, a publication of the American Bar Association's Section of Antitrust Law Civil Practice and Procedure
About the Authors

Committee. He is the co-author of the chapter titled ‘Settling an Antitrust Case’ in Settling Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement. Bill has also authored several articles on antitrust-related issues, for publications that include The New York Law Journal, Law360 and Competition Policy International.

Bill received his JD from Yale Law School, where he was a senior editor of the Yale Law Journal, and his BA summa cum laude from Columbia University.

**GABRIELA REIS PAIVA MONTEIRO**
Veirano Advogados

Gabriela Monteiro is an associate of Veirano Advogados’ antitrust and competition law and corporate integrity departments. She holds an LLB degree and a master’s degree in regulatory law from the Law School of Fundação Getulio Vargas in Rio de Janeiro.

**FARID FAUZI NASUTION**
Assegaf Hamzah and Partners

Farid is a partner in AHP’s antitrust and competition practice group. He has acted for many prominent clients in merger filings, competition litigation, advisory and competition compliance. He has deep experience in many sectors, including telecommunications, pharmaceutical, automotive, energy and mining, oil and gas, banking and finance, insurance and public procurement.

Prior to joining AHP in 2016, Farid worked at the Indonesian Competition Commission (KPPU) for more than seven years. He was the head of Prosecution Division and then the head of the Merger and Acquisition sub-directorate. During his time at KPPU, he also led the drafting of the Indonesian Merger Regulation and the first KPPU Merger Guidelines. He then spent five years at another prominent law firm in Indonesia, specialising in antitrust/competition, trade and general corporate.

In the trade law arena, Farid has advised clients in various trade aspects, including public procurement, import, retail, standardisation, and ASEAN free trade agreements.

**IRADJ NAZARYAR**
Allen & Overy LLP

Iradj specialises in competition law and market regulation. He joined Allen & Overy in 2017 after graduating from Utrecht University, where he studied Dutch civil law, and law and economics.

**EVELYN NIITVÄLI**
RCAA

Evelyn Niitväli is one of the co-founding partners of RCAA. She advises clients on all aspects of German and European competition law.

Evelyn has handled various complex merger control proceedings both with the German Federal Cartel Office and the European Commission. Another focus of her practice is on cartel proceedings and abuse of dominance cases. She has assisted clients in dawn raids and internal investigations, leniency proceedings and negotiating settlements with the competition authorities. Evelyn also regularly advises clients as regards commercial agreements and
represents clients in private antitrust litigation cases and out-of-court settlement negotiations. She has extensive experience in a broad range of industries, including consumer goods, retail, automotive, energy and utilities, IT and telecommunications.

Evelyn started her legal career at Hengeler Mueller in Düsseldorf and Brussels. Prior to founding RCAA, Evelyn was a partner in a Munich-based antitrust boutique firm and headed the German antitrust practice of Weil, Gotshal & Manges LLP, Frankfurt.

DAVID OLANDER

*Hannes Snellman Attorneys Ltd*

David Olander is an associate at Hannes Snellman in Stockholm. He specialises in competition law and related areas. Prior to joining the firm, he worked as a case manager at the Swedish Competition Authority.

WOJCIECH PODLASIN

*Linklaters C Wiśniewski i Wspólnicy sp k*

Wojciech Podlasin is an associate in Linklaters’ Warsaw competition practice. He specialises in antitrust, merger control and state aid cases and gained broad practical experience as a member of Linklaters’ Warsaw and Beijing competition teams.

Wojciech read law at the University of Warsaw and the London School of Economics, and finance at the Warsaw School of Economics. He is the co-author of a leading commentary on the Polish Competition Act in the part concerning merger control.

BERLA W AHYU PRATAMA

*Assegaf Hamzah and Partners*

Berla specialises in competition/antitrust and public procurement law. He started and built an impressive career for over six years at the Commission for Supervision of Business Competition (KPPU) as an investigator and litigator. He has handled various categories of competition cases such as cartels, abuse of dominant position, monopoly practices, mergers and acquisitions, bid rigging, and exclusive dealing. He also played a prominent role in KPPU’s leading cases, among others, the SMS (Short Messages Service) cartel case, abuse of dominant position by PT Carrefour Indonesia, the cooking oil cartel, and fuel surcharge price fixing by several airlines.

He also has extensive experience in public procurement arena is affirmed by his two certifications: procurement expert by the National Public Procurement Agency, and procurement lawyer by the International Federation of Purchasing and Supply Management.

ANASTASIA PRITAHAYU RD

*Assegaf Hamzah and Partners*

As a senior economist in AHP’s competition law practice, Anastasia advises on high-profile and multi-jurisdictional matters with her thorough assessment from an economics perspective. Anastasia provides advice on competition issues ranging from dominance and vertical restraints, to market allocations in new system applications in automotive, telecommunications, digital content, ecommerce, leasing, aviation, pharmaceutical, energy, oil and gas, utility, banking, shipping, and broadcasting. Her blue-chip clients are Yamaha
Motors, AETN, Mitsubishi Group, Garuda Indonesia, SC Johnson and JHHP, Unilever Indonesia, Asahi Group, Perusahaan Gas Negara, Holcim Indonesia, PT PLN (Persero), Beiersdorf, Sysmex Corporation, Indosat, and Surya Citra Media.

Anastasia also spends a lot of time teaching and giving training in various competition workshops that are attended by business practitioners and law students alike; such workshops are either held for the public or tailored for her clients in the aviation, infrastructure, personal care, and automotive sectors.

**SAGARDEEP RATHI**

*Khaitan & Co*

Sagardeep is a partner with the competition/antitrust law practice group of Khaitan & Co in New Delhi. He regularly advises clients on agreements for assessment of pro- and anticompetitive issues, joint ventures, licensing arrangements relating to technology transfer/IPR-competition and compliance/risk analysis. He is also involved in advising and representing various clients before the office of the DG, the CCI, the NCLAT and higher courts on various cases on the behavioural side. He also assists clients in merger control filings before the CCI. Sagardeep also has extensive experience in relation to leniency applications filed at the CCI.

Sagardeep regularly contributes to many international publications and comments in international news updates such as *GCR* and *IBLJ*. He recently co-authored the India chapter in *The Legal 500: Merger Control Country Comparative Guide (Third Edition)* 2018. Sagardeep has been recently ranked as the ‘Next Generation Lawyer, Antitrust and Competition 2019’ by *The Legal 500 Asia Pacific* and recognised by *Who’s Who Legal: Future Leaders – Partners* in 2019. He has also been mentioned as a noted competition lawyer in the 2018 and 2019 editions of *GCR 100*.

**MARC REYSEN**

*RCAA*

Dr Marc Reysen, LLM is one of the co-founding partners of RCAA where he advises on all aspects of European and German competition as well as EU state aid rules.

Dividing his time between the firm’s offices in Brussels and Frankfurt, his practice has a particular focus on guiding clients through complex merger control investigations at national or European level. He places emphasis on developing strategies that address potential challenges well before they materialise in the course of the investigation. He applies the same approach to other areas of competition law. Compliance strategies, advocacy efforts, and, if necessary, alternative ways to achieve commercial goals aim to avoid clashes with competition law. However, where necessary, he will guide clients through investigations and, where appropriate, support their leniency efforts but always vigorously defend their interest before competition authorities or courts.

Marc started his legal career with Freshfields Bruckhaus Deringer where he made partner in 2001, before joining Howrey as a partner in 2006. Prior to setting up RCAA he was a partner at O’Melveny & Myers between 2011 and 2013.
DAVID ROSNER  
*Goodmans LLP*
David Rosner is a partner in the competition, antitrust and foreign investment group. He provides strategic advice on all aspects of Canadian competition law, particularly with respect to complex mergers (including in regulated industries), mergers involving reviews in multiple jurisdictions, alleged cartels and alleged abuses of dominance (including those involving technology and intellectual property), as well as advice under the Investment Canada Act. He is an active member of the Canadian competition law community and bar associations, and taught competition law for many years at Osgoode Hall Law School. He is recognised by numerous publications, including most recently by *Who's Who Legal: Competition – Future Leaders 2018*.

SOPHIE SAHLIN  
*White & Case LLP*
Sophie is a counsel in the global antitrust practice. She advises clients on a range of competition law matters, with a particular focus on assisting clients with complex EU and international merger control proceedings. She also regularly advises clients on antitrust questions relating to the operation of joint ventures.

GIUSEPPE SCASSELLATI-SFORZOLINI  
*Cleary Gottlieb Steen & Hamilton LLP*
Giuseppe Scassellati-Sforzolini is a partner in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr Scassellati-Sforzolini is active in public and private M&A, financial services regulation, EU state aid law and enforcement matters.

Mr Scassellati-Sforzolini started Cleary’s Italian corporate practice in the early 90s. Since then, he has worked on numerous privatisations through equity offers and auctions, debt exchange offers by sovereign issuers, takeover bids, negotiated acquisitions, restructurings, divestitures, joint ventures and private equity investments, particularly in regulated sectors such as financial services, energy, media, telecoms and airlines. He advises on EU state aid law and financial services regulation. He is also active in enforcement and private investigation matters, litigations and arbitrations.

Mr Scassellati-Sforzolini joined the firm in January 1988 and became a partner in 1996. He was initially resident in Cleary’s Brussels office, until he transferred to Rome in July 1998 to open the firm’s first Italian office.

ODD STEMRSRUD  
*Advokatfirmaet Grette AS*
Odd Stemsrud is a partner at Advokatfirmaet Grette and head of the firm’s EU and competition/antitrust practice. He has advised on some of the largest competition and state aid matters involving Norwegian companies for 20 years. These include merger control at the European Commission, including global coordination, global cartel matters, as well as advice in EEA matters at the EFTA Surveillance Authority (ESA). He regularly assists clients with private enforcement at national courts, and he also has litigation experience from the European Court of Justice and the EFTA Court. Odd is recognised in various
international legal guides as a ‘go-to guy’ on competition and state aid. Of the current high-profile cases related to Norway he is, *inter alia*, legal counsel for Henrik Kristoffersen in a key private enforcement case and EU/coordinating global counsel for Höegh Autoliners Holdings in the global *PCTC* cartel case. Furthermore, he assists Flytoget (operator) and Entur (through-ticketing service provider) in the liberalisation process of passenger transport by rail and LFV, the main Swedish provider, in the liberalisation of the air navigation services markets. He is a contributor to the Antitrust Committee of the International Bar Association and the American Bar Association’s Section of Antitrust Law.

**MICHIO SUZUKI**  
*Baker & McKenzie (Gaikokuho Joint Enterprise)*

Michio Suzuki is a member of the antitrust/competition practice group at Baker & McKenzie (Gaikokuho Joint Enterprise). His practice focuses on antitrust/competition law (merger control, cartel and distribution), and banking/finance law (structured finance, project finance, securitisation, trust and financial regulation). He has extensive experience advising Japanese and foreign corporations in dealing with merger control matters – including prior consultation and negotiations with the relevant competition authorities as well as dealing with investigations by competition authorities.

Education: New York University School of Law (LLM), Keio University Graduate School of Law (LLM), Keio University (LLB).

**AIDAN SYNNOTT**  
*Paul, Weiss, Rifkind, Wharton & Garrison LLP*

Co-chair of the Paul, Weiss antitrust practice, Aidan Synnott focuses on high-stakes antitrust litigation, regulatory investigations and merger clearance, as well as bankruptcy and other complex commercial litigation. He has extensive trial experience in state and federal courts and in ADR forums, and frequently represents clients in antitrust investigations by the US and EU governmental agencies.

A fellow of the American Bar Foundation, he has been an associate editor of the *Antitrust Law Journal* and editorial board member of the American Bar Association’s *Annual Review of Antitrust Law Developments*. He was co-chair of the New York State Bar Association Section of Commercial and Federal Litigation’s Committee on Antitrust and a member of the Executive Committee of the Section. He has been a guest lecturer and speaker at New York University School of Law, the Wharton School and the University of Michigan Law School, and has published extensively in the areas of antitrust and IP law. He is recognised as a leading lawyer for his work in antitrust by *Chambers USA*, *The Legal 500* and *The Best Lawyers in America*. In addition, Aidan has been included in *Who’s Who Legal: Competition* since 2013.

Aidan earned his law degrees from the University of Michigan, the Honorable Society of King’s Inns and the National University of Ireland.

**MICHAEL TAGLIAVINI**  
*Cleary Gottlieb Steen & Hamilton LLP*

Michael Tagliavini is a trainee lawyer in the Rome office of Cleary Gottlieb Steen & Hamilton LLP. Mr Tagliavini’s practice focuses on Italian and European competition law.
Mr Tagliavini joined the firm in 2016. In 2018, he trained for a five-month period with the Directorate General for Competition of the European Commission, where he worked on complex merger cases in the telecommunications and media sectors and policy projects relating to mergers and acquisitions. He graduated with honors from the Università degli Studi in Bologna and holds an LLM from King’s College London.

CANDICE UPFOLD
Norton Rose Fulbright South Africa Inc

Candice Upfold is a senior associate in the antitrust and competition team in Johannesburg, South Africa. She has extensive experience providing competition law opinions and obtaining merger clearances from the competition authorities within South Africa, other sub-Saharan African jurisdictions and COMESA. She has assisted with several large mergers in the industrial and manufacturing, insurance and mining sectors.

Candice also has experience in cartel investigations, including applications for corporate leniency, dawn raids and settlement negotiations.

Candice also advises clients in proceedings before sectoral regulators such as the National Energy Regulator of South Africa and the International Trade Administration Commission.

Candice has provided a comparative analysis of the European Merger Regulation in an exclusive chapter in the 2014 International Economic Law and African Development guide. The chapter deals with the jurisdiction of the COMESA Competition Commission for merger transactions.

She also presented a paper at the Seventh Annual Conference on Competition Law, Economics & Policy comparing the approach taken by COMESA and the European Union to jurisdiction over mergers and thresholds, and is a contributor of articles on competition law and related issues to legal journals, including the Competition Policy International’s Antitrust Chronicle, the Global Antitrust Compliance Handbook and The Merger Control Review.

Candice joined the practice as a candidate attorney in January 2010 and holds both an LLB and LLM degree in business law from the University of KwaZulu-Natal. She also holds an LLM degree in international law with a focus on international trade law from the University of the Witwatersrand, Johannesburg.

ANNE VALLERY
Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale)

Anne Vallery has practised EU competition and regulatory law in Brussels for over 20 years, with a particular focus on electronic communications. She has litigated numerous cases before the European Commission, European courts, national competition authorities, Brussels courts and other national courts.

Ms Vallery has been involved in a host of major transatlantic cartel investigations, including the Soda Ash, Cement, Vitamins, Belgian Banks, Parcel Tankers, Chloroprene Rubber, Emulsion Styrene Butadiene Rubber, NBR, Flat Glass and LCD cases.

In addition to her considerable cartel experience, Ms Vallery has been involved in major abuse of dominance investigations, state aid litigation, damages litigation, international arbitration and telecoms matters.
About the Authors

TJARDA VAN DER VIJVER
Allen & Overy LLP

Tjarda specialises in EU and Dutch competition law and the regulation of network industries. Tjarda has previously worked at the Dutch Competition Authority, where he focused mainly on competition law enforcement and merger control in the telecoms, energy and media sectors. In September 2014, he successfully defended his PhD at Leiden University on the concept of ‘objective justification’ of the abuse of dominance. Tjarda has published in international journals such as the Common Market Law Review, World Competition, European Competition Journal and European Competition Law Review.

MERI VANHANEN
Hannes Snellman Attorneys Ltd

Meri Vanhanen worked as an associate trainee in the competition and procurement group at the Helsinki office of Hannes Snellman in spring 2019. She is a master’s student at the University of Helsinki.

HENDRIK VIAENE
Laga (Deloitte Legal)

Hendrik Viaene is a partner at Laga (Deloitte Legal), where he mainly focuses on European and Belgian competition law (merger control, cartels and abuse of dominant position), state aid and EU internal market provisions. He regularly assists clients before the Court of Justice, the General Court, the European Commission, national courts and administrative authorities. Mr Viaene has published various contributions relating to the application of European and Belgian competition law, and he is a member of the board of editors of Competitio and an editor of the EU Competition Law Handbook. He also teaches competition law in the framework of the Brussels Bar Association.

MARIANA VILLELA
Veirano Advogados

Mariana Villela is the head of Veirano Advogados’ antitrust and competition law and corporate integrity practices. Her experience in antitrust and competition law involves general advice on Brazilian competition law, including advice in relation to day-to-day business practices, risk assessment of specific mergers and commercial practices, merger notifications, challenges to merger notifications before competition authorities, representation of clients in procedures involving anticompetitive practices, litigation involving antitrust issues and preparation of compliance programmes. She has acted in many antitrust and competition cases, merger cases and cases involving anticompetitive conduct, including cartel cases and cases involving abuses of a dominant position. She also handles most of the firm’s litigation cases involving antitrust issues.

Ms Villela holds a master’s degree in commercial law from the Law School of the University of São Paulo, with an emphasis on competition law (2008), where she presented a dissertation on exclusive dealing and competition law; and a doctorate degree in commercial law from the Law School of the University of São Paulo, with an emphasis on competition law (2012), where she presented a thesis on abuse of dominance and distribution relations.
STEPHEN WU

*Lee and Li, Attorneys-at-Law*

Stephen Wu is the partner leading the competition law practice group at Lee and Li, and also the founding chair and an active member of the Competition Law Committee of the Taipei Bar Association. He has successfully represented domestic and international clients in handling numerous antitrust filing, cartel investigation and unfair competition cases. He has been recognised as being among the world’s leading competition lawyers by *Who’s Who Legal – Business Lawyers* 2012, 2013 and 2014. He keeps abreast of the latest developments in global antitrust and competition laws, and regularly contributes briefings and articles to *Global Competition Review*, AntitrustAsia.com and many competition law publications.

WEI-HAN WU

*Lee and Li, Attorneys-at-Law*

Wei-Han Wu is an associate partner at Lee and Li. She joined Lee and Li in 2008 and is a core member of the competition law practice group of Lee and Li. Ms Wu advises clients on the full range of competition law, focusing on merger control, cartel work, restrictive practice and unfair trade matters. She has extensive experience in representing international corporations in major deals relating to her practice areas before the Taiwan Fair Trade Commission. Ms Wu is also frequently involved in various cases at the intersection of antitrust and IP laws. Ms Wu regularly writes and speaks on a variety of competition law topics. In 2017 and 2018, she was listed in *Who’s Who Legal: Competition Future Leaders*.

RYO YAMAGUCHI

*Baker & McKenzie (Gaikokuho Joint Enterprise)*

Ryo Yamaguchi is a member of the antitrust/competition practice group at Baker & McKenzie (Gaikokuho Joint Enterprise). Her practice is mainly focused on antitrust/competition law and she advises on all aspects of antitrust/competition law issues including merger control, cartel and distribution.

Education: Hitotsubashi University (JD), University of Essex (MA in international relations), Kyoto University (LLB).

CLEOMENIS YANNIKAS

*Dryllerakis & Associates*

Cleomenis Yannikas is a senior partner at Dryllerakis & Associates.

He is a member of the firm’s competition team, having handled numerous antitrust cases before the Hellenic Competition Commission. He is also active in corporate law, mergers and acquisitions (M&A) and investment incentives, having considerable experience in major M&A and project finance deals with an international profile.

He graduated from the Athens University Law School in 2002. He is a member of the Athens Bar and qualified to practise before the courts of appeal of all jurisdictions.

Mr Yannikas is the author of or a contributor to articles in several local and international publications on competition law, corporate law and investment incentives. He speaks Greek and English fluently.
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

ADVOKATFIRMAET GRETTE AS
Filipstad Brygge 2
0114 Oslo
Norway
Tel: +47 480 121 94
odst@grette.no
www.grette.no

ALLEN & OVERY LLP
Apollolaan 15
1077 AB Amsterdam
Netherlands
PO Box 75440
1070 AK Amsterdam
Netherlands
iradj.nazaryar@allenovery.com
tjarda.vandervijver@allenovery.com
Tel: +31 20 674 1000
www.allenovery.com

ANJIE LAW FIRM
19/F, Tower D1
Liangmaqiao Diplomatic Office Building
No. 19 Dongfangdonglu
Chaoyang District
Beijing 100600
China
Tel: +86 10 8567 5959
Fax: +86 10 8567 5999
michaelgu@anjielaw.com
www.anjielaw.com

ASSEGAF HAMZAH AND PARTNERS
Capital Place, Level 36 & 37
Jalan Jenderal Gatot Subroto Kav. 18
Jakarta 12710
Indonesia
Tel: +62 21 2555 7800
Fax: +62 21 2555 7899
farid.nasution@ahp.id
anastasia.pritahayu@ahp.id
berla.pratama@ahp.id
www.ahp.co.id

BAKER & MCKENZIE (GAIKOKUHO JOINT ENTERPRISE)
Ark Hills Sengokuyama Mori Tower 28F
1-9-10 Roppongi, Minato-ku
Tokyo 106-0032
Japan
Tel: +81 3 6271 9900
Fax: +81 3 5549 7736
junya.ae@bakermckenzie.com
michio.suzuki@bakermckenzie.com
ryo.yamaguchi@bakermckenzie.com
www.bakermckenzie.co.jp/en/
BAYKANIDEA LAW OFFICES
Cumhuriyet Cad Dag Apt 34/6
Elmadag, Istanbul
Turkey
Tel: +90 212 241 00 63
Fax: +90 212 241 79 69
serbulent@baykanidea.com
www.baykanidea.com

BREDIN PRAT
53 Quai d’Orsay
75007 Paris
France
Tel: +33 1 44 35 35 35
olivierbillard@bredinprat.com
www.bredinprat.fr

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Piazza di Spagna 15
00187 Rome
Italy
Tel: +39 06 69 52 21
Fax: +39 06 6920 0665
gscassellati@cgsh.com
mdostuni@cgsh.com
lbellia@cgsh.com
fchiovini@cgsh.com
mtagliavini@cgsh.com
www.clearygottlieb.com

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ
Torre Virreyes Pedregal No. 24, 24th Floor
Col Molino del Rey
11040 Mexico City
Mexico
Tel: +52 55 4748 0600
luis.garcia@creel.mx
carlos.mena@creel.mx
sara.gutierrez@creel.mx
www.creel.mx

DRYLLERAKIS & ASSOCIATES
5 Chatzigianni Mexi St
115 28 Athens
Greece
Tel: +30 211 000 3456 /
+30 210 362 8159
Fax: +30 211 000 5200 /
+30 210 364 4218
lawoffice@dryllerakis.gr
www.dryllerakis.gr

GOODMANS LLP
Bay Adelaide Centre – West Tower
333 Bay Street, Suite 3400, 34th Floor
Toronto, Ontario M5H 2S7
Canada
Tel: +1 416 979 2211
mkoch@goodmans.ca
drosner@goodmans.ca
jjohnston@goodmans.ca
www.goodmans.ca

HANNES SNEILLMAN ATTORNEYS LTD
Eteläesplanadi 20
00130 Helsinki
Finland
PO Box 333
00131 Helsinki
Finland
Tel: +358 9 228 841
Fax: +358 9 177 393
tapani.manninen@hannessnellman.com
anette.laulajainen@hannessnellman.com
Kungsträdgårdsgatan 20
111 47 Stockholm
Sweden
Tel: +46 760 000 080 / +46 760 000 047
Fax: +46 8 679 85 11
peter.forsberg@hannessnellman.com
johan.holmquist@hannessnellman.com
david.olander@hannessnellman.com
www.hannessnellman.com
Contributors’ Contact Details

KHAITAN & CO
12th Floor, Ashoka Estate
24 Barakhamba Road
New Delhi 110 001
India
Tel: +91 11 4151 5454
Fax: +91 11 4151 5318

One Indiabulls Centre
13th Floor, Tower 1
841 Senapati Bapat Marg
Elphinstone Road
Mumbai 400 013
India
Tel: +91 22 6636 5000
Fax: +91 22 6636 5050

sagardeep.rathi@khaitanco.com
anisha.chand@khaitanco.com
ebaad.khan@khaitanco.com
www.khaitanco.com

LEE AND LI, ATTORNEYS-AT-LAW
7F, No. 201, Tun Hua N Road
Taipei 10508
Taiwan
Tel: +886 2 2715 3300
Fax: +886 2 2713 3966
stephenwu@leeandli.com
rebeccahsiao@leeandli.com
weihanwu@leeandli.com
www.leeandli.com

L PAPAPHILIPPOU & CO LLC
17 Ifigenias Street
2007 Strovolos
Nicosia
Cyprus
Tel: +357 22 27 10 00
Fax: +357 22 27 11 11
www.papaphilippou.eu

LEGA ABOGADOS
Av. Venezuela, Edificio Atrium, Piso 3
El Rosal
Caracas, 1060
Venezuela
Tel: +58 212 901 2600
Fax: +58 212 951 3205
agallotti@lega.law
www.lega.law

LAGA (DELOITTE LEGAL)
Gateway Building
Luchthaven Nationaal 1J
1930 Zaventem
Belgium
Tel: +32 2 800 70 42
hviaene@laga.be
www.laga.be

LINKLATERS C WISNIEWSKI I WSPÓLNICY SP K
32nd Floor
Building Q22
Aleja Jana Pawla II 22
00-133 Warsaw
Poland
anna.laszczyk@linklaters.com
wojciech.podlasin@linklaters.com
Tel: +48 22 526 5124/5055/5000
Fax: +48 22 526 5060
www.linklaters.com

LLOREDA CAMACHO & CO
Calle 72 No. 5-83 Piso 5
Bogotá 110221
Colombia
Tel: +57 1 326 4270
Fax: +57 1 606 9701
ealvarez@lloredacamacho.com
dcadena@lloredacamacho.com
www.lloredacamacho.com

© 2019 Law Business Research Ltd
Contributors' Contact Details

MARVAL, O'FARRELL & MAIRAL
Av Leandro N Alem 882
C1001AAQ Buenos Aires
Argentina
Tel: +54 11 4310 0100
Fax: +54 11 4310 0200
mp@marval.com
sdr@marval.com
www.marval.com

NORTON ROSE FULBRIGHT SOUTH AFRICA INC
15 Alice Lane
Sandton
Johannesburg
Gauteng 2196
South Africa
Tel: +27 11 685 8870
Fax +27 11 301 3503
candice.upfold@nortonrosefulbright.com
www.nortonrosefulbright.com

URÍA MENÉNDEZ PROENÇA DE CARVALHO
Edificio Rodrigo Uría
Praça Marquês de Pombal, 12
1250-162 Lisbon
Portugal
Tel: +351 21 030 86 00
Fax: +351 210 30 86 01
joaquim.caimotoduarte@uria.com
tanialuisa.faria@uria.com
www.uria.com

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
United States
Tel: +1 212 373 3213/3648
Fax: +1 212 492 0213/0648
asynnott@paulweiss.com
wmichael@paulweiss.com
www.paulweiss.com

VEIRANO ADVOGADOS
Av Presidente Wilson, 231, 25º andar
20030-021 Rio de Janeiro
Brazil

Av Brigadeiro Faria Lima, 3477, 16º andar
04538-133 São Paulo
Brazil

Av Dr. Nilo Peçanha 2900, 15º andar
91330-001 Porto Alegre
Brazil

RCAA
Feldbergstraße 23
60323 Frankfurt
Germany
Tel: +49 69 770 39 490
Fax: +49 69 770 39 49 29
eniitvaeli@rcaa.eu
mreysen@rcaa.eu
www.rcaa.eu

SCS Qd 9 Lt C
Ed Parque Cidade Corporate
Torre A, 12º andar sl 1203
70308-200 Brasília
Brazil

Tel: +55 21 3824 4739/4747
Fax: +55 21 2262 4247
mariana.villela@veirano.com.br
leonardo.duarte@veirano.com.br
gabriela.monteiro@veirano.com.br
vinicius.cardoso@veirano.com.br
www.veirano.com.br