MESSAGE FROM THE COMMITTEE CHAIRS

The goal of the International Antitrust Law Committee is to publicize global developments in and provide a forum for discussion and analysis of competition law. The Committee is comprised of members from around the world, making up an international network of competition/antitrust practitioners and government officials. We take a leading role in policy development, frequently providing comments and input to assist competition agencies and government officials worldwide in the formulation and enforcement of their competition laws.

One of our Committee’s principal functions is to keep our Committee and Section members informed about significant international competition law developments. We do this through regular reports on our Committee listserv, brown bags and teleconferences, presentations at the Section’s Spring and Fall meetings, and through our “Hot Topics” bulletins and Committee newsletter.

Another major component of our outreach effort is our annual analysis and summary of key antitrust developments in jurisdictions around the world. We do this through two vehicles: the International Section’s comprehensive “Year in Review” publication and through our committee’s own Year in Review Monograph, the 2014 edition of which you are now reading.

The “Year in Review” requires substantial time and effort on the part of the contributors and editors. We are indebted to our 2014 editors, Kristin Hjelmaas Valla, Gerardo Calderon-Villegas, Adam S. Goodman, Bronwyn Roe and Nikiforos Iatrou, and to all of the authors for their excellent contributions to this project.

Given the substantial lead time required to prepare this publication, we are already looking ahead to the 2015 edition. The 2014 Year in Review covers 31 jurisdictions. We would encourage all those who might be interested in contributing to this publication to contact us. You can also visit the International Antitrust Law Committee’s website at http://www.abanet.org for more information about this and other of our activities.

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EDITOR’S NOTE

Welcome to the 2014 Antitrust Year in Review, a compilation of the latest antitrust/competition law developments in 31 jurisdictions worldwide. Each contribution offers commentary on significant developments taking place across a number of areas, including legislation, mergers, cartels and anticompetitive practices, abuses of dominant position and court decisions. This is the International Antitrust Law Committee’s 9th edition of the Year in Review, which debuted in 2006 with reports from 24 jurisdictions.

Some highlights that you’ll see in this year’s edition are the latest reports on the auto-parts cases; trends in cases involving the telecom and media industries; legislative amendments improving private access to remedies for antitrust violations; and analysis of mergers involving everything from cement, to biomedical life sciences businesses, to heavy machinery, to hospitals, and everything in between. Joint ventures also feature prominently in many jurisdictions’ updates.

The 2014 Year in Review is the culmination of countless hours of work on the part of our authors and our editorial team (in fact, thanks to our docket sheets, the hours may not be “countless”, but they are nonetheless significant!). I am grateful for their dedication and commitment in producing this volume. I would be remiss if I did not also thank the staff and students at WeirFoulds LLP for their assistance in producing this tome.

We hope this publication affords a valuable tool for understanding the growing role of antitrust/competition law across the globe.

Sincerely,

Nikiforos Iatrou, Editor-in-Chief

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In 2014, the South African competition authorities focused on public interest factors in merger reviews and, for the first time, exercised new powers to initiate market inquiries. The staff shortages that plagued the authorities in 2013 were largely addressed. In particular, Tembinkosi Bonakele, who had been acting as Commissioner, was appointed as permanent Commissioner for a five-year period. A Chief Economist was also appointed, along with Divisional Managers for Enforcements and Exemptions, Mergers and Acquisitions, and Cartels.

A. LEGISLATIVE DEVELOPMENTS

There were no legislative changes in 2014, but the Minister of Economic Development proposed legislative amendments to the Competition Act 89 of 1998, aimed at extending the competition authorities' powers to order divestitures by dominant firms in abuse cases and to increase regulation of the industrial organization of firms. A draft of these proposed amendments has yet to be published.

B. MERGERS

Merger activity remained resilient even under difficult economic conditions. Three hundred and twenty mergers were notified to the Competition Commission in its 2013-2014 financial year, four less than the previous year. Of the 329 cases finalized in the financial year, 95 mergers were "large", 214 mergers were "intermediate", and 20 were "small" mergers. (Of those, 22 mergers were approved with conditions, and one case was prohibited.) The Commission managed to stay more or less in line with its service standards by completing these merger investigations in turnaround times of 21, 39 and 64 business days, respectively. For the Commission's 2013/2014 financial year, the Commission completed "non-complex", "complex" and "very complex" investigations in line with its service standards.

Of the 22 mergers in which conditions were imposed by the Commission, 10 were designed to remedy public interest concerns. Most of these conditions aimed to ameliorate the effect of the

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merger on employment. Of the 10 cases with public interest conditions, seven had a remedy relating to employment concerns, two addressed harm to small and medium enterprises and one merger aimed to address harm to a particular industrial sector or region. The conditions were primarily moratoriums restricting the number of retrenchments. The Commission reported that these interventions saved 4,076 jobs. In response, merging parties have been more proactive in ameliorating potentially adverse employment effects before seeking merger approval. For example, in the Nashua Mobile transactions, Nashua Mobile undertook to redeploy as many affected employees (and all unskilled employees) within Nashua’s parent company’s group; to provide very generous severance packages; to establish support structures providing employees with inter alia psychological and financial counselling; and to afford them preferential consideration in the event of vacancies arising.

The authorities’ increasingly broad view of their powers to impose conditions on mergers in the public interest was also illustrated by AgriGroupe’s buyout of Afgri, in which the Tribunal required the establishment of a fund and a development programme for emerging farmers. The Commission recently released draft guidelines on how it will apply public interest factors in merger reviews. Evidently, the focus on public interest considerations will undoubtedly continue in 2015.

Another important merger in 2014 was Oceana’s acquisition of Foodcorp. In the Tribunal’s approval of the merger, it imposed a condition requiring divestment of Foodcorp’s fishing quota on the basis that the combination of the merging parties’ rights was said to enable an already dominant player to increase its power and undermine competition from other players. However, the decision was overturned on appeal at the Competition Appeal Court. Interestingly, the Court emphasised that the transaction had a significant public interest consideration that should have been taken into account: the continued existence of the Foodcorp fishing business (under Oceana) would result in the survival of the Laaiplek processing facility and employment for approximately 1,000 employees in a highly impoverished region, who otherwise would likely have been retrenched.

A number of proposed transactions were announced in the telecommunications industry in 2014. Vodacom, controlled by Vodafone,  

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announced an intention to acquire the second fixed line telecommunications operator, Neotel. In addition, the second largest mobile operator, MTN, announced a network-sharing agreement with the dominant fixed line operator, Telkom. There were also various transactions involving internet service providers and managed network solutions providers, all reiterating a move toward significant and speedy consolidation in the sector.\textsuperscript{12} At the time of writing, the Vodacom and MTN transactions were still being investigated by the Commission and are facing challenges from other market players.\textsuperscript{13}

\section*{C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES}

During the Commission’s 2013-2014 financial year, the Cartels division initiated and investigated a total of 11 new cartel complaints and received four cartel complaints from members of the public.\textsuperscript{14}

The Commission referred cartel complaints in the power cable\textsuperscript{15} and fishing sectors.\textsuperscript{16} The Commission also made a number of referrals in the construction industry\textsuperscript{17} despite having settled numerous construction cartel complaints (relating to collusive tendering) through the “fast-track” settlement process\textsuperscript{18} with major construction firms such as Murray & Roberts, Grinaker-LTA, WBHO, Stefanutti and Basil Read. Some of the major projects settled under this process included the 2010 FIFA World Cup stadia tenders, the Gauteng Freeway Improvement project, the Gautrain project and various road projects across South Africa.\textsuperscript{19} Those construction companies that failed to accept liability for certain projects during the course of this fast-track process are now being brought before the Tribunal.

The Commission conducted dawn raids in the edible oil\textsuperscript{20} and auto body repairs\textsuperscript{21} industries in

\begin{itemize}
\item \textsuperscript{13} Warren Dick, Vodacom to have the edge, Moneyweb, (Feb. 26, 2015), available at http://www.moneyweb.co.za/moneyweb-south-africa/vodacom-to-have-the-edge.
\item \textsuperscript{17} For instance, in November, the Commission referred a case of collusive tendering in respect of tenders for the construction of 2010 FIFA World Cup stadia against WBHO Construction (Pty) Ltd, Group Five Construction Ltd, Stefanutti Stocks Holdings Limited and Basil Read (Pty) Ltd. Murray & Roberts Limited has been granted leniency in respect of this conduct. See Media Advisory, Competition Comm’n of S. Afr., 2010 FIFA World Cup Stadia Referral (Nov. 13, 2014), http://www.compcom.co.za/media-advisory-13-november-2014-2010-fifa-world-cup-stadia-referral/.
\item \textsuperscript{18} Katy Oglethorpe, SA takes World Cup Riggers to Court, Global Competition Review (Nov. 13, 2014), http://globalcompetitionreview.com/news/article/37261/sa-takes-world-cup-riggers-court/.
\item \textsuperscript{21} Press Release, Competition Comm’n of S. Afr., Competition Commission Raids Precision and Eldan offices (July 4, 2014), http://www.compcom.co.za/wp-
27. The Commission raided edible oil producers Unilever and Sime Darby Hudson and McKnight after a year-long investigation regarding price fixing in the market for cooking oil and margarine, following an anonymous complaint.22 Precision and Sons ("Precision") and Eldan Auto Body ("Eldan") (both auto body repair companies) and Vehicle Accident Assessment Centre (which renders vehicle assessment services to customers of Precision and Eldan) were raided as part of the Commission’s ongoing investigation into collusive conduct in the market for auto body repairs.23

The Commission began flexing its market inquiry muscle by publishing terms of reference for enquiries into private healthcare 24 and liquefied petroleum gas.25 The inquiry into private healthcare has attracted interest from all sectors of South African society, and was prompted not only by high pricing in private healthcare, but also by general concerns regarding access to healthcare services from both the public and private sector.26 The enquiry got off the ground with the appointment of a panel headed by a former Constitutional Court Justice, Sandile Ngcobo, and the successful wading off a High Court challenge, discussed in more detail below.

The inquiry into the liquefied petroleum gas sector was initiated in the context of South Africa’s energy crisis and the country’s strategic need to switch to more sustainable energy sources. The terms of reference for the inquiry note that the sector is characterized by a limited supply, with imports supplementing the domestic supply. This confers substantial market power on major resellers who can secure steady supplies from refineries.27 In both market enquiries, the first round of submissions have been called for and submitted.

D. ABUSES OF DOMINANCE

The Competition Tribunal found that Sasol Chemical Industries ("Sasol") had engaged in excessive pricing of propylene and polypropylene, which are inputs into plastic products.28 Key to the Tribunal's decision was the fact that the relevant inputs into these products are low-cost because they are by-products of Sasol’s fuel production process. In addition, the Tribunal found that Sasol’s acquisition of dominance was achieved through State support and a number of legislative, regulatory and other

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measures, rather than through risk-taking or innovation on its own part. In the result, the Tribunal imposed an administrative penalty of R205.2 million and R328.8 million in respect of purified propylene and polypropylene, respectively. In addition, the Tribunal ordered that Sasol must revise its future pricing of polypropylene and propylene. The appeal was heard by the Competition Appeal Court in December and a decision is expected in the first half of 2015.


E. COURT DECISIONS

In litigation related to the healthcare inquiry, the High Court dismissed a case brought by hospital group Netcare seeking to interdict KPMG from being appointed as the Commission’s healthcare inquiry technical service provider. Netcare claimed that KPMG, which had previously performed consulting work for Netcare, had a conflict of interests. The High Court supported the Commission’s position that all parties in the country’s healthcare sector, recent-competition-and-antitrust-law-developments-with-practical-relevance#section8.


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including Netcare, must fully cooperate with the healthcare investigation rather than seek to derail it. The High Court also pointed out that an interdict would not protect relevant information from the Commission’s scrutiny as the Commission has powers to subpoena information relevant to the market enquiry. The Competition Commission welcomed the decision of the High Court.  

In the matter of Competition Commission v. Computicket (Pty) Ltd., the Supreme Court of Appeal decided that amendments to section 168(3) of the South African Constitution materially changed the Supreme Court of Appeal’s jurisdiction in Competition matters. On the facts, the Court found that it did not have jurisdiction to hear the matter.

In Videx Wire Products (Pty) Ltd. v. Competition Commission of South Africa, the Competition Appeal Court held that Videx Wire Products was party to an over-arching price-fixing agreement. Accordingly, it was unable to prove that some of the separate incidents of its cartel conduct were time-barred from prosecution in terms of the prescription provisions contained in section 67(1) of the Competition Act. The CAC confirmed that the onus is on the respondents relying on a defence of prescription to show when the conduct ceased. In addition, in order to argue that there were different and separate instances of collusion, it would be necessary to show that such separate instances are not merely manifestations of the same understanding (and overarching contravention) between competitors with continuing prejudicial effects.

In EOH Holdings Limited and EOH Mthombo (Pty) Ltd., Invensys PLC, Invensys Systems (UK) Limited and Eurotherm Limited v. Protea Automation Solutions (Pty) Ltd., the Tribunal determined that it had the power to award costs against private parties where a complaint was directly referred to it, but that it did not have the power to order security for costs.

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ISRAEL

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A. LEGISLATIVE DEVELOPMENTS

Section 3 of the Israeli Restrictive Trade Practices Law 5748-1988 (the “Law”) excludes certain arrangements from the limitations set forth in the Law. Amendment number 14 of the Law, which was enacted in March and came into effect in March 2015, limits the statutory exclusion regarding arrangements between agricultural producers and wholesalers under section 3(4) of the Law. Prior to the amendment, the Law stated that an arrangement involving restrictions on producing or wholesaling domestic agricultural produce shall not be considered a restrictive arrangement if it applies to products manufactured from such agricultural produce, provided all parties thereto are producers or wholesale marketers. The new amendment limits the scope of this exclusion to apply only to certain types of producers and wholesalers.¹

In April, the Israeli Antitrust Authority (the “IAA”) published Guidelines regarding the Prohibition on Excessive Pricing by a Monopoly. According to the Guidelines, in certain cases, excessive pricing might be deemed an abuse of dominant position by a Monopoly, in violation of the Law.²

In August, the IAA published a Draft Policy Paper that sets guidelines regarding unilateral public disclosures, statements, and publications which may harm competition. According to the Draft Policy Paper, anticompetitive public disclosures may occur in various forms, and information delivered through public disclosure might be used to create, conserve, or increase the stability of a restrictive arrangement. The IAA notes that the guidelines provided in the Draft Policy Paper will bring policies in line with OECD Best Practices and the antitrust laws of the EU and the United States.³

In September, the IAA published a Policy Paper setting standards for the proper conduct of trade associations. The Policy Paper states that, even though trade associations are important institutions, their activity may threaten competition. Among other concerns, the Policy Paper refers to the potential for trade associations to be used as forums for enacting restrictive arrangements, exchanging sensitive information, or boycotting competitors, clients, or suppliers, etc. The Policy Paper makes recommendations regarding the proper conduct of trade associations. Although these recommendations are not binding, compliance with the recommendations will reduce the risk of violating of the Law and exposure to prosecution (safe harbor).⁴

Amendment Number 16 of the Law was enacted in November and will take effect in

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August 2015. The amendment repeals the statutory exclusion in section 3(6) regarding reciprocal exclusivity arrangements between the purchaser of an asset or service and its supplier. Prior to the amendment, the Law stated that, under certain circumstances, such arrangements shall not be deemed restrictive arrangements.5

B. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In February, the IAA invited the Ashdod Port Company Ltd. (the "Port") to a hearing regarding its intention to impose an administrative fine of approximately US$3 million on the Port, inter alia, on the grounds that the Port had allegedly conducted a restrictive arrangement (the case also included claims of abusive behavior). According to the IAA’s press release, a logistics company, which works at the Port as a subcontractor, tried to arrange an alternate unloading point at a competing port. In response, the Port tried to prevent the logistics company from providing services at the Port's premises.6

In December, the IAA imposed administrative fines of approximately US$200,000 on Tnuva Food Industries – Israel Agricultural Cooperative Society Ltd. ("Tnuva") and approximately US$51,000 on Tiv Tirat-Tzvi 2000 Limited Partnership ("Tirat-Tzvi"). Tnuva and Tirat-Tzvi were parties to an exclusive distribution arrangement that had been approved by the IAA several times in the past (the "Agreement"). The approval expired, and Tnuva and Tirat-Tzvi continued to execute the Agreement without filing for renewed approval. Although the IAA ultimately renewed the approval, it decided to impose administrative fines on Tnuva and Tirat-Tzvi for part of the time during which they acted without authorization.7

C. ABUSES OF DOMINANT POSITION

In November, the IAA published a declaratory decision stating that Bezeq – The Israel Telecommunication Corp., Ltd. ("Bezeq"), the leading telecommunication company in Israel, abused its monopolistic position in the telecommunication and internet markets by engaging in a "margin squeeze." In particular, Bezeq offered internet access infrastructure, an essential service for the provision of internet-based telephony services, to competitors at a higher price than that which Bezeq offered its own customers, putting such competitors at an inherent competitive disadvantage.8

D. COURT DECISIONS

In 2012, the IAA blocked a merger wherein the Azrieli Group Ltd. ("Azrieli"), one of Israel's largest commercial real estate groups, sought to acquire a shopping complex from Mashhar Shopping and Leisure Centers Ltd. ("Mashhar"). Azrieli appealed to the Antitrust Tribunal. Following Mashar’s termination of the merger agreement, the appeal was dismissed on the grounds that it was theoretical. Azrieli appealed to the Supreme Court, arguing that the Tribunal's decision would effectively grant the IAA immunity

from judicial review since parties to an agreement will rarely be able to maintain a merger agreement throughout the appeal process. In August 2014, the Supreme Court accepted Azrieli’s appeal and remanded the case to the Antitrust Tribunal.⁹

In April, the Jerusalem District Court approved a plea bargain and sentenced a gardening contractor to five and a half months of community service and a fine of approximately US$27,500 for, inter alia, participating in a pruning cartel. The cartel is an extensive and complex case, involving the indictment of over 40 defendants for coordinating 18 tenders.¹⁰

The IAA reached an agreement with Israel’s five largest banks regarding an alleged restrictive arrangement regarding the exchange of information relating to bank fees. In June, the Antitrust Tribunal approved the agreement as a Consent Decree. The five banks were required to pay approximately US$19 million to the State Treasury, without an admission of liability. If the banks settle the pending class action suits related to the case, the compensation money will be deducted from the US$19 million.

In July, the Jerusalem District Court convicted ShuferSal Ltd. ("ShuferSal"), the largest supermarket chain in Israel, its former CEO, and its former Deputy CEO of violations, inter alia, of merger conditions set by the IAA in a merger between ShuferSal and another supermarket chain. The allegations concerned ShuferSal’s attempt to intervene in the commercial terms and conditions set between ShuferSal’s suppliers and other supermarket chains. ShuferSal’s former CEO was sentenced to two months in prison, two and a half months of community service, and a fine of approximately US$124,000. The former Deputy CEO was sentenced to one month in prison, six weeks of community service, and a fine of approximately US$70,000. ShuferSal itself was ordered to pay a fine of approximately US$800,000.¹¹ An appeal was filed with the Supreme Court (pending).

In 2011 the IAA opened an investigation against the Israeli bookstore chain, Steimatzky (2005) Ltd. ("Steimatzky") regarding alleged violations of merger conditions set by the IAA in a decision regarding a merger between Steimatzky and another bookstore chain. Suspicions of the violations arose following Steimatzky’s alleged demand from publishers to receive exclusive rights to sell certain titles at discounted prices. In July, the Antitrust Tribunal approved a Consent Decree between the IAA, Steimatzky and its CEO. Without an admission of liability, Steimatzky will pay approximately US$400,000 and its CEO will pay approximately US$14,000 to the State Treasury.¹²

In August, the Jerusalem District Court sentenced a lawyer to two months of community service and a monetary fine of approximately US$14,000.¹³ The lawyer was convicted of aiding and enforcing a restrictive arrangement whereby two companies agreed not to compete in public tenders.

In March, the IAA blocked a merger between two companies operating parking lots in the Old City of Jerusalem. Had the merger been

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⁹ CA 6426/13 Azrieli Group Ltd. v. General Dir. of the IAA [2014].
approved, it would have created a perfect monopoly in the parking lots market in part of the Old City of Jerusalem (the "Relevant Market"). The IAA was concerned because the potential buyer - Alrov Mamilla Commercial Zone (1993) Ltd. ("Alrov") owns two other parking lots in the Relevant Market. Alrov appealed the IAA's decision to the Antitrust Tribunal. In December, the Antitrust Tribunal dismissed the appeal and upheld the IAA's conclusion that approving the merger would create a perfect monopoly, and provide Alrov with the market power and the ability to charge monopolistic prices in the Relevant Market.

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14 The IAA defined the Relevant Market very narrowly as "the market of public parking lots containing more than 40 parking spaces, and its geographical borders are 550 meters from Jaffa Gate and Mamilla Shopping Center." Israeli Antitrust Auth., The Grounds for the General Director of Restrictive Trade Practices' Block of the Merger Between Alrov Mamilla Commercial Zone (1993) and Karta Central Jerusalem Development Company Ltd. (In Liquidation), (Mar. 17, 2014), http://www.antitrust.gov.il/subject/113/item/33082.aspx.

A. LEGISLATIVE DEVELOPMENTS

In 2014, the Ministry of Commerce ("MOFCOM"), the agency responsible for merger review in China under the Anti-Monopoly Law ("AML"), published the long awaited Rules on Thresholds for Simple Cases and relevant procedures and forms. The Rules provide criteria based on which MOFCOM may treat a transaction as "simple," subject to several exceptions, and which offer clarification regarding the reporting obligations for offshore joint ventures. The Rules are designed to speed up the review process. MOFCOM also updated the Guidelines for Notification of Concentration, originally published in 2009, which provides more detail of the definition of control, transactions subject to notification, turnover calculation and other relevant issues. In addition, the National Development and Reform Commission ("NDRC"), the agency responsible for non-merger price violations, issued Rules on the Reporting of Price Related Violations, which specify the rules and procedures for reporting and handling price related violations. NDRC also issued Rules on Administrative Penalties for Price-Related Violations, which provides, among other things, more detail on relevant factors in determining penalties. These Rules presumably apply to price related violations under both the Price Law and AML. The State Administration for Industry and Commerce ("SAIC"), the agency responsible for non-price non-merger antitrust enforcement in China, has published for public comments draft rules on issues at the intersection of antitrust and...
IPRs, but has not yet finalized and promulgated the rules.

B. MERGERS

In 2014, MOFCOM has unconditionally cleared 233 merger cases and cleared more than 60 cases under the simple case procedure. It is a considerable improvement that the vast majority of the cases under the simplified procedure were cleared within phase I (30 days or less). In 2014, MOFCOM imposed conditions in four cases and blocked one transaction.

1. *Thermo Fisher/Life Science:* MOFCOM required divestiture of its cell-culture gene-modulation businesses, a 1% price reduction of SSP reagent kit and SDS-PAGE in the Chinese market every year for the next 10 years, and provided these two products to a third party through an OEM or license agreement. Most notable in this case was the faster speed of MOFCOM's review and the agency's increased use of economic analysis. This decision also highlights how MOFCOM is charting its own course, which often leads it to impose remedies beyond or different to those required by enforcement agencies in other jurisdictions.

2. *Microsoft/Nokia:* MOFCOM's review focused on three product markets: smart phones, mobile operating systems, and the licensing of standard-essential and non-essential patents for smart phones. After finding that the Microsoft mobile operating system and the Nokia smart phone business had minor market positions and were unlikely to impact competition post-closing, MOFCOM concluded that, post-acquisition, Microsoft would have the capability to restrict competition in the upstream patent license market for smart phones and Nokia will have the incentive and ability to increase its own patent licensing royalty rates for smart phone-related patents. MOFCOM required that Microsoft observe its FRAND commitments for SEPs, not seek injunction or exclusion orders based on its SEPs against smartphones made in China, and not transfer its non-SEPs within 5 years. It required that Nokia observe its FRAND commitments for SEPs, not depart from its current FRAND royalty rates for cellular communication SEPs, and acquirers of Nokia' SEPs subjecting to the same FRAND and MOFCOM commitments.

3. *Merck/AZ Electronics:* MOFCOM's review focused on two products that are components in the manufacture of flat panel displays ("FPDs"): liquid crystal and photoresist. The decision indicates that MOFCOM engaged outside

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6 The ABA has commented on the draft rules on July 9, 2014. See the ABA comment at: http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_201407saic.authcheckdam.pdf.


8 Cases reviewed under the MOFCOM Simple Case Procedure are published for third party comment. They are available in Chinese at http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/.

9 MOFCOM's conditional approval decisions are available in Chinese at http://fldj.mofcom.gov.cn/article/ztxx.

economists to assist with its review. MOFCOM found that, because both liquid crystal and photoresist are raw materials used for FPD manufacturing, they are “complementary” and constitute “adjacent” markets, and Merck and AZ have significant market shares in the two markets. To resolve the concerns, MOFCOM required the parties not to engage in tie-in sales, and to license Merck liquid crystal patents on non-exclusive, commercially reasonable and non-discriminatory terms; and

(4) JV between Korun, Toyota China and PEVE in the area of NiMH battery for vehicles: MOFCOM required the JV to sell products on a fair, reasonable and non-discrimination basis and to start external sales within 3 years.

MOFCOM blocked the proposed P3 Network shipping alliance\(^\text{11}\) between Denmark’s Maersk, Switzerland’s Mediterranean Shipping Company ("MSC") and France’s CMA CGM. The purpose of the Alliance was to share the capacity of the three shipping companies on Asia-Europe, Trans-Pacific and Trans-Atlantic shipping lanes and create a joint vessel operation center to coordinate the fleets of the alliance members. The parties had structured the transaction to ensure that each of them would “retain its separate identity and shall have fully separate and independent sales, pricing and marketing functions.” Thus, while they would coordinate capacity, they would continue to compete against each other. MOFCOM’s investigation was particularly focused on the Asia-Europe routes. MOFCOM considered that the combined market shares of the three shipping companies on these routes would amount to 47% in terms of capacity. It found that this would lead to a significant increase in the parties’ market power and also increase concentration in the market. In addition, MOFCOM found that the transaction would increase barriers to entry, but did not offer further details. Of greatest significance, MOFCOM considered that other competitors would be put at a competitive disadvantage and that customers as well as ports have weak bargaining power against shipping companies. MOFCOM concluded that the P3 Alliance would have the effect of restricting or eliminating competition on the Asia-Europe container liner shipping services market, and prohibited the transaction. The Alliance had previously been approved by the US Federal Maritime Commission ("FMC"), and the EU Commission similarly decided not to open a formal investigation into the alliance. This is only the second time in six years that MOFCOM has blocked a transaction under AML. This and other decisions confirm that China is confident in diverging from positions taken elsewhere, including in other major jurisdictions such as the EU\(^\text{12}\) and the US\(^\text{13}\) particularly if local Chinese industry and/or Chinese customers have an important stake.

In addition, in 2014, MOFCOM released its first public decision imposing a fine for failing to notify a transaction under the AML. This decision relates to the 2013 acquisition by Tsinghua Unigroup of RDA Microelectronics, a transaction valued at almost USD 1 billion and which closed in 2014. Under the AML, failure to notify a transaction can be subject to a fine of up to RMB 500,000 (USD 80,000). MOFCOM also has the power to unwind a transaction, although it is

\(^{11}\) Id.


unclear whether this power can only be exercised where the non-notified transaction is found to be anti-competitive. MOFCOM found that the transaction did not have adverse effects on competition. It imposed a fine of RMB 300,000 (approximately USD 48,000) for the failure to file.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The two non-merger enforcement agencies, NDRC and SAIC, have been particularly active since 2013. These agencies have investigated and issued large fines in several high-profile cases in 2014, including:

(1) Imposing fines totaling RMB 1.2 billion ($195 million) against 12 international auto-parts manufacturers for price fixing.\footnote{NDRC’s administrative penalty decisions are available at http://jjs.ndrc.gov.cn/fjgld.} The investigation arose from a global investigation into anticompetitive conduct involving price fixing and bid rigging in the EU, the US and Japan. NDRC found that, since 2000, eight auto parts manufacturers engaged in frequent communication and coordination regarding sales and pricing in China, and four manufacturers of bearings were involved in pricing collusion in China. NDRC further found that the anticompetitive collusive practices affected the pricing of 13 different auto parts and more than 20 car models manufactured by 5 auto makers. Hitachi, one of the eight auto parts manufacturers investigated, received immunity under NDRC’s leniency program for voluntarily providing information to NDRC. In addition to auto parts and bearing cartels, NDRC and its provincial counterparts also investigated other sectors of the car industry, including auto sales and after-sale maintenance services. Some joint ventures of multinational and domestic auto manufacturers as well as their dealers have been fined in Hubei and Shanghai, and more remain under investigation.

(2) Imposing fines totaling RMB 19 million ($3 million) against international glasses and contact lens companies for RPM, which required distributors to sell products at a “suggested retail price.” Companies which voluntarily provided information to NDRC were exempted from punishment. Companies that offered cooperation to the satisfaction of NDRC and voluntarily corrected the alleged anticompetitive conduct received lesser penalties of 1 percent of the previous year’s sales. Other companies that failed to cooperate to the satisfaction of NDRC but engaged in self corrective actions received slightly higher punishments of 2 percent of the previous year’s sales.\footnote{Press Release, Glasses and Contact Lens Companies Fined for Retail Price Maintenance (May 29, 2014), available at http://www.ndrc.gov.cn/gzdt/201405/120140529_613562.html.}

(3) Imposing fines totaling RMB 110 million against Zhejiang Insurance Association and its member insurers. Zhejiang Insurance Association was found to have organized its member insurers to agree on unified commissions from auto insurance premiums through meetings. NDRC has been investigating the insurance sector for years with several small cases reported. The Zhejiang case attracted more attention, not only because the heavier penalty but also because it was the first time that NDRC published its final decision in such a
matter. Since then it has become routine for NDRC to publish non-confidential versions of its decisions on its website, which is understood to be a measure to enhance enforcement transparency.

(4) Imposing fines totaling RMB 114 million against three cement manufacturers by Jilin Province Price Bureau. On September 9, 2014, NDRC announced that it had instructed the Jilin Province Price Bureau to impose fines totaling 114 million RMB on three cement companies for unlawful price fixing. Provincial authorities apparently adopted the final decision under NDRC’s direction. Precisely how Chinese anti-monopoly enforcement agencies share jurisdiction between central and provincial levels remains to be further explored.

(5) Settling with InterDigital regarding allegations of unfairly high royalties, bundling of essential and non-essential patents and free grant back clauses. According to InterDigital’s press release, it committed to:

a. “Offer such Chinese Manufacturer the option of taking a worldwide portfolio license of only its standards-essential wireless patents, and comply with FRAND principles when negotiating and entering into such licensing agreements with Chinese Manufacturers”;

b. “Not require that a Chinese Manufacturer agree to a royalty-free, reciprocal cross-license of such Chinese Manufacturer’s similarly categorized standards-essential wireless patents”; and

c. “Offer such Chinese Manufacturer the option to enter into expedited binding arbitration under fair and reasonable procedures to resolve the royalty rate and other terms of a worldwide license under its wireless standards-essential patents” before seeking injunctive relief;¹⁶

(6) Ongoing reported investigations against Microsoft, QUALCOMM and TetraPak and other multinational companies for potential abuses of dominance.¹⁷

Moreover, Chinese antitrust regulators are increasingly using dawn raids in their investigations. Dawn raids have been employed not only in cartel cases, but also in vertical restraint¹⁸ and abuse of dominance cases.¹⁹ Chinese antitrust regulators do not need a search order from a court to conduct a search; the agencies can take action on their own.

D. COURT DECISIONS

On 16 October 2014, China’s Supreme People’s Court (“SPC”) announced its decision in the landmark antitrust case between internet companies Qihoo, a leading anti-virus and security software provider in China known for its anti-virus program 360 Safeguard, and Tencent, a social networking service provider known for its instant message program such as QQ, Weibo and Wechat. This is the first SPC decision under China’s AML since it came into effect in 2008.

The SPC’s landmark ruling sets an important legal precedent for the definition of the relevant market, the assessment of market dominance and abusive conduct, and the use of an economic analysis in antitrust disputes in China. For example, the SPC held that applying the SSNIP test in a market where products are highly differentiated, offered free of charge and competing based on innovation and consumer preference would be inappropriate because it would likely cause products and/or services which are not considered as substitutes to fall into the same relevant market. For another example, despite Tencent having more than an 80 percent share of both the PC-based and the mobile instant messaging service markets (well above the ‘50% or more’ presumption of dominance under the AML), the SPC concluded that the evidence was insufficient to prove Tencent’s dominance in the relevant market because after considering other countervailing factors, the SPC found that the instant messaging market is competitive and Tencent cannot substantially control sales price, quality, quantity or other trading conditions that restrict competition. The decision appears to suggest that the court will take a cautious and effects-based approach in assessing abuse of dominance.

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INDIA

By Vinod Dhall and Sonam Mathur of Dhall Law Chambers

Competition law in India, though relatively new, has witnessed significant developments in 2014 in the form of orders passed and regulatory changes made by the Competition Commission of India ("CCI") and the Competition Appellate Tribunal ("COMPAT"). At the same time, the CCI has continued to face challenges in the courts.

A. LEGISLATIVE DEVELOPMENTS

The CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 ("Merger Regulations") were amended to include the "substance test" in applying the financial thresholds for notification to the CCI. This widens the scope for the CCI to look beyond the structure of a transaction and examine its "substance" when determining the requirement for filing a notice. Parties can no longer avoid filing by resorting to complex or innovative structures of transactions.

The CCI has deleted the regulation which exempted combinations taking place entirely outside India, and with insignificant local nexus and effect, from notifying the CCI. Despite past decisions of the CCI, there was uncertainty regarding the application of this clause. Deletion of this exemption has put to rest this uncertainty and aligned the Merger Regulations with the approach of other competition authorities, which largely rely on thresholds to determine the requirement to notify of a wholly-offshore transaction.

B. MERGERS

In a major development, the CCI issued its first divestment order in the acquisition by Sun Pharma of rival pharma company Ranbaxy. This was the first case subject to a public scrutiny process (Phase-II). The approval was subject to up-front divestment of seven key products to address monopoly concerns.

In another first, the CCI imposed a penalty of INR 10 million (approx. US $160,000) on Etihad Airways for "gun-jumping". Only a nominal penalty was imposed, due to the parties' misunderstanding of legal requirements.

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3 The CCI in TCL-Wyoming and Nestle-Pfizer, Combination Registration No. C- 2011/12/12 held that if the parties to a transaction were directly or indirectly present in India and the transaction met the thresholds prescribed under the Competition Act, 2002 ("Act"), the transaction could not be said to take place entirely outside India, and therefore, Clause 10 would not be applicable.
A penalty of INR 30 million (approx. US $480,000) was imposed on British retailer Tesco for an apparent "delay" in filing notice of its purchase of a 50 percent stake in a Tata Group company, Trent Hypermarket. Under the Act, parties are required to notify the CCI within 30 days of execution of an agreement or other document in the case of an acquisition. However, if such a document has not been executed, but the intention to acquire has been communicated to the government or any statutory authority, the date of such communication is deemed to be the date of execution of the binding document, i.e., the trigger event. On this basis, the CCI held that Tesco should have filed the notice seeking approval within 30 days of its application to the government for approval of a foreign direct investment. This case means that great care should be taken by merger parties in determining the deadline for filing.

In line with earlier decisions, the CCI held that veto rights over strategic commercial decisions (e.g., approval of annual budget/business plan, appointment of key managerial personnel, approval of emoluments, amendment of the memorandum or articles of association of the company) would amount to acquisition of "joint control" over an enterprise. In another case, the CCI held that an acquisition of shares/voting rights, even below 25 percent, may raise competition concerns if a horizontal overlap or vertical relationship exists between the acquirer and target, and such transactions should be notified. Previously, such acquisitions made solely for investment purposes or during the ordinary course of business (unless amounting to acquisition of control) would ordinarily not require notification. This order has created uncertainty about the application of that exemption in cases where an insignificant existing relationship may lead parties to seek CCI approval for a transaction.

C. CARTELS AND OTHER ANTI-COMPETITIVE AGREEMENTS

Continuing its drive against trade associations, especially in sensitive sectors such as healthcare, the CCI imposed penalties on a number of chemists and druggists and their associations for entering into anti-competitive agreements which had the effect of directly/indirectly determining the sale prices of drugs, and controlling/limiting the supply of drugs. Individuals who were held to be responsible for the conduct of those associations were also penalized.

The CCI also came down heavily on other exploitative practices in healthcare. A penalty of INR 38 million (approx. US $610,000) was imposed on Hiranandani hospital for entering into an exclusive, anti-competitive agreement with Cryobanks, a stem cell service provider. The

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CCI observed that an agreement, even if it does not fall under section 3(3) or 3(4) of the Act, would fall within its jurisdiction under section 3(1) if the agreement has an appreciable adverse effect on competition. Section 3(1) prohibits any agreement with respect to 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 within India.

On the issue of penalties, CCI has been imposing penalties on a company’s total turnover, instead of the relevant turnover of the product in question. In a bid-rigging case decided last year, the penalty was imposed based on the total turnover as per practice, but the fact that the turnover from the product being investigated constituted a small percentage of the total turnover was considered as a mitigating factor by the CCI.\(^\text{11}\)

**D. ABUSE OF DOMINANCE**

As in previous years, the CCI continued to take aggressive action in cases of abuse of dominance. The CCI imposed a penalty of INR 25.67 crores (approx. US $4.12 million) on Adani Gas Limited ("AGL") for abusing its dominant position by entering into unfair gas supply agreements ("GSAs") with its customers.\(^\text{12}\) AGL was held to be dominant with a 100% market share in the supply and distribution of natural gas to industrial customers in a district. The GSAs included terms including the following: (i) an excess payment to AGL by a customer due to erroneous billing/invoicing by AGL would give rise to no liability on the part of AGL, whereas a delayed payment by the customer rendered the customer liable to pay interest on such rates as AGL may decide in the future; and (ii) AGL could terminate the agreement at its sole discretion with 30 days’ notice to the customer if there is less than 50% off-take of the daily contracted quantity of gas for a consecutive period of 45 days. In contrast, AGL’s contract with its upstream supplier provided for a period significantly longer period than 45 days in the corresponding termination clause, and the right to accept or reject customer requests in case of any force majeure events rested with AGL at its sole discretion.

In two separate orders, the CCI found that Coal India Limited ("CIL") had abused its dominant position by imposing one-sided unfair conditions in relation to its fuel supply agreements ("FSAs") with customers.\(^\text{13}\) The relevant market was restricted to the sale of non-coking coal in India. CIL’s argument that the relevant geographic market was global in scope was found to be legally untenable by the CCI on the basis that the definition of a “dominant position” under the Act specifies that a dominant position means a position of strength enjoyed by an enterprise in the relevant market in India. The view taken by the CCI, however, is debatable as it is not based on sound economic logic. No penalty was imposed by the CCI as a penalty of INR 1,773 crores (approx. US $286 million) had already been levied in a previous case for similar conduct. An order was made to cease and desist

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from such abusive conduct and to modify its terms and conditions.

The CCI imposed a penalty of INR 2,544.64 crores (approx. US $410.32 million) on 14 car manufacturers for entering into anti-competitive agreements and abusing their dominance by restricting access to required spare parts and tools/manuals only to authorised dealers, and charging exorbitant and unfair prices for spare parts. The CCI identified three separate markets, namely, a primary market for the "sale of cars in India" and two aftermarkets for "sale of spare parts" and "repair and maintenance services" on the basis that it is not possible for a consumer to switch to spare parts manufactured by another car manufacturer. Each car manufacturer was found to be dominant in its aftermarkets, as described above. Interestingly, CCI rejected the argument that spare parts and tools were proprietary materials of the car manufacturers on the ground that the defence of intellectual property rights is only available in cases of anti-competitive agreements and not for abuse of dominance. The CCI directed the car manufacturers to make spare parts available in the open market, provide appropriate training for independent repairers on a payment basis, and consider standardization of parts to enable interoperability across brands.

E. COURT DECISIONS

The CCI faced numerous challenges in the judiciary this year in carrying out its powers. The jurisdiction of the CCI to examine abuse by standard essential patent holders was challenged before the Delhi High Court. The CCI used its search and seizure powers to collect evidence in its investigation into abuse of dominance by JCB India Limited ("JCB"), a manufacturer of construction and earth-moving equipment. The High Court instructed the CCI Director General to file a personal affidavit, stating therein the reasons that warranted taking such drastic measures and to seal all the hardware, electronic or otherwise, seized from the offices of JCB.

In support of the CCI, the COMPAT dismissed DLF Limited's ("DLF") appeal against CCI's order finding that DLF had abused its dominant position in the market for "services of developer/builder in respect of high-end residential accommodation in Gurgaon".15 The COMPAT, however, disagreed with the CCI to a limited extent, and held that the CCI had incorrectly extended its jurisdiction to agreements which were executed prior to the notification of section 4 of the Act, since the Act does not permit retrospective application of its provisions. Further, continuation of the agreement after notification of section 4 by itself would not attract the provisions of the Act, unless there was some action in pursuance of those clauses, which was not contemplated in the original agreement and would, therefore, amount to the imposition of an unfair condition. Subsequently, DLF filed an appeal before the Supreme Court. The matter is currently pending before the Supreme Court: the Supreme Court refused to grant a stay on the penalty imposed by CCI and directed DLF to deposit the penalty.


In the high profile case relating to the Board for Control of Cricket in India ("BCCI"), the COMPAT set aside an order of the CCI imposing a penalty of approximately INR 52 crores (approx. US $8.5 million) for abuse of dominance and remanded the matter for fresh disposal by the CCI. The CCI in its order had found that BCCI held a dominant position in the market for the organization of private professional cricket leagues/events in India and that it had abused its dominance by inserting a clause in its media rights agreement whereby BCCI bound itself to not organize, sanction, recognize, or support any professional Indian T20 competition that competes with its own Indian Premier League ("IPL"). The CCI had found that this resulted in denial of market access to competing cricket leagues.

Before the COMPAT, BCCI argued, inter alia, that the order of the CCI ought to be set aside on grounds of natural justice since BCCI had not been given an opportunity to respond to the CCI’s proposed definition of the market or the material relied upon by the CCI to arrive at its findings. The complaint had been filed by an individual alleging irregularities in the manner of granting franchises, television, website, sponsorship and other rights for the IPL by BCCI; the findings of the Director General ("DG") also related to these allegations and BCCI was given an opportunity to respond only to the findings of the DG. The CCI, however, relied upon certain information available in the public domain on the internet to arrive at its findings and BCCI was provided no opportunity to rebut/respond to that information.

The COMPAT, agreeing with BCCI, observed that the provisions of the Act and its accompanying regulations, in addition to the principles of natural justice, required the CCI to provide notice to the concerned parties and invite their objections or suggestions in case it opined that further inquiry was required following receipt of the DG’s report. In addition, with respect to the internet information relied upon by the CCI, the COMPAT observed that such information can, at best, be compared to newspaper reports which have no evidentiary value without further proof. This decision of the COMPAT is significant with respect to the issue of due process in proceedings before the CCI. The CCI, a quasi-judicial body, can regulate its own procedure with a view to functioning in a less formalistic, court-like manner. Despite this, there are basic safeguards built into the statute itself to ensure compliance with the principles of natural justice.

In summary, 2014 has been the year of many "firsts" for the CCI (e.g., issuance of the first divestment order and conduct of a dawn raid). However, some inconsistencies have also been observed in the orders and certain anomalies continue in the implementation of the law. It will be interesting to observe how the law develops in the years ahead.
OVERVIEW

In 2014, the Japan Fair Trade Commission ("JFTC") continued to be active in the enforcement of the prohibition on "unreasonable restraint of trade" and "unfair trade practice" under the Antimonopoly Act ("AMA"). Particular areas of active enforcement have been cartels for unreasonable restraint of trade and the abuse of superior bargaining position for unfair trade practices. With regard to cartels, the JFTC imposed the largest ever amount of surcharges against a single entity for cartel conduct (approximately 13.1 billion JPY which is approximately 109 million USD) in the market for international ocean shipping services for automobiles.¹ In the area of abuse of superior bargaining position, the JFTC’s active enforcement target was large retailers which exploited small suppliers. The JFTC, however, was less active in enforcing "private monopolization" under the AMA (which is similar to abuse of market dominance in EU and US), partly because of the JFTC’s lack of flexibility and discretion in such cases (since the JFTC must issue not only a cease and desist order but must also impose financial surcharges provided by the AMA for abuse of dominance cases). In this related area, there was a noteworthy court decision in 2014 with respect to Standard Essential Patents ("SEP") in the Apple vs Samsung case. ² As to merger control developments in Japan, during the fiscal year ended on March 31, 2014 ("last fiscal year") there was a tendency towards a decrease in the number of Phase 2 cases (just one case) partly due to the parties' preference to avoid Phase 2 investigations by using the practice of "pull and refile".³

A. CARTELS AND BID RIGGING

In the last fiscal year, the JFTC issued 18 cease-and-desist orders, eight related to cartels and nine related to bid rigging cases. Administrative surcharges imposed by the JFTC totaled JPY 30.2 billion (approximately US$ 25 million) against 181 companies. The JFTC received fifty leniency applications between April 2013 and March 2014, which brings the total to 775 applications since the introduction of the leniency program in 2006.⁴

1. Administrative sanctions

In March 2014, the JFTC issued cease and desist orders and surcharge payment orders against marine shipping companies, finding that they violated the prohibition of unreasonable restraint of trade with regard to international ocean shipping services for automobiles. The JFTC imposed the largest ever amount of surcharges against a single entity in a cartel case

Using an approximate Japanese yen to US dollar exchange rate of 120 yen for 1 US dollar throughout this article.


⁴ Id.
(approximately 13.1 billion JPY which is approximately 109 million USD).

As a result of its investigation, the JFTC found that the shipping companies substantially restrained competition for particular international ocean shipping services for automobile carriage on the North American, European, Middle and Near Eastern as well as the Oceanian route. The JFTC found that those shipping companies did so for the purpose of maintaining existing transactions and preventing freight rates, with respect to particular international ocean shipping services for automobile carriage, from falling. They also agreed to mutually refrain from competing for customers by raising or maintaining freight rates rather than lowering them.

The marine shipping industry benefits from certain exemptions from the cartel prohibition. However, the JFTC did not allow the use of such exemptions because it found that the tariffs (freight rate tables which are uniformly applied to all consignors) stipulated for the exempted cartels were rarely or never applied to the actual transactions.

2. Criminal sanctions

In March the JFTC, having investigated a bid-rigging case concerning snow-melting equipment engineering works for the Hokuriku Shinkansen (Japanese "bullet" train) ordered by the Japan Railway Construction, Transport and Technology Agency (JRCTTA), found a criminal violation of the AMA and filed a criminal accusation with the Public Prosecutor-General against eight companies and eight individuals of such companies who were engaged in the equipment engineering business. The JFTC has expressed its policy that in this case it will actively seek criminal charges against cartels and bid-rigging which have a significant impact on people’s lives. Notably, this case involved companies doing business nationwide, including listed companies associated with public social infrastructure, and an employee of the violating company who was a repeat offender with a criminal conviction in a past bid-rigging case. Further, this case was a so-called "Kansei Dango", or procurer-led/assisted bid-rigging case, as the procurer’s (JRCTTA) employees provided particular bid participants with the planned upper prices of the bid that were not to be disclosed before the bids were submitted. JFTC demanded that the JRCTTA take more measures to eradicate "Kansei Dango".

3. Civil liability

In Japan, civil litigation is not very active because there is no class action system and no treble damage claims. However, directors of companies who are involved in cartels should be aware of the risks they face through, in particular, shareholder derivative suits. In some recent cases, the plaintiffs argued that directors who failed to apply for leniency properly and failed to establish a compliance system, breached their fiduciary duties. In May 2014, in the Sumitomo Electronics wire harness case, directors of the company paid the highest ever settlement (520 million JPY which is about 4.3 million USD) following a shareholder derivative suit. This case is noteworthy in that the management of Sumitomo actually applied for leniency and obtained immunity. As for the scope of the leniency, the JFTC took a very narrow and rigid

5 Supra note 1.

view on the delineation of the scope and only granted leniency on a customer by customer basis. This meant that Sumitomo obtained immunity for products related to Nissan, but lost immunity status for products related to Honda and Toyota.

B. ABUSE OF DOMINANCE

1. Administrative sanctions

As noted above, the JFTC has not been very active in this area recently. After the cease and desist order against JASRAC in 2009 (which order was reversed at the JFTC hearing, then rejected by the Tokyo High Court, following which the case is currently pending before the Supreme Court), the JFTC has not started a formal investigation for private monopolization cases. Due to the amendment to the AMA in 2009, an automatic, obligatory imposition of a surcharge against private monopolization was introduced. Since the 2009 amendment, the JFTC must issue not only a cease and desist order but also must impose financial surcharges provided by the statute for abuse of dominance cases. Lack of flexibility and non-discretion means that the JFTC lacks the right negotiating tools to induce the alleged violators to cooperate with the JFTC investigation. This might discourage the JFTC from using the private monopolization prohibition in complicated cases and, instead, may result in more active enforcement of unfair trade practices where the surcharge is only imposed in certain limited cases such as repeated offences and abuse of superior bargaining positions. For example, the JFTC issued a cease and desist order against QUALCOMM based upon the unfair trade practice prohibition regarding its licensing practices including the non-assertion of patent provision (the appeal is still pending at the JFTC hearing stage) and did not impose any surcharges.9

2. Civil cases

There was an interesting development in private enforcement with respect to private monopolization in 2014. In May 2014, the Japanese Intellectual Property High Court issued a decision in the Samsung vs Apple case regarding SEP for mobile phones.10 The court stated that Samsung had no right to a sales injunction, and struck down the company’s efforts to win excess royalties against Apple, ruling instead to cap Samsung’s licensing demand to approximately 9.9 million Yen (82,500 USD) for the patent, which is in line with what Apple had expected to pay as a FRAND licensee. The Japanese IP high court convened a "Grand Panel" to hear the case, which involved two hearings and called for public comment. A total of 58 amicus curiae briefs were submitted for the court to consider, which the court described as valuable and informative in making its ruling.

C. UNFAIR TRADE PRACTICES

1. Administrative sanctions

The JFTC has been actively enforcing the unfair trade practice rules on large retailers based upon abuse of superior bargaining positions (i.e. rules that protect small suppliers), targeting large retailers such as supermarkets. Such large retailers do not necessarily have a high market share, so the JFTC’s enforcement is not aimed at protecting against the exclusion of competitors or control of the market by a

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10 Supra note 2.
dominant market player. Rather, such enforcement is aimed at protecting smaller suppliers by prohibiting the exploitation of weak companies.

In June 2014, the JFTC issued a cease and desist order and a surcharge payment order against DIREX Corporation ("DIREX"), which operates discount stores in the Kyushu district and others areas of Japan. The JFTC found that DIREX, imposed on its suppliers (which are in inferior trading positions) terms that were found to be unjust in light of normal business practices. More specifically, DIREX forced its suppliers to: (i) dispatch their employees without pre-agreement on the dispatch terms and without bearing the expenses necessary for such dispatching, so as to engage such employees in DIREX’s stores to display and remove merchandise (not limited to merchandise supplied by that specific supplier); (ii) without showing its calculation basis nor uses, provide monetary contribution equivalent to all or part of discounts set by DIREX for the merchandise supplied by the specific suppliers; and (iii) provide monetary contributions equivalent to all or part of purchase values for the merchandise that was lost or damaged following a fire that occurred at one of DIREX’s stores. The surcharge amount imposed by the JFTC was approximately 1.2 billion JPY (approximately 10 million USD).

2. Civil cases

There were also some interesting civil cases with respect to unfair trade practices in 2014.

In June 2014, the Tokyo District Court issued a decision in the Softbank vs NTT case. Softbank, one of the leading communications providers in Japan, filed an injunction lawsuit against NTT’s regional firms over their fibre wholesale practices. Softbank claimed that the way NTT East and NTT West bundled optical fibre services constituted an unjust refusal to deal. The NTT units lease circuits in bundles of eight while Softbank would prefer to lease circuits one at a time because charging for eight circuits if only one is used, amounts effectively to refusing connections. Softbank requested the Tokyo District Court to order NTT to stop this practice. The Court denied Softbank’s claim, stating that the Telecommunication Act does not allow NTT to connect the fibre service without permission of the relevant authorities and therefore NTT’s conduct should not be regarded as illegal because such permission had not been issued. This decision seems to recognize an implicit exemption from the AMA when there exist regulations imposed by another public authority.

As this case shows, it is difficult to win a private injunction case under the AMA and there has so far been no successful cases since the private injunction case was introduced in 2000, except for preliminary injunction cases. However, in January 2014, the Kobe District Court issued a precedent ruling in which it recognized physical interference as a form of interfering with fair trade, making this case the first successful injunction case. It found that the owner of a taxi business had engaged in illegal conduct (unfair trade practice) by physically preventing a competing private taxi business from using the taxi waiting area outside the Kobe Electric Railway. The court


13 Kobe District Court decision of January 14, 2014, LEX/DB25503024 (Japanese only).
awarded damages for emotional distress and for loss of operating profit. In October 2014, the Osaka High Court also approved an injunction and awarded damages (although small) for loss of operating profit but not for emotional distress.\textsuperscript{14}

\section*{D. MERGERS}

In the last fiscal year, the JFTC received 264 merger filings and conducted Phase 2 reviews in one case. In the previous fiscal year, the JFTC handled 349 merger filings and conducted Phase 2 reviews in six cases.\textsuperscript{15} One of the reasons for the decrease of the number of Phase 2 cases (one case from six) is because the parties have more widely adopted the practice of "pull and refile" to avoid a full blown Phase 2 review. Conditional clearance decisions or decisions to block have been very rare in Japan. Rather, the JFTC usually issues a decision not to issue a cease and desist order which relies on a "voluntary" amendment of the notification that includes the conditions agreed upon during the informal consultation with the JFTC. Such "voluntarily" agreed conditions may not be disclosed to the public without consent of the parties and therefore the parties prefer to try and limit the JFTC’s review to a Phase 1 investigation. Practice shows that even after the abolishment of the prior consultation procedure in 2010, an informal consultation with the JFTC is still critical to a smooth review, especially in complicated cases.

The only case which went to a Phase 2 review in the last fiscal year relates to MH Power Systems, Ltd. ("MHPS"), a subsidiary of Mitsubishi Heavy Industries, Ltd. ("MHI") and Hitachi, Ltd. ("Hitachi"), both of which manufacture and sell industrial machinery. MHPS and MHI were planning to integrate their thermal power generation systems businesses. The JFTC found that in certain markets (such as major GTCC power generation plant supply business) the combined share of MHI and Hitachi was about 70\% and therefore the safe harbour was about 70\% and therefore the safe harbour was not applicable. However, based on the fact that there would still be active competition after the transaction (there are a number of business operators that purchase and sell certain types of thermal power generation plants and associated components), the JFTC concluded that the transaction would not substantially restrain competition in any particular fields of trade. More specifically, the JFTC relied on the presence of strong competitors in the market, the possibility of new entry, and pressure from the demand side to clear the case without issuing a cease and desist order.\textsuperscript{16}

\section*{E. LEGISLATIVE DEVELOPMENTS}

The effective date of the amendment bill of the Antimonopoly Act ("AMA"), which abolished the hearing procedure of the JFTC for administrative appeals, was set for April 1, 2015.\textsuperscript{17} If the JFTC issues the prior notice for a hearing on a certain case after April 1, 2015, the amended AMA shall apply to that case. This fundamentally revises the appeal procedure for JFTC decisions by:

\begin{itemize}
  \item[(i)] Abolishing the JFTC’s hearing procedure for administrative appeals;
  \item[(ii)] Abolishing the jurisdiction of the Tokyo High Court as the court that reviewed any appeal suits pertaining to decisions of the JFTC in the first instance;
\end{itemize}

\textsuperscript{14} Osaka High Court decision of October 31, 2014, LEX,DB25505289 (Japanese only).

\textsuperscript{15} Supra note 3.


(iii) Introducing a system where any first instance appeal pertaining to cease-and-desist orders etc. shall be to the Tokyo District Court only (with a panel of three or five judges); and

(iv) Developing procedures for a hearing prior to issuing a cease-and-desist order etc. to ensure due process.

Under the past system, if the JFTC issued a decision, the addressees usually decline the chance to lodge an appeal because the appeal at the JFTC hearing is essentially a rubber stamp process with some binding effect upon the court. Under the new system, the number of opportunities for judicial review of the JFTC’s decision will increase, and "due process" prior to the issuance of the JFTC’s decision will become more important.

In 2014, the Japanese government established a study group to consider further amendments to the AMA. In particular, the group is considering whether a discretionary surcharge imposition system should be introduced to enhance the JFTC’s investigative capabilities and whether to adopt an EU style "settlement" system for cartels, and an EU style "commitment" system for abuse of dominance cases and mergers. Further, the right for outside counsel to be present during JFTC investigations or the concept of attorney client privilege are also being considered so as to enhance due process. Currently in Japan there is no concept of attorney client privilege and attorneys are not allowed to be present during interviews conducted by the JFTC. This practice might change in the future, although currently the majority of the study group has indicated that the introduction of attorney client privilege would be premature under the current system.19

18 For example, in September 2014, the Tokyo High Court ordered the JFTC to amend and reduce the amount of the surcharge payment order against Air Water Inc. (Air Water) from YEN 3,639,110,000 to YEN 727,820,000 because the Tokyo High Court overturned the JFTC hearing’s rubber stamping decision stating that Air Water should be regarded not as a manufacturer but as a wholesaler, which means that a smaller surcharge percentage (2%) rather than the standard 10% percentage for manufacturers was applicable. Tokyo High Court decision of September 16, 2014, available at: http://snk.jftc.go.jp/JDSWeb/ids/dc005/DC005?selecte dDocumentKey=H260926H25G09000120.

A. LEGISLATIVE DEVELOPMENTS

In December, the Korea Fair Trade Commission ("KFTC") amended the Guidelines on Unfair Exercise of Intellectual Property Rights ("Amended IPR Guidelines"). The Amended IPR Guidelines explicitly state that they will be principally applied to abuse of market dominance and cartel cases. To this end, the Amended IPR Guidelines have revised the standard of illegality from "unfairness" to "anti-competitiveness". The Amended IPR Guidelines include chapters on the standard for determining the illegality of injunctions filed by standard essential patent holders and the exercise of patent rights by non-practicing entities.

In August, the KFTC amended its Guidelines on Criminal Referral for Violation of the Monopoly Regulation and Fair Trade Law ("FTL") ("Amended Referral Guidelines"). The Amended Referral Guidelines establish new standards for requesting the criminal prosecution of individuals involved in cartel activities and other violations of the FTL. Under the new standards, individuals directly responsible for violating the FTL, or individuals who used physical force to impede the KFTC’s investigation, will be principally subjected to criminal referral. These new standards are widely viewed as foreshadowing a shift in the KFTC’s practice to refer more individuals for criminal prosecution.

In December, Cabinet approved a draft bill ("Bill") prepared by the KFTC to amend the FTL. In order to strengthen Respondents’ rights and ensure transparency of the KFTC investigation and enforcement procedure, the Bill amends the FTL to explicitly include certain rights of Respondents, such as the right to submit opinions and testify during the investigation, that were previously only codified in subordinate regulations. The Bill also exempts certain types of transactions, such as mergers and business transfers between affiliates of companies that are not "large-scale companies", from the merger notification requirement. While the current FTL deems minimum resale price maintenance to be a per se violation, the Bill codifies the recent Supreme Court decision which held that the rule of reason test should also apply to minimum resale price maintenance. The Bill is currently under review at the National Assembly.

B. MERGERS

In 2014, the KFTC reviewed a total of 571 business combinations (a 2.4% decrease from the previous year), and the total transaction value of reviewed cases was KRW 21 trillion.

4 Companies with KRW 2 trillion (approximately US$1.8 billion) or more of total assets or revenues.
(approximately US $19 billion) (a 27.3% increase from the previous year).  

In January, the KFTC unconditionally approved Thermo Fisher Scientific Inc.’s acquisition of Life Technologies, Inc. The acquisition combined two leading laboratory and life sciences companies with approximately 61 overlapping product categories, and was subject to global merger control review. The transaction raised significant anti-competitive concerns regarding several of the parties’ product lines, and included structural remedies in several jurisdictions. The KFTC ultimately granted unconditional approval of the transaction since the *de facto* anti-competitive concerns were eliminated once Thermo Fisher executed a definitive agreement, triggered by consent decree procedures in other jurisdictions, to divest certain assets.

In March, the KFTC blocked the acquisition by a leading worldwide optical lens manufacturer of 50% of the shares in the second-largest Korean manufacturer of optical lenses. After considering the circumstances, which included the acquirer’s acquisition of a major local competitor in 2002, the KFTC determined that there were substantial anti-competitive concerns which could not be addressed by behavioral remedies. This was the first case in which the KFTC blocked a proposed combination since 2009, when it blocked the acquisition of the duty-free business of Paradise Global by Lotte Hotel.

In July, the KFTC conditionally approved a transaction involving the business combination of the first and second-largest operators of online game item trading websites in Korea. While the combined market share of the two companies was 95.2%, the KFTC acknowledged that the potential anti-competitive effects could be mitigated by, among other things, the fact that the online game item market is subordinate to the online game market, which is constantly and rapidly transforming. The KFTC approved the transaction, imposing behavioral remedies such as the prohibition of fee increases exceeding the consumer price increase ratio for the next three years.

**C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES**

In November, the KFTC imposed administrative surcharges amounting to KRW 77.8 billion (approximately US $71 million) against nine Japanese and German ball bearing suppliers for engaging in price-fixing for a period of 14 years, from 1998 to 2012. The KFTC announced that it referred all nine companies to the Prosecutor’s Office for criminal sanctions. According to the KFTC, the ball bearing suppliers formed a consultative group for international cartels named "the Asia Study Group," and agreed upon the price increase ratio for each Asian country including Korea. The KFTC announced that this cartel is the longest-running cartel that the KFTC has sanctioned, and that this is the first case in which a foreign headquartered company was criminally referred to the Prosecutor’s Office, in addition to being subject to administrative surcharges.
In May, the KFTC imposed corrective orders regarding an administrative surcharge of KRW 1.8 billion (approximately US $1.6 million) against a multinational healthcare company for allegations of resale price maintenance ("RPM") and unfair trade practices (transacting under binding terms and conditions). According to the KFTC, the Respondent determined a price for each of its products, informed the optical stores distributing its products of such prices, and constantly monitored the optical stores to verify that they were not deviating from the determined prices. For those optical stores that deviated from the determined prices, the Respondent refused to supply its products for up to one month. The KFTC determined that there were no reasonable justifications for the RPM, and therefore, the Respondent’s acts were illegal. Further, the KFTC decided that the Respondent engaged in unfair trade practices by continuously monitoring the transacting optical stores to verify that they did not resell its products to non-transacting optical stores.

D. ABUSE OF DOMINANCE

In March, the KFTC approved the consent decree in its investigation on Naver, Naver Business Platform (collectively, "Naver") and Daum Communications ("Daum") for their alleged violations of the FTL, including abuse of market dominance in the online search market. This was the first time this procedure has been applied since it was introduced in 2012. The finalized consent decree included voluntary corrective measures for each of the five allegations raised against the parties and a remedy program amounting to KRW 100 billion (approximately US $91 million) for Naver and KRW 4 billion (approximately US $3.6 million) for Daum.

In October, the KFTC finalized the consent decree in its investigation of a global IT company for its alleged FTL violations for partial terminations and terminations without cause. The company agreed to voluntary correction of its practices and an investment of up to KRW 16 billion (approximately US $14.6 million) in a newly established public entity.

In February, the KFTC dismissed Apple’s complaint against Samsung, in which Apple argued that Samsung violated the FTL by filing an injunction based on its standard essential patents in contravention of its FRAND commitment. While acknowledging that Samsung is a dominant enterprise in the relevant technology market and the mobile telecommunication device market, the KFTC determined that it is difficult to conclude that Apple engaged in good faith negotiations and that Samsung did not engage in good faith negotiations. This was the first case in which the KFTC stated that the parties’ good faith negotiations is an important factor in determining proposed measures and conclude the investigation without finding any liability.
whether the standard essential patent-based injunction violates the FTL.

E. COURT DECISIONS

In July, the Supreme Court upheld a Seoul High Court decision revoking the KFTC’s corrective orders and administrative surcharges (amounting to KRW 363 billion (approximately US $330 million)) against 16 life insurance companies for allegations of collusion by exchanging information undisclosed to the market, such as expected future interest rates.\(^\text{13}\) The Supreme Court held that the existence of an agreement (whether explicit or implicit) among cartel participants is essential to establishing unlawful collusion to unfairly restrain competition, and the KFTC had failed to prove the existence of such agreement. While the Supreme Court acknowledged that an exchange of information among competitors may be considered strong evidence of the existence of collusion, the Court declined to infer an agreement in this case as there existed plausible alternative explanations for the possible exchange of information. The Supreme Court held that the exchange of information should be evaluated based on the overall circumstances, and provided specific examples of criteria which can be used for such evaluation.

In February, the Supreme Court revoked the Seoul High Court decision which upheld the KFTC’s decision to impose corrective orders and administrative surcharges amounting to approximately KRW 5.2 billion (approximately US $4.7 million) against a global multinational pharmaceutical company and a Korean pharmaceutical company for allegations of collusion. The KFTC had determined that the two companies had engaged in illegal collusion through market division and interference with other’s business activities by executing a settlement agreement to conclude a patent infringement lawsuit.\(^\text{14}\) According to the Supreme Court, whether a settlement agreement constitutes a legitimate exercise of patent rights should be determined by whether the patent influenced fair and free competition by providing a part of its monopoly profit to the counterparty through the agreement in exchange for maintaining its monopoly position. The Supreme Court ultimately agreed with the KFTC’s decision that the collusion was illegal, but revoked the Seoul High Court decision as it failed to determine the relevant market for a certain product. This was the first Korean Supreme Court decision to directly rule on the antitrust issues arising from the exercise of intellectual property rights.

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\(^{13}\) Supreme Court [S. Ct.], 2013Du16951, Jul. 24, 2014. Please note that this Supreme Court Decision relates to one of the 16 life insurance companies involved in the information exchange, and this company has filed an appeal to the Supreme Court.

\(^{14}\) Supreme Court [S. Ct.], 2012Du24498, Feb. 27, 2014.
AUSTRALIA

By Paul Schoff, Katrina Groshinski and Eric White of Minter Ellison

A. LEGISLATIVE DEVELOPMENTS

There were no relevant amendments to the Competition and Consumer Act 2010 ("CCA") in 2014. However, the Competition Policy Review, a "root and branch" review of competition law, policy and institutions, released its draft report in September 2014. The draft report makes 52 draft recommendations. With respect to competition laws, the draft report makes recommendations to reform the misuse of market power (abuse of dominance) prohibition, simplify the cartel conduct laws, abolish the bespoke price signalling laws in favour of a new concept of "concerted practices", streamline the merger clearance process, and, once again, remove the per se prohibition on third line forcing.

The draft report recommends amending the misuse of market power prohibition by removing the requirement to prove that a corporation "took advantage" of its market power and replacing the proscribed purpose test with a "purpose or effect of substantially lessening competition" test. In addition, in order to protect against fears of "over reach" and "chilling" of pro-competitive conduct, the draft report proposes a new defence that would apply if a company can prove, first, that its conduct would have been a rational business decision by a company without market power, and second, that such conduct would be in the long-term interests of consumers.

The draft report also recommends removing the prohibitions against price signalling and instead extending the current prohibition on anti-competitive contracts, arrangements and understandings that have the purpose or likely effect of substantially lessening competition to cover concerted practices. The effect of such a change would be to import a concept not currently used in Australian competition law.

The draft report also makes a number of recommendations for reforms to Australia's competition policy and institutions. The final report is due in March 2015.

B. MERGERS

The Australian Competition and Consumer Commission ("ACCC") opposed four proposed transactions in 2014. The most significant of these involved the acquisition of assets of Macquarie Generation ("MacGen"), a state-owned electricity generator, by AGL Energy Limited ("AGL"), a large electricity retailer. Following opposition by the ACCC, AGL sought and successfully obtained merger authorization from the Australian Competition Tribunal ("ACT"),\(^1\) which functions as an alternative to merger clearance from the ACCC. This was the first time authorization has been successfully sought from the ACT in those circumstances.

The ACT had to determine whether, in all the circumstances, the proposed acquisition would be likely to result in such a benefit to the public that the acquisition should be allowed to occur.\(^2\)

The ACCC opposed the transaction on the basis

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1 Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1 (Competition Tribunal) (Austl.) ("AGL / MacGen").

2 Competition and Consumer Act 2010 (Cth) ss 95AT, 95AZH.
that AGL, one of the largest electricity generators in New South Wales ("NSW"), would, as a result, also become one of the three largest retailers in NSW. This would cause a substantial lessening of competition in the NSW retail market, raising barriers to entry and expansion for other NSW retailers because the acquisition would reduce hedge availability and liquidity. The ACCC was also concerned that the acquisition would have an anti-competitive effect in wholesale markets, as AGL may have the ability and incentive to withhold generation of electricity to increase electricity spot prices, and therefore retail prices, in the medium to longer term.

The ACT rejected all of the ACCC’s contentions. In relation to the retail market for electricity in NSW, the ACT found that post acquisition there would be active competition in the market and that the market for hedge contracts was liquid and competitive enough to incentivise gentailers, including AGL, to offer hedge contracts to smaller retailers. In relation to the wholesale market, the ACT held that the proposed acquisition would not likely have an anti-competitive effect in this market because the market’s generation capacity would be significantly in excess of demand in the medium to long-term, and AGL would likely be unable to spike the spot price for electricity as the ACCC had suggested. The ACT also had regard to the public benefits arising from the transaction, the most significant of which was the application of the sale proceeds ($1 billion) to finance infrastructure projects in NSW. The ACT noted that if the authorization were not granted, the state would probably sell the assets for a lower price in the future.

In January 2014, the ACCC opposed the proposed acquisition by Sonic Healthcare Limited of assets of the Delta Imaging Group, which comprised three companies in liquidation. Delta Imaging Group companies owned two radiology practices in Newcastle and Maitland. The ACCC concluded that the acquisition would have had the effect of substantially lessening competition in the Newcastle and Maitland markets for the supply of MRI services and in the Maitland market for general diagnostic imaging services.

In June 2014, the ACCC announced that it would oppose the acquisition of Brunswick Private Hospital from Healthe Care Pty Ltd by Healthscope Limited ("Healthscope"). Brunswick Private Hospital is the largest private provider of rehabilitation services in the northern suburbs of Melbourne. Healthscope is a large national provider of private hospital services that operates several private hospitals in the northern suburbs of Melbourne. The ACCC found that the proposed transaction would remove Healthscope’s closest and most significant competitor in the supply of private rehabilitation services in northern Melbourne and would cause a substantial lessening of competition in the supply of rehabilitation services in the geographic market.

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8 AGL / MacGen [2014] ACompT 1, [268].
The ACCC also announced, in May 2014, that it would oppose the proposed acquisition by Peregrine Corporation (“Peregrine”) of a petrol station site in Adelaide owned by Caltex Australia. The ACCC opposed the acquisition on the basis that the Caltex station competed closely with BP Glenunga, which Peregrine was to acquire under an arrangement, and other nearby Peregrine petrol stations. The proposed acquisition would therefore eliminated close competition.11

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

At the start of 2014, the ACCC announced that cartel conduct would be one of its enforcement priorities, with a particular focus on conduct in the supermarket and fuel industries.12

Consistent with this focus, the ACCC commenced proceedings in August 2014 against Informed Sources (Australia) Pty Ltd (“Informed Sources”), a provider of market information, and several major petrol retailers for alleged anti-competitive information sharing.13 The ACCC alleges that the petrol retailers, through a service provided by Informed Sources, are able to communicate with each other about their prices in a way that has the effect or likely effect of substantially lessening competition for the sale of petrol in Melbourne.

In December 2014, the ACCC was unsuccessful in its prosecution of two airlines, Air New Zealand Ltd and PT Garuda Indonesia Ltd, relating to a price fixing cartel for air freight services. The ACCC alleged that the two airlines, working with other airlines (who settled claims made against them) fixed the level of various surcharges to be applied to air cargo services in a manner that affected the price of air cargo services in Australia. The Federal Court found that the airlines had entered into collusive arrangements but that the conduct did not occur in a “market in Australia” as was required by the relevant legislation at the time.14 The ACCC has appealed the decision.15

In late 2013, the ACCC was unsuccessful in its prosecution of ANZ Bank for allegedly entering into an anti-competitive agreement with one of its distributors, a mortgage broker, requiring it to limit refunds it paid to customers in respect of arranging home loans. The appeal was heard in 2014.

In December 2013, the ACCC was successful in its prosecution of Flight Centre Travel Group Limited (“Flight Centre”) in the Federal Court, having alleged that Flight Centre attempted to enter into anti-competitive arrangements with

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14 ACCC v. Air New Zealand Limited & Ors [2014] FCA 1157 (Fed. Court of Ausl.).
several airlines on six occasions over four years. In March 2014, the Federal Court imposed a fine of $11 million on Flight Centre.\textsuperscript{16} Flight Centre has appealed both the primary decision and the decision on penalties and the ACCC has cross-appealed seeking higher penalties.\textsuperscript{17} The appeal was heard in 2014.

In October 2014, the ACCC was successful in cartel prosecutions of two suppliers of LPG cylinders for forklifts, Renegade Gas Pty Ltd and Speed-E-Gas (“NSW”) Pty Ltd, for entering into a “no poaching” understanding between 2006 and 2011.\textsuperscript{18} The Federal Court ordered penalties totalling $8.3 million against the two companies and three of their senior officers.

In May 2014, the ACCC successfully prosecuted NSK Australia Pty Ltd for its involvement in cartel conduct relating to the price of bearings in Australia.\textsuperscript{19} The Court held that from at least 2000 to 2011, senior executives of NSK and two other bearings companies met and discussed confidential information including pricing plans, allowing them to control the price of bearings that were used in after-market applications such as repairs to vehicles. The Court ordered penalties totalling $3 million.

Having declared the supermarket sector to be a focus area, the ACCC commenced proceedings in May 2014, and further proceedings in October 2014, against Coles Supermarkets Australia Pty Ltd and another related company (together, “Coles”) alleging that Coles engaged in unconscionable conduct in its dealings with its suppliers, particularly smaller suppliers. The ACCC alleged, inter alia, that Coles engaged in unconscionable conduct including making false representations, undue influence, unfair tactics and taking advantage of its bargaining position to seek payments without a legitimate basis in order to require suppliers to pay it an ongoing rebate. In December 2014, the Federal Court, by consent, found that Coles engaged in unconscionable conduct and ordered it to pay combined penalties of $10 million. Coles will enter into an enforceable undertaking with the ACCC to establish a formal process to provide options for redress to its suppliers.\textsuperscript{20}

In December 2014, the ACCC granted conditional authorization to Tooltechnic Systems (Aust) Pty Ltd (“Tooltechnic”) to set minimum resale prices for Festool power tools until 31 December 2018.\textsuperscript{21} This was the first application for authorization to engage in resale price maintenance brought to the ACCC. The ACCC granted the application on the basis that Festool power tools are complex, highly differentiated products that often require a high level of both pre- and post-sales service. It considered that the increase in retail services would outweigh the


\textsuperscript{18} ACCC v Renegade Gas Pty Ltd (trading as Supagas NSW) [2014] FCA 1135 (Fed. Court of Austl.).

\textsuperscript{19} ACCC v NSK Australia Pty Ltd [2014] FCA 453 (Fed. Court of Austl.).

\textsuperscript{18} ACCC v Renegade Gas Pty Ltd (trading as Supagas NSW) [2014] FCA 1135 (Fed. Court of Austl.).


potential detriment to the public from facing higher prices for the product. The authorization was granted for four years rather than the five sought by Tooltechnic, and on condition that Tooltechnic report certain information, including retail prices for the Festool products, to the ACCC over the course of the authorization period.

The ACCC instituted proceedings in May 2014 against the Australian Egg Corporation Limited, an industry corporation (the "AECL"), two egg producing companies and senior employees of all three entities alleging that they encouraged members of the AECL to reduce egg production to address a perceived oversupply of eggs in the market.\(^{22}\)

In August 2014, the ACCC commenced proceedings against OmniBlend Australia Pty Ltd, a supplier of kitchen blenders, for attempting to enter into a price-fixing arrangement with a competitor and, after failing to establish such an arrangement, inducing a key supplier to engage in resale price maintenance by refusing to supply the competitor unless it stopped discounting the price of certain blenders.\(^{23}\)

The ACCC obtained court-enforceable undertakings in December 2014 from two importers and distributors of bicycle parts and accessories, Italiatech Australia Pty Ltd and TMO Sports Pty Ltd, in relation to conduct that amounted to, or was likely to amount to, resale price maintenance.\(^{24}\)

The ACCC released a new immunity policy for cartel conduct in September 2014.\(^{25}\) The new policy, \textit{inter alia}, removes the "clear leader" exception for participation in the immunity regime and implements a two-step process for the Commonwealth Director of Public Prosecutions to grant criminal immunity for cartel conduct. The new process involves the issuing of a letter of comfort followed by a formal undertaking.

\textbf{D. ABUSES OF A DOMINANT POSITION}

In February 2014, the ACCC initiated proceedings against Pfizer, alleging misuse of market power and exclusive dealing in relation to distribution arrangements for the supply of a generic version of the drug atorvastatin ahead of the expiry of Pfizer's patent over its branded version, Lipitor.\(^{26}\) The ACCC alleged that Pfizer offered the payment of rebates accrued on previous sales of Lipitor as well as significant discounts on purchases of its generic product to pharmacies conditional on the acquisition of a minimum quantity of the generic product. It further alleged that this conduct was engaged in for the substantial purpose of deterring or preventing competitors from supplying atorvastatin to a substantial proportion of the market.

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community pharmacies after the expiration of Pfizer's patent. The ACCC claimed that Pfizer's offers amounted to unlawful exclusive dealing. The Court dismissed the ACCC's case in February 2015.

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NEW ZEALAND

By Sarah Keene and Troy Pilkington of Russel McVeagh

A. LEGISLATIVE DEVELOPMENTS

The Commerce (Cartels and Other Matters) Amendment Bill ("Cartels Bill") proposes the most significant reforms to the Commerce Act 1986 since its inception, including the expansion of the cartel prohibition, the introduction of a maximum seven-year jail sentence for cartel conduct and the introduction of new exemptions, including a "collaborative activities" exemption to replace the current joint venture exemption.¹

In November 2014 the Cartels Bill passed its second reading, moving it one step closer to enactment. Although the reform process has progressed slowly, this Bill is high on the Government's legislative agenda for 2015 and it is expected to be enacted during the first half of the year.

In August 2014 the Commerce Commission ("NZCC") released a revised draft of its Competitor Collaboration Guidelines (the "Revised Guidelines"). The Revised Guidelines clarify the NZCC’s intended approach to interpreting the new exemptions to the expanded cartel prohibition, namely the exemptions for vertical supply contracts, joint buying and promotion agreements, and collaborative activities.²

Two points in the NZCC's Revised Guidelines are of particular note. First, the Revised Guidelines provide guidance on the NZCC's interpretation of the requirement in the collaborative activities exemption that a cartel provision be "reasonably necessary" for the purpose of a collaborative activity in order to be exempt. The NZCC’s view is that:³

- whether a cartel provision is reasonably necessary must be assessed objectively at the time the cartel provision was entered into or given effect to;
- the phrase "reasonably necessary" means that a cartel provision need not be essential, but rather requires that the collaboration would be "materially hindered" without the cartel provision; and
- a provision will not be reasonably necessary if it is merely desirable, expedient or preferable.

Secondly, the Revised Guidelines set out the NZCC’s intended approach to operating the new voluntary clearance regime for cartel provisions that parties propose to implement as part of a collaborative activity.⁴ Under the new regime, obtaining clearance would provide parties with statutory immunity from any subsequent challenge. The NZCC proposes a two-stage clearance process. First, the NZCC will reach a view as to whether the collaborative activity exemption applies (stage one). If the exemption is applicable, the NZCC will then conduct a

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³ Revised Draft Competitor Collaboration Guidelines (August 2014), ¶Ch. 5.30–5.31.
substantive competition assessment in order to consider whether, despite the application of the exemption, the provision might nevertheless be caught by the general prohibition on arrangements that have the purpose or effect of substantially lessening competition in a market (stage two).

In addition to the reforms proposed in the Cartels Bill, the Government has announced it will review the Commerce Act's market power prohibition (section 36) and other "provisions that may no longer be necessary or working effectively", such as the resale price maintenance prohibition (section 37). There have been several driving forces behind the announcement of this review:

- The NZCC has long publicly expressed its dissatisfaction with New Zealand's existing prohibition on misuse of market power. In 2012, for example, NZCC Chair Dr. Mark Berry wrote that section 36 is "in urgent need of amendment".  
- In May 2014, in the context of its report on "Boosting productivity in the services sector", the Productivity Commission concluded that that "a better balance is needed to achieve an effective monopolisation law for the small, competition-challenged New Zealand economy".  
- The ongoing Australian Harper Review of the competition laws in Australia, which has made a draft recommendation that section 46 of Australia's Competition and Consumer Act 2010 (the equivalent to section 36 of the Commerce Act) be amended to incorporate an "effects-based" test.  

Given this announcement, it is expected that the Government will task the Ministry of Business, Innovation and Employment ("MBIE") with preparing a discussion document on potential reforms during 2015 for the purposes of consultation (as it did with the review of the cartels regime, which ultimately led to the Cartels Bill). In light of the complexity of the issues involved, MBIE will likely be receptive to stakeholder views during consultation.

B. MERGERS

2014 was an active year for New Zealand merger control. A total of 14 clearance applications were received by the NZCC, the highest number since 2008.

The NZCC declined only one application: Connor Healthcare's acquisition of the remaining 88.3% of the shares of Acurity Health Group that it did not already own. This acquisition would have resulted in three of the four private hospitals in Wellington coming under common ownership, as Acurity owned two such hospitals and Connor's 100% parent, Evolution Healthcare (NZ) Pty Ltd, owned a third. Following the decision to decline clearance, the parties filed a subsequent

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9 Press Release, New Zealand Commerce Commission, Commerce Commission declines
application for the same acquisition that was subject to an undertaking that Evolution Healthcare would divest 75% of its shares in Connor. The NZCC reasoned that the effect of the undertaking would be to "maintain the status quo" of the common ownership of hospitals in the Wellington region at the level it had been prior to the acquisition. The NZCC cleared the second application within a day.

Of the remaining clearance applications filed in 2014, eleven were cleared and one remains pending. The average time taken for the NZCC to determine a clearance has been almost twelve weeks, an increase on recent years.

Other notable clearance decisions include:

- IAG (NZ) Holding Ltd's acquisition of Lumley General Insurance (NZ) Ltd received clearance in May 2014. While IAG and Lumley were two of the three largest participants in certain markets (such as commercial motor vehicle insurance), the NZCC concluded that competition from existing providers, combined with the ability of competitors to expand, was sufficient to mean that no substantial lessening of competition was likely. The determination confirmed that the NZCC is prepared to take an economics-based approach and approve mergers involving high combined market shares (over 50%) where there is a credible threat of post-merger entry or expansion by competitors.

- The NZCC also cleared Vector Ltd's acquisition of Arc Innovations Ltd, a competing advanced electricity meter and meter service provider to electricity retailers. The NZCC's decision took a long-term view in assessing the impact on competition, focusing its attention on the degree of competition in the mid-2020s, on the basis that all major electricity retailers had already agreed to long-term supply contracts with a preferred metering provider until that time. The NZCC, again applying an economics-based approach, was satisfied that there would be sufficient competition in the mid-2020s since technological developments would lower metering costs, and the volume of meters contestable at the next round of tenders would likely be sufficient to incentivize new entrants to bid.

- The NZCC received one application for a merger authorization in 2014: Cavalier Wool Holdings' ("CWH") October 2014 application for authorization to acquire New Zealand Wool Services International's wool scouring business, which acquisition would result in CWH being the only wool scouring business in

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New Zealand. This application effectively seeks a re-authorization of a transaction previously authorized but not implemented within the statutory timeframe. A decision on this application is due in late March 2015.

At the time of writing, the NZCC’s investigation into Wilson Parking’s completed acquisition of 60% of the assets of competing car parking business Tournament Parking, which was commenced in June 2013, remains on foot. If the NZCC decides to bring proceedings, they will be the first merger control proceedings since 2006.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In early 2014, following complaints made by opposition MP Shane Jones and the New Zealand Food and Grocery Council, the NZCC commenced a uniquely wide-ranging investigation into whether Progressive Enterprises Ltd may have breached the Commerce Act or the Fair Trading Act 1986. Progressive (a subsidiary of Australian firm Woolworths Ltd) operates over 170 "Countdown" supermarkets across New Zealand.

The NZCC’s investigation covered alleged retrospective payments, unauthorized deductions from supplier invoices, exchanges of information about future pricing and promotional intentions of competitors, abuses of market power in dealings with suppliers, and conduct concerning preferential treatment of Progressive’s own transport subsidiary.

After a nine-month investigation, in November 2014 the NZCC issued a report concluding that Progressive had not breached any provision of either Act, on the basis that (amongst other reasons) there was no evidence that Progressive had:

- engaged in coercion or misrepresentation as to entitlement to retrospective payments, nor any evidence that it sought to reduce competition by negotiating strongly on price;
- tried to enter into pricing arrangements with competing retailers either directly or by using suppliers as a conduit; or
- made changes to its delivery schedules to exclude other third party transport providers.

The investigation of Progressive was widely discussed in the media and on social media, and led to calls for the imposition of a "Supermarket Code of Conduct" similar to those in place in the United Kingdom and Australia. However, this issue does not appear to be a high priority of the governing National party, particularly given that no misconduct was ultimately found.

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16 Adam Bennett, Govt Eyes Aussie Supermarket Moves, NEW ZEALAND HERALD, Nov. 21, 2014,
The NZCC also has an ongoing investigation into allegations that competing real estate agents agreed to boycott Trade Me, a real estate listing website, in order to benefit their own collectively-owned real estate listing website. The investigation was commenced in February 2014 and is expected to be concluded some time during 2015.

D. ABUSES OF DOMINANCE

In December 2014 the NZCC closed its 16-month investigation into allegations that Winstone Wallboards Ltd (part of Fletcher Building) had acted anti-competitively and/or misused its market power in the manufacture and supply of its plasterboard through use of exclusivity provisions, rebates, and targeted predatory pricing.\(^{17}\) Winstone’s plasterboard, sold under the "GIB" brand, is the only plasterboard manufactured in New Zealand and has a market share of 94%. A competing plasterboard supplier, Knauf, had entered but subsequently exited the New Zealand market.

The NZCC’s investigation ultimately concluded that, while Winstone was likely to have market power, the evidence did not support a conclusion that Winstone had breached the Commerce Act. The following factors were key to the NZCC’s determination:

- Only one out of the four major building supply merchants had a contract with Winstone requiring exclusive stocking of GIB, so Winstone’s exclusivity requirements did not substantially lessen competition.
- Winstone’s rebates did not constitute a taking advantage of market power, as rebates are a feature of competitive markets, nor did they substantially lessen competition, as the rebates were not material to the merchants’ stocking decisions – rather, there were other reasons for the merchants’ decisions not to stock competitor product, namely Building Code compliance, architect/builder preferences and import duties.
- Following an analysis of Winstone’s pricing and costs, the NZCC concluded Winstone was not selling below cost and, therefore, there was no predatory pricing.

E. COURT DECISIONS

In March 2014 the High Court approved an agreed penalty of NZ$1.85 million on Carter Holt Harvey ("CHH") for engaging in a "classic case of price fixing" with a competing building supply merchant, Fletcher Distribution (operating as Placemakers).\(^{18}\) The parties agreed to price timber in the Auckland commercial timber market at cost plus an 8% margin. The understanding lasted just six months, and the Court acknowledged that any commercial gain to CHH was "extremely limited". A former CHH manager was also fined NZ$5,000 for "integral" personal involvement in the arrangement. Fletcher successfully obtained leniency and therefore it, and its employees, were granted immunity from any penalties.


In April 2014 the High Court approved an agreed penalty of NZ$3.1 million on Kuehne + Nagel for its participation in an international air freight forwarding cartel. The arrangements were a "classic hard-core cartel": in secretive meetings, the members agreed to impose surcharges on air freight forwarding services from the UK to other countries, including New Zealand. This decision marked the final chapter in the NZCC's prosecutions of the air freight forwarding cartel. In total, penalties of NZ$11.95 million were obtained.

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AUSTRIA

By Dr. Axel Reidlinger of Freshfields Bruckhaus Deringer LLP and Dr. Heinrich Kühnert of bpv Hügel Rechtsanwälte OG

A. LEGISLATIVE DEVELOPMENTS

On 22 September 2014, the Federal Chamber of Labor and the Federal Chamber of Commerce published their joint report on competition policy in Austria. The two Chambers are important stakeholders in the Austrian legislative process, in particular in the antitrust field. In their report, they propose a number of amendments to Austrian antitrust law, such as increased access to investigation files for potential damages claimants, and an extension of the statutory limitation period for antitrust infringements.

Following the report’s publication, the Austrian government launched a consultation process with regard to potential amendments to the Austrian antitrust rules. Concrete legislative proposals may however still be some time in the making.

B. MERGERS

Merger review activity remained stable in 2014, with 322 merger notifications received by the FCA. Only two of those cases were referred to the Cartel Court for investigation in phase two (one of them was cleared with remedies and the other one was still pending at the end of 2014), while one case, which filed a notification in 2013, was cleared in phase two in 2014.

As in previous years, no mergers were prohibited. With respect to the two phase 2 cases decided in 2014, both were cleared with remedies. For the acquisition of three German female lifestyle and television magazines by a German publishing group, the remedies imposed by the Cartel Court in April 2014 consisted of a hold-separate commitment for a minority shareholding of the purchaser in an Austrian magazine group and certain non-discrimination commitments for selling advertisements.

The second case, which concerned railway infrastructure, was cleared on the basis of remedies that will safeguard competition by requiring public tenders for track maintenance services by the Federal Railways even at values below the value thresholds at which tenders are required under public procurement law. These remedies led to the Federal Competition Authority (“FCA”) and the Federal Cartel Prosecutor (“FCP”) withdrawing their phase 2 requests, which in turn resulted in a closure of the case by the Cartel Court in fall 2014, removing the standstill obligation (rather than a substantive clearance decision).

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3 50/14 – voestalpine Weichensysteme GmbH - WS Service GmbH, Cartel Court, Case No 25 Kt 49, summary available in German at
The only Supreme Court decision in 2014 regarding mergers focused on the question of whether Austrian merger control allows for an assessment of cooperative effects in the framework of the merger control procedure. A decision by the Cartel Court in autumn 2013 to clear a logistics joint venture between the only two relevant Austrian press wholesalers with significant remedies had been appealed by the FCA. The FCA argued that (i) the transaction did not amount to a merger at all (because it was not a full-function JV) and that (ii) it should not have been cleared as a merger because it rather amounted to a horizontal anti-competitive agreement, which should not be able to benefit from "permanent" merger clearance. Both arguments were rejected by the Supreme Court, which clarified first that no full-functionality is required for assessing a JV as a merger as long as it is not a greenfield JV but rather a company into which existing assets are contributed by the parents, which can thus rather be seen the mutual acquisition of assets contributed by the other party. Second, it also stated that since 2006 (when the new Cartel Act entered into force) cooperative JVs – like the one at stake – do fall under the Austrian merger control rules and that any ancillary restraints are covered by a merger clearance decision. Any anti-competitive agreements beyond ancillary restraints and potential spillover effects (the latter being assessed in the context of the dominance test) fall outside the merger control procedure and can only be reviewed by competition authorities ex post, the court concluded – this would apply, for example, to any market-sharing agreements.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Pursuant to data published by the FCA, it carried out 18 dawn raids in 2014, and obtained fines of a total of approx. EUR 25 million in Cartel Court proceedings (only the Cartel Court can impose fines for infringements of substantive antitrust law).

The bulk of these fines, approx. EUR 17.5 million, were imposed by the Cartel Court in the Freight Forwarders case. As previously reported, this case concerned agreements within an association of freight forwarders, by which the parties fixed consignment rates. In its first decision on the case in 2011, the Cartel Court decided not to impose a fine, based on the principle of legitimate expectations. This was due to the fact that the Cartel Court had previously held, in 1996, that the agreement was de minimis under the Austrian antitrust rules as then in force, and because the parties had sought advice regarding the lawfulness of their conduct from an Austrian law firm. On appeal, the Austrian Supreme Court referred the question whether this excluded fault on the part of the undertakings concerned to the European Court of Justice ("ECJ"), which disagreed. Pursuant to the ECJ, undertakings may not rely on advice from a lawyer, nor on assurances from national competition authorities, to escape imposition of a fine for violations of the European antitrust rules. Based on the ECJ’s decision, the Austrian Supreme Court remanded the case to the Court.

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6 ABA Section of International Law, 2013 Antitrust Year in Review, p. 22.
7 Schenker et al, ECJ, Judgment of 18 June 2013, Case C-681/11, not yet published in the ECR. The judgment is available at the ECJ’s website at http://curia.europa.eu.
Court, holding that the 1996 decision and the fact that the parties had sought advice from lawyers could not be regarded as attenuating circumstances, either. On 19 December 2014, the Cartel Court issued its new decision in the case, imposing fines of approx. EUR 10.3 million on the members of the freight forwarders association. An additional fine of EUR 7.2 million was imposed on the cargo subsidiary of the Austrian Federal Railways, for exchanging information with the association.

In addition to horizontal agreements, vertical restraints in the retail sector continue to be a major focus of Austrian antitrust enforcement. Other than the Freight Forwarders decision, almost all of the fines imposed in 2014 related to vertical restrictions, and in particular to resale price maintenance (“RPM”). Most of the cases concerned the food and beverages industry, as well as consumer electronics. With one exception, all cases were settled — i.e., the undertakings in question admitted to the infringement in exchange for a reduced fine. The exception was the EUR 3 million fine imposed on Austrian retailer Spar in November 2014. This decision concerned RPM for dairy products; with regard to 16 further product groups, proceedings against Spar are still pending. While the Spar decision has yet to be made public, it allegedly confirms the per se approach to RPM under European and Austrian antitrust law, in spite of significant criticism in legal and economic writing.

The same approach is evident from the FCA’s Guidance on Resale Price Maintenance, the final version of which was published in July 2014. The Guidance however contains some helpful discussion on issues which arise frequently in consumer goods retailing (e.g., on how manufacturers and retailers should plan sales promotions, without running afoul of the prohibition of RPM). In addition to its RPM Guidance, the FCA also published Guidance on Settlements. Notably, the FCA’s Guidance on Settlements provides for a reduction of the fine of up to 20% for admitting to the infringement, which is somewhat more generous than the 10% reduction applied by the European Commission in settlement cases.

**D. ABUSES OF A DOMINANT POSITION**

In this field, the Supreme Court adopted three major decisions in 2014, all of them on private applications to the Cartel Court for interim measures (under Austrian law, any business with a legitimate legal or economic interest can submit claims to the Cartel Court against competitors, customers or suppliers). In all three cases the claims had been rejected by the Cartel Court in 2013, and in all three cases the Supreme Court confirmed the rejections.

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8 Austrian Supreme Court, December 2, 2013, Case No 16 Ok 4/13, available in German at https://www.ris.bka.gv.at/.

9 Not yet published. A summary of the Cartel Court’s decision is available in German at http://www.bwb.gv.at/KartelleUndMarktmachtmissbrauch/Entscheidungen/Seiten/BWB-K-150-Geldbu%C3%9Fenentscheidung-gegen-30-Unternehmen-in-der-Speditionsbranche-.aspx.

10 Summaries of the decisions are published by the FCA on its website, available in German at http://www.bwb.gv.at/KartelleUndMarktmachtmissbrauch/Entscheidungen/Seiten/default.aspx.


One case dealt with refusal-to-deal allegations against a supplier of running shoes. An international retailer of sports goods had acquired a majority stake in a leading Austrian retailer of sports goods, which triggered the termination of a supply agreement with the Austrian retailer by a major supplier of running shoes. The Austrian retailer argued that the supplier was dominant on the relevant market and that the termination amounted to a "refusal-to-deal" abuse (not only pursuant to the Cartel Act but also under the Act on the Improvement of the provision of Services of Proximity and Competition, which does not require dominance). The Supreme Court confirmed the Cartel Court's rejection decision and ruled that the dominance type "overwhelming market position" (which under Austrian law can be fulfilled by the dependence of a customer on a supplier for a certain product type) was not fulfilled in the present case as the applicant did not suffer "grave economic disadvantages" from its supplier's behaviour and its survival did not depend on continued supplies by this supplier, since only 10% of the running shoes sold by the applicant in the past came from this supplier. This was also the reason why the prohibition under the Act on the Improvement of the provision of Services of Proximity and Competition was not infringed. An interference with the competitiveness of a customer by a supplier's action cannot be assumed if the products for which supply is refused only constitute a small share of the respective type of products sold by the customer, the court held.

Another Supreme Court decision dealt with alleged excessive pricing by a natural gas supplier vis-à-vis a major industrial customer. The Cartel Court had rejected the claim for an interim injunction because the applicant had failed to prove any abusive behaviour. In particular the court criticized that fact that the applicant insisted on a price reduction while the alleged abuse, if any, would only consist of a combination of the price and the long-term take-or-pay obligation which could be remedied by changing either one of them. Moreover, the court had clarified that pricing abuse could not be seen — as alleged by the applicant — in the mere refusal of the supplier to adapt the contract price following market price changes, especially as the contract could be terminated in about two years anyway. The principle "pacta sunt servanda" should therefore prevail. The Supreme Court confirmed the Cartel Court's decision and stated that the applicant had failed to determine the "competitive price" as the benchmark for the excessive pricing allegations. It also reiterated that the applicant had only insisted on a price reduction without referring to the other elements of the alleged abuse (take-or-pay quota, duration). In light of the "no abuse" findings of the courts, neither of the decisions dealt with the alleged dominant position, which had also been contested by the defendant.

Finally, the Supreme Court confirmed a Cartel Court decision rejecting an application by a smaller competitor for an injunction against a dominant recycling business for waste packaging (which was a monopolist for certain services but not for others used by the same customers). In its application, the competitor argued that certain data gathered in customer audits (which aimed at establishing the packaging volumes actually put on the market) should be kept confidential vis-à-vis the dominant company, as the data was used

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14 See Austrian Supreme Court, June 26, 2014, Case No 16 Ok 12/13, available in German at https://www.ris.bka.gv.at/.
15 Austrian Supreme Court, September 16, 2014, Case No 16 Ok 13/13, available in German at https://www.ris.bka.gv.at/.
16 Austrian Supreme Court, June 26, 2014, Case No 16 Ok 10/13, available in German at https://www.ris.bka.gv.at/.
by the dominant company to deter customers from switching to competitors (in particular, by suing customers on the basis that certain volumes allegedly fell within its monopoly). The Supreme Court saw the monitoring rights as a legitimate tool used by the defendant to ensure that its customers would pay fees for the full quantities of packaging recycled by the defendant.

**E. COURT DECISIONS**

While no significant damages were awarded for violations of the antitrust rules in 2014, the year brought important clarifications of the law, which will likely have an impact on pending and future cases.

The first major clarification concerned the material scope of losses for which compensation may be sought in private damages proceedings. The issue arose in the *Elevators* case: after the Cartel Court’s decision fining a number of major elevators manufacturers for cartel arrangements in Austria, the Austrian Federal Railways brought a follow-on action for damages. The railway company however had not bought from the firms which had been fined by the Cartel Court, but from third parties who had set their prices independently. In the proceedings, the claimant argued that the cartel had nevertheless caused damage to it, by inflating the overall price level in the market ("umbrella pricing"). The question of whether damages could be sought for such alleged negative consequences of a cartel was appealed up to the Austrian Supreme Court, which referred the question to the ECJ. In its June 5, 2014 judgment, the ECJ held that national law may not categorically exclude the liability of cartel members for umbrella pricing. The ECJ however did not provide guidance on how an umbrella pricing effect may be established. In practice, this is likely to become a battleground for economic expert witnesses.

The second clarification concerned a procedural issue, namely, access of prospective claimants to the Cartel Court’s file. In 2013, the ECJ had held that the provisions of the Austrian Cartel Act, which made third party access to the Cartel Court’s file conditional upon consent by both the authority and the cartelists, were contrary to EU law. The Austrian courts thus had to disregard these statutory provisions when ruling on requests for access to file – which gave rise to the question how they would adjudicate such cases. This issue has now been resolved in the *Debit Card* case, in which the claimants sought access to the Cartel Court’s file relating to a fine imposed in 2006 on Austria’s leading debit card issuer, for foreclosure of rivals. In its decision of 28 November 2014, the Austrian Supreme Court held that third party access to files was subject to a two-pronged test. First, the applicant has to show a legal interest in being granted access. Such an interest will exist, in particular, if the applicant seeks information on the file which is unknown to him, and which he requires to assert his legal rights. Secondly, the Cartel Court has to carry out a balancing exercise, weighing the interests of the applicant against the legitimate interest of the parties to the initial proceedings, such as the protection of

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20. Austrian Supreme Court, September 12, 2007, Case No 16 Ok 4/07, available in German at [https://www.ris.bka.gv.at/](https://www.ris.bka.gv.at/).
business secrets. The Supreme Court’s judgment however does not address the interesting question of what degree of protection should be afforded to self-incriminating statements submitted to competition authorities in leniency or settlement proceedings, as no such statement had been submitted in the Debit Card case. Under the EU’s Antitrust Damages Directive, such statements (but not the pre-existing evidence which may be attached to them) enjoy protection from discovery in civil damages proceedings. Arguably, the same degree of protection should be extended to such statements if the claimant seeks to obtain them by way of access to file.

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21 Austrian Supreme Court, November 28, 2014, Case No 16 Ok 10/14b, available in German at https://www.ris.bka.gv.at/.  
DENMARK

By Jesper Kaltoft and Mark Gall of Bech-Bruun Law Firm

A. LEGISLATIVE DEVELOPMENTS

On December 16, 2014, the Danish Parliament adopted an amendment to the Danish Competition Act. The amendment will take effect July 1, 2015.

Under the current Competition Act, the deadline for approving a merger in phase I is 25 weekdays. To provide for more flexibility, the amendment to the Competition Act will enable the DCCA to extend the deadline for approval in phase I to 35 weekdays if remedies are proposed by the undertakings concerned.

Currently, the Danish Competition Council (“DCC”) consists of 18 members, including nine members appointed by trade and interest organizations. With the amendment to the Competition Act, the 18 members of the DCC will be replaced by a professional board of directors consisting of seven members with specific qualifications by way of practical and theoretical know-how. In addition, an advisory committee will be established, consisting of representatives from trade and interest organizations, which will provide guidance to the professional board of directors.

B. MERGERS

On April 30, 2014 the DCC cleared the acquisition by Jyske Bank A/S (“JB”) of BRFkredit A/S (“BRF”). Prior to the merger, JB was a financial institution operating the third largest bank in Denmark, while BRF was a mortgage credit institute operating the fourth largest mortgage credit institute in Denmark.

JB and BRF were only considered to have limited market shares of the relevant markets and the activities of the parties were generally considered vertically related, with only minor horizontal overlaps. However, the DCC decided to carry out an analysis of these markets. Firstly, the relevant upstream markets—the markets for mortgage financing for consumers and business customers—were found to be highly concentrated (with an HHI as high as 3,400). Secondly, the concentration was important due to the significance of the parties in their respective core markets. Thirdly, JB and BRF would constitute a systemic important financial institution in Denmark following the consummation of the concentration; i.e., if the merged entity were to experience financial difficulties, it would have far-reaching negative impact on households, businesses, and the national economy.

Generally, the DCC’s market investigation showed that the concentration would have short term positive effects on competition, as the concentration would likely improve BRF’s position in the market. The DCC went on to assess the possible vertical effects of the concentration in order to consider whether the concentration would give rise to (i) input foreclosure, where the merged entity can foreclose competing banks downstream from entering into procurement agreements concerning mortgage financing with banks other...
than JB, and (ii) customer foreclosure, where the merged entity could prevent other mortgage banks from entering into procurement agreements with banks competing with JB.

The DCC concluded that the benefit of increased sales of mortgage products upstream, combined with the merged entity’s limited market share in this market, seemed to indicate that the merged entity would have incentives to enter into sales agreements with banks competing with JB. Even if the merged entity should decide to prevent competing banks from selling BRF’s products, there would be a limited effect on competition due to BRF’s limited market share upstream. After the consummation of the concentration, the merged entity would have the same financial structure as the other big players in the financial market (Danske Bank and Nordea), and the merged entity was considered likely to better compete with the established financial corporations in several markets. In addition, the DCC considered that the risk of coordination was limited. As the concentration was found not to significantly impede effective competition, it was approved without remedies.

On November 18, 2013 Ernst & Young Europe LLP (“EY”) entered into an agreement with the Danish KPMG (“KPMG DK”) to join their activities in Denmark. On the same day, KPMG DK withdrew from the international KPMG network (“KPMG International”), effective September 30, 2014. The joining of activities constituted a merger and could not be carried out before it had been approved by the DCC. The merger was approved on May 28, 2014. As KPMG DK had already withdrawn from KPMG International before the approval, the DCC decided that KPMG DK had violated the merger stand-still obligation. In reaching this decision, the DCC attached specific importance to whether the act (i) is merger specific, i.e. is carried out as a part of the overall merger; (ii) is irreversible; and (iii) has a potential impact on the market. The DCC found that the consequence of KPMG DK withdrawing from the KPMG network was that the effect on the market had materialized earlier than it would have absent the termination. Violations of the prohibition against pre-implementation may be subject to fines. It is currently unknown if the DCC will ask the Public Prosecutor for Special Economic Crimes to impose a fine in this case.

C. CARTELS AND ANTICOMPETITIVE PRACTICES

In Denmark, it has been possible to apply for leniency since 2007, and in March 2014, the DCCA announced the first instance of immunity granted in a Danish case. The cartel involved two undertakings in the cleaning industry and concerned a tender offered by the Capital Region of Denmark. The parties infringed Section 6 of the Danish Competition Act by having had contact in the period up to the submission of their bids. One undertaking and an individual successfully filed for leniency. Due to exceptional personal circumstances, the State Prosecutor for Serious Economic and International Crime decided to close the case without imposing any sanctions.

On March 26, 2014, the DCC found that the Association for Auto Repair Shops in Denmark (“CAD”) had violated the Competition Act by urging its members to boycott Autobutler, an online platform for auto maintenance and

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4 Decision of December 17, 2014 by the Danish Competition Council.
5 Decision of May 28, 2014 by the Danish Competition Council.
6 Press release of March 7, 2014 from the Danish Consumer and Competition Authority.
7 See above.
servicing. CAD is the largest trade organization for auto repair shops in Denmark and represents approximately one third of all auto repair shops in Denmark. Autobutler is the largest online platform that allows users to compare pricing and offers for car repair and maintenance. The DCC ordered CAD to abstain from any future agreements, decisions, or concerted practices with the same or similar object or effect of its boycott. In addition, CAD was ordered to notify its members of the DCC’s decision.

On April 30, 2014, the DCC ruled that Skive og Omegns Vognmandsforening (“SOV”), had restricted competition by coordinating tenders for winter road maintenance in the municipality of Skive (“Skive Kommune”) in Jutland, Denmark. The DCC ordered the association to stop the infringement. SOV is an association of undertakings with approximately 40 members located in and around Skive Kommune. In 2010, Skive Kommune called for tenders for winter road maintenance for 11 individual routes from October 1, 2010 to April 30, 2014. SOV made offers on all 11 routes and won nine routes. Subsequently, SOV allocated by way of lot the routes between 10 of their members.

DCC found that by making a coordinated offer and allocating the routes between independent carriers who are members of the association, SOV had restricted competition between the individual members. The coordination of the tenders removed any incentive for the individual members of SOV to compete by making their own offers. Consequently, there was a substantial risk that the cost of winter road maintenance was too high, thereby harming Skive Kommune, and ultimately taxpayers.

On June 25, 2014, the DCC ruled in a case concerning anticompetitive behavior in the markets for milking systems, repair and maintenance of milking systems, and accessories and spare parts used in milking systems. The case concerned Danish companies Lely Scandinavia (the franchisor) and four Danish franchisees. The DCC ruled that the parties had agreed to fix selling prices and share markets of supply by agreeing not to make passive sales of Lely’s robotic milking systems and associated services, accessories and spare parts outside the area assigned to each franchisee. The DCC found that the anticompetitive behavior was likely to have increased consumer prices for dairy products.

From July 2014 to December 2014, 15 Danish construction companies and 15 employees entered into settlements with the Danish Public Prosecutor for Serious Economic and International Crime for infringing Section 6 of the Danish Competition Act. The infringement concerned cases of bid rigging in which the companies exchanged information about prices and other terms. In some cases the companies entered into agreements with competitors for the allocation of calculation costs. In total, 32 companies have been presented with penalty notices. The infringements took place from 2006 until 2009 and were discovered during dawn raids in 2010. One company, Elindco Byggefirma A/S, agreed to pay a fine of DKK 10 million (€1,333,333), the largest fine ever imposed in a Danish competition case.

On November 3, 2014, the DCC ordered a chain of hairdressers, Stender, to stop setting

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8 Decision of March 26, 2014 by the Danish Competition Council.
9 Decision of April 30, 2014 by the Danish Competition Council.
10 Decision of June 25, 2014 by the Danish Competition Council.
11 See press release of December 22, 2014 from the Danish Competition and Consumer Authority (only available in Danish).
minimum prices for its franchisees. The Stender chain comprises 19 hairdressers, 11 of which are owned by Stender Administration ApS, and the remaining eight of which are owned by independent franchisees. Stender Administration ApS operates as the chain office for both the franchisees and the fully-owned hairdressers. As a part of the franchise agreement, the independent hairdressers are obliged to comply with the Stender chain’s sales policy, and the investigation carried out by the DCC showed that the price recommendations were applied as minimum sales prices which could not be deviated from by the franchisees without approval by Stender Administration ApS. After a disagreement with one of the franchisees, Stender Administration ApS notified the DCC of its franchise agreement and sought a declaration of non-intervention. The DCC found that the agreement adopted by the Stender chain constituted an infringement by “object” of Section 6 of the Competition Act, and Stender was ordered to stop fixing its franchisees’ retail prices.

D. ABUSES OF DOMINANCE

On December 4, 2012, the DCCA conducted a dawn raid of Nets Holding A/S (“Nets”) following a complaint regarding anti-competitive behavior in the Danish market for payment cards. Nets is active in the upstream market for processing services and its subsidiary, Teller, is active in the downstream market for acquiring international payment cards.

The DCCA was concerned that Nets had conducted an illegal margin squeeze in the Danish market for acquiring international payment cards through pricing in the upstream market for processing of payment card transactions, through Nets’ infrastructure (upstream) and Teller’s pricing in the acquiring market (downstream). The DCCA was concerned that Nets had set excessive prices on some upstream processing services to a number of the acquirers that were downstream competitors to Teller.

The case was settled with commitments. The DCCA made a preliminary analysis of (i) whether Nets’ services were objectively necessary for Teller’s competitors in the retail market; (ii) whether there was a discrepancy between the prices of Nets’ wholesale products and Teller’s prices in the retail market leading to a potential margin squeeze; and (iii) whether Nets’ wholesale price could be seen as excessive pricing. Nets offered commitments to abstain from illegal margin squeeze by introducing a new wholesale price model for front-end acquiring processing services applicable to all acquirers, including Teller. The new price model reduces the average price charged for front-end acquiring processing significantly, in particular for certain of Teller’s competitors. In addition, Nets offered to provide to all of Teller’s acquiring customers an extraordinary termination right during the first three months of the commitments and without imposing any costs on those acquiring customers that make use of this option. On May 28, 2014 the DCCA rendered the commitments binding and closed the case without deciding if the acts by Nets amounted to an abuse of a dominant position.

E. COURT DECISIONS

On June 3, 2014 the Supreme Court ruled in favour of the DCC that Nykredit Realkredit A/S (“Nykredit”) remained bound by its 2003 commitment (in connection with a merger with Totalkredit A/S) to adjust Nykredit’s

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12 Decision of November 3, 2014 by the Danish Competition Council (only available in Danish).

13 Decision of May 28, 2014 by the Danish Competition and Consumer Authority.
administration margin to 0.5%. In February 2010, Nykredit announced that the administration margin was to be increased. In a June 23, 2010 decision, the DCC found that this would constitute a violation of the commitments accepted in 2003, since the commitments had no time limit. The DCC’s decision was upheld by the Danish Appeals Tribunal on December 2, 2010. Nykredit appealed to the Danish Maritime and Commercial Court (“DMCC”), which found on December 6, 2012 that the commitment could not be interpreted as being unlimited and ordered the DCC and the Danish Competition Appeals Tribunal to acknowledge Nykredit’s fulfilment of the commitments.

The DCC appealed the DMCC’s judgment to the Supreme Court, which overturned the DMCC decision, finding that Nykredit remained bound by the commitments. The Supreme Court stated that no time limit was specified in the wording of the commitments and that no such limit could be inferred from the circumstances in which the commitments were given.

14 Decision of June 3, 2014 by the Danish Supreme Court (only available in Danish).
15 Decision of June 23, 2010 by the Danish Competition Council.
16 Decision of December 2, 2010 by the Danish Appeals Tribunal (only available in Danish).
17 Decision of December 6, 2012 by the Danish Maritime and Commercial Court (only available in Danish).
A. LEGISLATIVE DEVELOPMENTS

In November 2014, Margrethe Vestager succeeded to Joaquín Almunia as the European Commission’s (“EC’s”) Competition Commissioner with the mission to promote a more economic approach to competition enforcement and focus on financial services, energy, the digital industry, and state aid/tax evasion, while maintaining anti-cartel and merger enforcement.¹

Before this transition, the EC adopted revised rules for technology transfers,² and further considered extending the merger notification system to also apply to the acquisitions of minority shareholdings; on the latter, the decision on how to proceed is still open.³ Further, concluding a legislative review that began in 2013, the European Union (“EU”) adopted legislation aimed at facilitating damages claims by alleged victims of antitrust violations.⁴ At the industry-specific level, the EC prolonged the validity of the existing special antitrust regime for liner shipping consortia, considering it had worked relatively well and that the current market context and operators would benefit from such extension.⁵

B. MERGERS

The cement industry generated several deals in 2014: the EC cleared asset swaps between Holcim and Cemex in France, Germany and the Netherlands,⁶ and in Spain,⁷ after in-depth reviews. The EC further gave its green light to Holcim’s acquisition of Lafarge, a "megamerger" that is set to create the world’s largest cement maker, subject to divestment of a number of plants and related assets in seven EU countries.⁸

Consolidation in the mobile telecommunications sector has also continued to keep the EC busy in 2014, as it finished its in-depth examinations of Hutchison Whampoa’s proposed acquisition of rival Telefónica Ireland, as well as of Telefónica Deutschland’s proposed acquisition of German rival E-Plus, clearing both “four-to-three” deals subject to commitments. The EC further started an in-depth investigation into Orange’s plans to acquire rival Jazztel, another deal that will reduce the number of operators from four to three in a given EU country (Spain).

In the related sector of consumer communication and networking services, the EC granted its go-ahead to Facebook’s planned acquisition of WhatsApp.

Separately, the EC imposed a €20 million fine (approximately US$27 million) on Marine Harvest for failing to notify its acquisition of control over rival Morpol; the EC’s second large “gun jumping” fine since Electrabel.

C. ANTI-COMPETITIVE PRACTICES

In 2014, the EC maintained its practice of imposing high financial penalties, with fines totaling €1.7 billion (approximately US$2.3 billion), the most significant of which being a €953 million (approximately US$1.3 billion) total fine on six companies for their participation in an alleged bearings cartel -- which is also the highest fine the EC has imposed in the auto parts "supercartel" to date. Now-former Commissioner Almunia also pre-announced that more fines are to be expected in the ongoing auto parts investigations, although the EC has reportedly now dropped certain of these probes. Out of the eight other cartel decisions it adopted in 2014, the EC made use of its settlement procedure in six cases, granting a 10% fine reduction to companies in return for acknowledging their involvement in alleged cartels in the paper envelopes, Swiss Franc interest rate derivatives, canned mushrooms, interest rate derivatives, and canned mushrooms.

steel abrasive, power exchanges and polyurethane foam sectors. The EC further launched or continued cartel investigations into companies in the following industries: exhaust systems, Euro interest rate derivatives, trucks, and steel abrasives.

In addition to its cartel enforcement activities, the EC examined other forms of competitor interaction. It issued formal charges to Honeywell and DuPont over competition concerns relating to their development and production agreement for a car air refrigerant. The EC also market tested commitments offered by Air France/KLM, Alitalia and Delta to address concerns that their transatlantic cooperation involving joint management of schedules, pricing and capacity as well as profit-sharing may adversely impact competition on certain routes. Further, the EC accepted commitments offered by Visa Europe and accordingly closed its probe into multilateral interchange fees for credit card payments, which it had initiated back in 2008.

Finally, in its second decision concerning reverse-payment patent settlements, the EC imposed fines totaling €428 million (approximately US$568 million) on Servier and five generic pharmaceutical companies.

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D. ABUSES OF A DOMINANT POSITION

Noting that he would not rush a decision at "any cost" before his term ends, ex-Commissioner Almunia handed over to Commissioner Vestager the long-running investigation of Google’s search and advertising services, after Google’s three successive remedy packages were considered unsatisfactory.  

At the IP-antitrust crossover, the EC adopted its first decision in the smartphone "patent wars”, finding that Motorola abused its dominance by seeking an injunction against Apple on the basis of its standard essential patents ("SEPs"), and settled a parallel investigation into Samsung’s IP practices without a finding of wrongdoing. Similar SEP-related issues are pending before the EU courts (see Section E).

In the telecommunications sector, the EC imposed a €39 million fine (approximately US$52 million) on Slovak Telekom and its parent Deutsche Telekom for allegedly restricting alternative operators’ access to its local loop and applying them a margin squeeze. In a related sector, the EC dropped its investigations against Orange, Deutsche Telekom and Telefónica regarding allegations that they provided favorable internet connectivity to their own online services and degraded access to competing services, after concluding that it had not found evidence of problematic activities. In another network industry, the EC issued formal charges against electricity incumbent Bulgaria Energy Holding for imposing restrictions in the territories where its purchasers could resell electricity.

E. COURT DECISIONS

In 2014, in respect of approximately thirty-two rulings in cartel cases, the EU’s lower court fully upheld the EC’s decisions in eighteen of them. With respect to private enforcement, the EU’s higher court (the Court of Justice – "CJEU") ruled that umbrella price damage claims should be allowed, thereby expanding the scope of prospective defendants’ exposure in antitrust damage litigation. The CJEU also underscored that the concept of infringement "by object" (which is close to a per se infringement) must be reserved to the most serious (i.e., cartel-like) types of anti-
In light of growing EC enforcement activities based on assumptions (e.g., information exchanges, price signaling, reverse-payment patent settlements), this is an important reminder by the EU judiciary on the burden of proof in EU competition law enforcement.

On single-firm conduct, the EU’s lower court handed its ruling in the Intel appeal, in which it re-confirms the EU’s tough stance on fidelity/exclusivity-type rebates by dominant companies, despite the effects-based analysis advanced by Intel and in stark contrast with the more economic-oriented approach applied by the CJEU in the Cartes Bancaires ruling per above. On SEP-related issues, Advocate General Wathelet issued his non-binding (but yet highly influential) opinion in the Huawei vs ZTE referral case, in which he advanced a pragmatic middle-of-the-road approach between the interests of SEP-holders and those of licensees. This approach contrasts with the EC’s pro-licensee position as reflected in the Motorola decision and Samsung commitments, and could thus -- if adopted -- impact on the EC’s enforcement activities in this field.

Finally, on the procedural front, the EU’s lower court upheld a €2.5 million (approximately US$3.3 million) EC fine on Czech energy company Energetický a průmyslový holding a.s. and its subsidiary for unblocking an email account and diverting incoming emails during a dawn raid, thereby confirming, after the E.ON €38 million fine (approximately US$56 million) for breach of seal in 2008, the EC’s very broad powers and that any attempt to obstruct dawn raids may lead to the imposition of substantial fines.

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FINLAND

By Ami Paanajärvi of Roschier Attorneys Ltd.

A. LEGISLATIVE DEVELOPMENTS

There were no amendments to the Competition Act (“Act”) in 2014. However, a significant amendment came into force as of January 1, 2014 relating to the Finnish market for the retail of daily consumer goods. As reported in last year’s review, a new Section 4(a) containing a specific definition of a dominant position in the daily consumer goods sector has been added to the Act.

According to the new section, a dominant position shall be deemed to be held by one or more business undertakings or association of undertakings holding at least a 30% market share in the market for retail trade of daily consumer goods in Finland. This definition is an exception to Section 7 of the Act, under which the existence of a dominant market position is assessed on a case-by-case basis, based on competition conditions within the relevant markets. According to the Government Bill, the Finnish daily consumer goods sector is one of the most concentrated in Europe, with the two largest players, K-Group and S-Group, holding a joint market share of over 80%. Despite this, they have not—individually or jointly—been considered to be in a dominant position under the current provisions of the Act. As a result of this amendment, however, both aforementioned retailers will be considered to be in a dominant market position and will, therefore, have to refrain from certain business practices considered abusive. It remains to be seen how the FCCA applies this provision in practice.

B. MERGERS

The amount of transactions notified to the FCCA increased significantly in 2014 in comparison with the previous year. Nevertheless, only two of the 30 cases notified to the FCCA in 2014 where subjected to an in-depth review (Phase II), while the remaining 28 were approved unconditionally within the standard one-month Phase I procedure.

The two cases that went on to a Phase II investigation were the joint acquisition of HFN Group AS by Altor Fund III and TryghedsGruppen smba, which was approved with conditions on February 24, 2014, and the sole acquisition by DAVA Foods Holding A/S of Muna Foods Oy, which was approved on October 21, 2014.

The first case belongs to a relatively short list of referrals from the European Commission to the FCCA. The transaction concerned the combination of two full-service fitness clubs, Elixia and SATS. The FCCA assessed the transaction’s effects on competition in the market for fitness clubs in five major cities in Finland in


which the parties’ activities overlapped. Based on its in-depth investigation, the FCCA found that the transaction would have significantly impeded competition in the market for full-service fitness clubs in two of the cities concerned, most likely resulting in higher prices for the consumers.

The FCCA emphasized the fact that Elixia and SATS are each other’s closest competitors, and the market test showed that the customers did not see alternatives for these clubs. To address the FCCA’s concerns, the purchasers, both private equity funds, committed to divest two fitness clubs from the SATS chain, which the FCCA concluded would substantially remove the horizontal overlaps and prevent the price increases in the market for full-service fitness clubs in the areas concerned. In addition to being a rarity as a referral case, the case was also the first one in which the FCCA employed a diversion ratio and Upward Pricing Pressure analysis on the basis of a consumer survey to assess the closeness of competition between the parties’ fitness clubs and the likelihood and extent of price increases post-transaction.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

2014 saw some long-expected activity on the cartel enforcement front by the FCCA. On October 31, 2014, the FCCA proposed to the Market Court that Eltel Oy and Eltel Networks Oy (“Eltel”) be fined €35 million for participation in a cartel in the markets for power transmission line building, in breach of Finnish and EU competition rules.

According to the FCCA, the conduct of Eltel and Empower amounted to a serious violation of competition law as the companies are the two largest companies in the power transmission line building business, and the cartel covered the entire country. Empower received immunity from fines for revealing the existence of the cartel to the FCCA. In determining the level of the fine proposed, the FCCA took into account the gravity and duration of the infringement as well as Eltel’s turnover in 2013, which amounted to €1.1 billion. The matter is currently pending before the Market Court.

The FCCA seemed to be more active in 2014 in conducting surprise inspections (so-called dawn raids) in the course of its cartel investigations. At least two surprise inspections were announced to have taken place and it is understood that the first ever inspection on private premises was also conducted.5

D. ABUSE OF A DOMINANT POSITION

The landmark case of the year is most certainly the Market Court’s judgment in the raw milk predator pricing case. On June 26, 2014 the Market Court handed down its ruling dismissing an appeal brought by Valio Oy (“Valio”) of the FCCA’s decision of December 2012 and imposed a €70 million fine on Valio for having abused its dominant position by engaging in predatory pricing in the market for production

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and wholesale of fresh milk. In its December 2012 decision, the FCCA found that Valio had reduced its wholesale price of fresh milk below average variable production costs as of March 2010. The below-cost pricing continued when the FCCA handed down its decision in December 2012. The FCCA also found that Valio’s below-cost pricing aimed to foreclose its competitors from the Finnish fresh milk market. Therefore, the FCCA found Valio’s conduct to amount to predatory pricing, ordered Valio to cease the abusive conduct, and proposed that the Market Court should impose a fine of €70 million on Valio.

In its ruling, the Market Court upheld the FCCA’s finding that Valio’s fresh milk prices were below Valio’s average variable production costs for the entire period investigated by the FCCA. Further, the Market Court held that Valio’s price reductions were part of a detailed plan which aimed to force Arla Ingman (“Arla”), the main competitor, out of the market by the end of 2011 or to significantly weaken Arla’s position in the market. Valio also aimed to increase its market share in the Finnish fresh milk market to 80%. The Market Court also held that Valio’s plan was to raise prices back to their previous level once it had reached its goals. According to the Market Court, Valio’s behavior constituted a serious breach of the Act and, therefore, the Market Court imposed the €70 million fine on Valio proposed by the FCCA. This is the highest fine for an individual company in Finnish competition law history.

**E. COURT DECISIONS**

2014 was also an interesting year in private antitrust enforcement. In the wake of the Helsinki District Court’s (“District Court”) November 28, 2013 judgments (41 in total) in the asphalt cartel damages case, in which an award of €37.4 million was given, the same court, on March 31, 2014, dismissed the action for damages in the car spare part cartel case. The case was a follow-on from the cartel investigation initiated by the FCCA in 2004, which finally ended in a Supreme Administrative Court ruling in 2012, imposing a fine of €1.03 million on five wholesalers of car spare parts for their participation in an illegal price cartel for varying periods between 2004 and 2005.

The Supreme Administrative Court held that the five wholesalers had engaged in a concerted practice to collectively boycott a car spare parts retail chain after it announced a new strategic cooperation agreement with a competitor of the five wholesalers. According to the Supreme Administrative Court, the wholesalers had exchanged confidential information on their future actions in response to the announcement in one meeting and thereafter terminated their marketing agreements with the competitor and reduced discounts granted to its retailers. The other party to the cooperation agreement launched an action for damages, claiming that the cartel caused the partial failure of the planned cooperation.

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Nevertheless, the District Court dismissed the action for damages in its entirety. The District Court found that even though the five wholesalers’ actions may have caused some difficulties, the competition law infringement was not the ultimate cause of the losses the claimant alleged to have suffered. The District Court concluded that any losses suffered by the claimant due to the partial failure of the cooperation were primarily caused by its own unpreparedness to implement the planned cooperation and lack of financial resources needed to implement the plan. As these factors were not in causal connection to the competition law infringement, the District Court dismissed the claim. The District Court also ordered the claimant to compensate the respondents’ legal fees, over €2 million.

In another significant decision, the Helsinki Court of Appeal ("Court of Appeal") weighed in on the question of limitation periods in the so-called raw wood cartel damage actions case. On November 21, 2014 the Court of Appeal handed down 13 judgments concerning the actions for damages in the raw wood cartel. The Court of Appeal ruled that the District Court of Helsinki ("District Court") had erred in dismissing the actions for damages in the raw wood cartel. The Court of Appeal found that the District Court of Helsinki ("District Court") had erred in dismissing the actions for damages brought by corporations and private forest owners against the cartel participants on the grounds that the statute of limitations had expired.

In 2009, the Market Court imposed fines totaling €51 million for illegal price cooperation and information exchange in the market for the purchase of timber from 1997–2004. Following the judgment of the Market Court, 656 corporations and private forest owners brought actions for damages before the District Court against the above-mentioned three forestry companies. The District Court dismissed the first 13 actions, finding that the cartel victims’ right to compensation had expired under the applicable statute of limitations. According to the District Court, the statute of limitations period had started on May 25, 2004, the date of the FCCA’s press release on the alleged cartel, because due to the press release and the related wide publicity, the claimants had had all the information needed to assess whether they had suffered damage from the alleged cartel.

The Court of Appeal disagreed. As regards the five-year limitation period under the Finnish Competition Act and the three-year limitation period under the Finnish Tort Liability Act, the Court of Appeal found that, contrary to the District Court’s view, these limitation periods did not start on May 25, 2004 when the FCCA’s press release was published, but on January 4, 2010 when the Market Court’s judgment against the cartel became binding. Further, the Court of Appeal concluded that the ten-year limitation period under the Finnish Tort Liability Act had started in the spring of 2004 when the cartel had ceased its operations following the leniency application submitted in the case. Accordingly, the Court of Appeal concluded that the actions for damages instituted in December 2011 and May 2012 could not be dismissed on the grounds that the cartel victims’ right to compensation had expired. The Court of Appeal thus referred the cases back to the District Court for review on the merits.

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10 Helsinki Appeal Court, 21.11.2014, case S 14/1418 (not available electronically).

11 Helsinki District Court, 28.3.2014, case no. 13977 (not available electronically).
According to press coverage, several further claimants (including one class action group) have submitted further claims for damages based on the Court of Appeal's confirmation that the five-year limitation period stated running only on January 4, 2010.
A. LEGISLATIVE DEVELOPMENTS

A law, which entered into force in France on October 1, 2014, was enacted in 2014 in order to organize a class action system. The class action system provided for by French law only applies to litigation relating to competition and consumer law infringements but could be extended to healthcare and environmental law in the future. This new law enables a limited number of government approved consumer protection associations to bring actions before civil courts and seek indemnification of damages caused to consumers through infringements of French consumer and competition law. The first class action lawsuit has been filed by “UFC-Que Choisir” (French consumer protection groups) against a company specialized in residential property management and real estate services, for violations of consumer law.

The court of the defendant has jurisdiction for handling the complaints, as well as the Paris court for foreign defendants. The new French class action is based on an opt-in mechanism: consumers have to adhere to the class action and mandate a consumer association to conduct the proceedings.

The law also simplifies the actions to repair the damage caused by breaches of French competition law and Articles 101 and 102 of the TFEU, which have been the subject of a final decision by the French competition authority (“FCA”), any other competition authority within the EU or the European Commission, and cannot be appealed. This private enforcement mechanism follows the same procedure as classical tort litigation except for the fact that the claimants can rely on the existence of a decision to prove the infringement of competition law by the defendant. It remains only necessary to establish injury and causation.

It should also be noted that until this law was enacted, proceedings before a competition authority did not suspend or interrupt the limitation period for civil action (which starts on the day the damages were discovered). Article L. 462-7 of the French Commercial Code, now provides that the initiation of proceedings before the FCA, the European Commission or a national competition authority of another EU member state interrupts the limitation period until the decision is final.

B. MERGERS

During 2014 the FCA reviewed more than 150 merger control filings. It also received four referrals of cases from the European Commission, among which two concerned the retail sector.

One year after clearance by the FCA, subject to commitments, of the acquisition of sole control of retailer Monoprix by its rival Casino, the European Commission referred to the FCA the review of the acquisition of sole control of Dia France SAS by Carrefour France SAS. Dia has

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2 http://www.huffingtonpost.fr/2014/10/01/class-action-france-foncia-ufc-que-choisir_n_5911282.html.
4 Decision n° 14-DCC-173 of November 21, 2014.
more than 800 retail outlets operated directly or under a franchise. The FCA considered that the acquisition of Dia by Carrefour France SAS would be likely to harm competition in several local markets and Carrefour submitted a commitment to divest 50 shops and to terminate six franchise agreements, under the supervision of an independent trustee.

Among other notable decisions, one decision issued in April 2014 is particularly interesting because the acquisition of exclusive control was not based on a change in the target’s shareholder structure, but on a long term contract. In essence, the company acquiring control had entered into a long term agreement with the target company, pursuant to which it gained control over its production process and sales policy. Under an exclusive distribution agreement, Terra Lacta entrusted the marketing and distribution of almost all milk volumes it produces to Orlait. In exchange, Terra Lacta acquired a minority stake in Orlait. The FCA considered that such an agreement could, in exceptional circumstances, confer decisive influence on the conduct of the affairs of a company, based on the following factors: (i) Orlait controls the process and procedures related to production; (ii) Orlait controls the process and methods of distribution and marketing; (iii) a salesman previously employed by Terra Lacta is transferred to Orlait; (iv) the contract has a duration of 10 years, renewable for periods of five years.

Finally, the FCA authorized two notable acquisitions in the telecommunications sector. The FCA gave clearance to the acquisition of SFR (Vivendi group), the second largest French mobile phone operator, by the Altice group and its subsidiary Numericable Group. The authorization was subject to several commitments: (i) Numericable committed to give access to its cable network to competitors, (ii) Numericable committed to make certain divestments and (iii) the new group committed to take measures to ensure that no strategic information is provided to Vivendi. These commitments have been made for a period of five years, renewable once. One month after this clearance of the SFR acquisition, in a decision dated November 27, the FCA authorized the absorption of Virgin Mobile by the Numericable SFR group.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

2014 was not very intense in respect of cartel infringement decisions, but some decisions adopted at the end of the year deserve to be highlighted. For instance, three years after a major decision in the detergents sector, in December 2014, the FCA imposed a record fine on home care and personal care manufacturers for having implemented cartel-type practices. This case originated from the French leniency program and generated total fines of nearly €1 billion.

The FCA imposed much lower fines (below €1 million) on three companies for cartel behavior in the market for transportation services in November 2014.

The same month, the FCA announced that it was investigating the creation of joint purchasing entities by several retailers in France, at the request of the Minister for the Economy.

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5 Decision n°14-DCC-57 of April 14, 2014.  
6 Decision n°14-DCC-09 of January 22, 2014.

7 Decision n°14-DCC-160 of October 30, 2014.  
8 Decision n° 11-D-17 of December 8, 2011.  
9 Decision n°14-D-16 of November 18, 2014.  
D. ABUSES OF A DOMINANT POSITION

The competition authority handled several dominance cases in the telecommunications sector in 2014, sanctioning, for example, price discrimination between so-called “in-net” and “off-net” phone calls.\textsuperscript{11}

One notable decision, issued in September 2014, concerned Nespresso.\textsuperscript{12} In essence, the authority investigated the existence of bundling/tying practices by Nespresso in the markets for portioned coffee machines and for Nespresso capsules. The concerns of the authority were addressed by commitments of Nespresso and Nestle to: (i) eliminate indications on the coffee machines which give consumers the impression that the machines are not compatible with capsules other than Nespresso capsules, (ii) modify the contractual guarantee of the machines in case of defects by eliminating the systematic exclusion of the guarantee when capsules other than Nespresso capsules are used, (iii) provide information to the competing providers of capsules about modifications to coffee machines which could have an impact on the capsules, as well as enabling such competing providers to test their capsules with the modified machines.

E. COURT DECISIONS

On November 20, 2014,\textsuperscript{13} the Paris Court of Appeals confirmed a decision of the FCA in which it fined competing French and German millers for a non-compete agreement. It is noteworthy that, even though no translation of the statement of objections had been provided to the German millers, the Court considered that there was no breach of the rights of defense under Article 6§1 of the ECHR. The Court nevertheless reduced substantially the amount of the fines because the financial situation of manufacturers had significantly worsened since the decision of the FCA.

The Paris Court of Appeals\textsuperscript{14} overturned a decision of the FCA, in which the latter had imposed a fine of €3.6 million on endive growers for a price-fixing cartel.\textsuperscript{15} The Court of Appeals stated that competition law rules only apply to the agricultural sector if they do not interfere with the objectives of the EU’s Common Agricultural Policy (e.g. increased productivity, fair standard of life, stable markets, secure availability of supplies, supplying of food at reasonable prices for consumers). The Court also considered that a high fine would seriously alter the organization of endive growers. It is noteworthy that the FCA is now appealing that decision before the French Supreme Court.

Finally, while reviewing a decision in which the FCA had imposed a high fine on a company belonging to a group with significant revenues,\textsuperscript{16} the French Supreme Court has excluded that belonging to a group can constitute an individual circumstance justifying a systematic increase of the amount of fines.\textsuperscript{17} The FCA decision was based on its own guidelines on the method for setting financial penalties published in 2011.\textsuperscript{18}

\textsuperscript{11} Decision n°14-D-05 of June 13, 2014.
\textsuperscript{12} Decision n°14-D-09 of September 4, 2014.
\textsuperscript{13} Judgment of the Paris Court of Appeals of November 20, 2014 n°2018/06828.
\textsuperscript{14} Judgment of the Paris Court of Appeals of May 15, 2014 n°2018/06494.
\textsuperscript{15} Decision n° 12-D-08 of March 6, 2012.
\textsuperscript{16} Decision n°11-D-02 of January 26, 2011.
\textsuperscript{17} Judgment of the French Supreme Court of February 18, 2014 n° 12-27.643.
\textsuperscript{18} FCA Guidelines, May 16, 2011.
these guidelines, the FCA had stated that financial penalties should be proportionate to the situation of the group to which the undertaking belongs.
GERMANY

By Susanne Zuehlke of E&Z Lawyers

A. LEGISLATIVE DEVELOPMENTS

The German Act against Restraints of Competition (“ARC”) was most recently revised in 2013. In 2014, the German Federal Cartel Office (“FCO”) introduced new guidelines for the assessment of domestic effects of mergers. The adoption of the EU directive on antitrust damages in November 2014 will require some amendments of the ARC and applicable procedural rules.

The FCO published new guidelines for the assessment of domestic (German) effects of transactions. The guidelines clarify that foreign-to-foreign transactions do not need to be notified, even if they technically exceed the German merger thresholds if they do not have an effect in Germany. Given that Germany has a two party threshold, the guidelines focus on those transactions where there are more than two parties. They acknowledge that joint ventures, which have no actual or planned activities in Germany (aka the proverbial Brazilian gas station), do not have an effect in Germany, unless there exist exceptional circumstances. This might be the case where the parents are competitors or active upstream or downstream of the JV. Where the guidelines leave doubt as to whether a particular transaction requires notification, the parties can consult with the relevant decision making unit at the FCO.

Finally, the transposition of the EU Damages Directive will require certain changes to the rules on access to file and documents of the FCO, a review of the statutes of limitations applicable to private damages claims, a modification of the rules on joint and several liability and those applying to the passing on defense as well as some provisions that safeguard the parties’ ability to conclude meaningful settlements. The directive must be transposed by December 27, 2016.

B. MERGERS

The FCO reviewed around 1,200 transactions in 2014. This is more than in previous years but far off the peak in 2007 (2,200 transactions). Interestingly, against the background of the recovery from the financial crisis, it is not entirely clear whether the introduction of the second revenue threshold has actually led to a marked decrease in notifications. Twenty-one transactions (or less than 2%) were reviewed in phase 2. One transaction was prohibited, one was cleared with remedies, eight cases were withdrawn following the start of the phase 2 investigation and eight cases were cleared without remedies. Three phase 2 cases were still pending at the time of this writing.

The sole prohibition decision in 2014 concerns hospitals, where the FCO historically takes an extremely narrow geographic approach

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1 See for a consolidated version: http://www.bmwi.de/DE/Service/gesetze_did=22072.html (in German).
to market definition. This approach can lead to unfortunate results particularly in smaller cities and rural areas, and there are some questions as to whether the presence of national hospital chains and national insurance coverage militates in favour of a wider geographic market definition. On a positive note, all the other hospital mergers were cleared, including the acquisition by Fresenius of forty hospitals and thirteen medical care centres operated by Rhön-Klinikum AG after phase 2 review.

Another focus of the activity was in the area of print media newspapers. The acquisition by Funke Group of assets of Axel Springer was cleared only subject to conditions and obligations. The plan by Medienhaus Lensing to acquire seven local editions of Westdeutsche Allgemeine Zeitung and Westfaelische Rundschau was withdrawn after the FCO indicated that it would prohibit the acquisition because Medienhaus Lensing publishes the only competitor Ruhr-Nachrichten. The plan by Dr. Haas GmbH to acquire the assets of Neue Pressegesellschaft Ulm was withdrawn as well. At the time of this writing an advertising JV between Funke Group and Axel Springer is pending phase 2 review.

Finally, most of the other cases were in product markets that are traditionally considered to be national or smaller, e.g. supermarkets, waste management, asphalt, agricultural trading, gas, or mill products (flour). Only a few transactions were in geographically broader – mostly industrial – product markets. Those include Continental’s acquisition of conveyor belt and air springs manufacturer Veyance, Giesecke Devrient’s JV with the Bundesdruckerei (ID systems), and a JV between Tokyo Electron and Applied Materials in semiconductors.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2014, the FCO imposed record fines against sixty-seven companies and eighty individuals amounting to a total of more than EUR 1 billion. The FCO also conducted dawn raids in fifteen new cases against eighty-four companies and has already conducted its first raids in 2015 as well. The most notable fines in 2014 were: sausages (EUR 338 million/ US$ 451 million), beer (EUR 337.7 million/ US$ 450 million), and sugar (EUR 280 million/ US$ 111 million).
million\textsuperscript{11}). Other cases related to concrete paving stones, specialist mining services, wallpaper and others.\textsuperscript{12}

The FCO also pursued companies for other anticompetitive practices: it prohibited non-compete obligations for tenants of factory outlet centers.\textsuperscript{13} The MFN clauses used by hotel portal operator HRS were declared illegal. The decision was confirmed by the Higher Regional Court of Duesseldorf on January 9, 2015;\textsuperscript{14} proceedings against Expedia and booking.com were pending at the beginning of 2015. In the meantime, the FCO has declared practices by booking.com illegal and requested the company to cease those practices immediately.\textsuperscript{15} Adidas was forced to allow its authorized retailers to sell on online market places.\textsuperscript{16} Independently, two German courts came to similar conclusions in relation to functional backpacks and digital cameras.\textsuperscript{17} The FCO fined several mattress manufacturers for minimum resale price maintenance. The companies had asked online dealers to accept a minimum resale price.\textsuperscript{18} Following an investigation by the FCO, the German banking association and its members agreed to end the uniform merchant fee for use of the ec-card, now Girocard, since the FCO considered the joint setting of a uniform fee as potential price fixing.\textsuperscript{19}

D. ABUSES OF DOMINANCE

The FCO also pursued a limited number of abuse of dominance cases. The FCO rejected a complaint by VG Media against Google as unsubstantiated. The FCO considered that while VG Media raised general concerns about how Google might abuse its dominance in search, it did not provide any substantiated facts that Google actually had done so.\textsuperscript{20} Further, supermarket chain EDEKA was fined for requesting a “wedding rebate” from suppliers and


\textsuperscript{12} See FCO press releases concerning concrete paving stones (September 11, 2014), specialist mining services (February 28, 2014), wallpaper (February 25, 2015); all at: \url{http://www.bundeskartellamt.de/EN/AboutUs/Press/Pressreleases/pressreleases_node.html?nn=3591568}.

\textsuperscript{13} See FCO press release dated March 3, 2015: \url{http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/03_03_2015_Factory_Outlet_Center.html?nn=3591568}.


\textsuperscript{15} See FCO press release dated April 2, 2015: \url{http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_04_2015_Book ing.html?nn=3591568}.

\textsuperscript{16} See Case B3 - 137/12, FCO case report (in German) of August 19, 2014: \url{http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2}. a similar proceeding against ASICS is pending.

\textsuperscript{17} Higher Regional Court Schleswig-Holstein, judgment of June 5, 2014, 16 U Kart 154/13, 16 U (Kart) 154/13 (backpacks) and Regional Court Frankfurt a.M., judgment of June 18, 2014, 2-03 O 158/13 (digital cameras).


\textsuperscript{19} See FCO press release dated April 8, 2014: \url{http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/08_04_2014_EC-Cash.html?nn=3591568}.

for “cherry picking” contract provisions after its acquisition of PLUS. SodaStream was fined for suggesting that its machines would only work with authorized original CO2 cylinders. Earlier in 2014, the FCO also opened an abuse of dominance investigation against Deutsche Bahn for allegedly not allowing competitors to sell their tickets at its stations and making it otherwise difficult for such tickets to be sold through normal channels.

E. JUDGMENTS

In a judgment dated February 18, 2015, the Higher Regional Court in Düsseldorf confirmed the dismissal of CDC’s action for damages relating to the (German) cement cartel case, because it considered the transfer of the claims by the purchasers of cement to CDC as invalid. This was a fairly unceremonious end to a trailblazing case that had been pending since 2002. The court did not allow for an appeal but the parties may apply to the Federal Supreme Court for leave to appeal.

In a judgment of November 18, 2014, the Federal Supreme Court clarified the German rules for allocating ultimate liability for fines imposed on several legal entities within one corporate group. The European Commission had held the ultimate parent and two of the group companies jointly and severally liable for the fine imposed in the calcium carbide case. The Federal Supreme Court noted that the courts must take account of the specific circumstances of a case when establishing who should bear the ultimate liability. This should leave sufficient room for companies to put internal agreements in place that clearly allocate responsibility for any cartel activity, at least in those cases where the parent is not involved in the cartel activity.

Finally, early in 2014, the Higher Regional Court of Frankfurt confirmed the legality of the extradition of an Italian national to the United States. The U.S Department of Justice had charged a former senior manager for his involvement in the marine hoses cartel. This case marks the first time a person has been extradited to the U.S. from Germany for alleged involvement in a cartel. It should be noted that the alleged conduct also involved bid rigging which is a criminal offense under German law. The result may have been different, had the alleged cartel activity not involved a criminal offence under German law.

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21 See also the FCO report on its sector inquiry into buyer power in the retail food industry. According to the report the four leading food retailers in Germany have a structural advantage over their suppliers and much smaller competitors. See FCO press release dated July 3, 2014: http://www.bundeskartellamt.de/SharedDocs/Meldungen/EN/Pressemitteilungen/2014/03_07_2014_edeka.html?nn=3591568.


24 Case number not yet public. See also: Regional Court Düsseldorf, Judgment of December 17, 2013, 37 O 200/09 (Kart) U.

25 Federal Supreme Court, judgment of November 18, 2014 – KZR 15/12.


HUNGARY

By Dr. Kornelia Nagy-Koppany, Dr. Annamaria Klara and Robert Almosd of KNP LAW Nagy Koppany Varga and Partners

A. LEGISLATIVE CHANGES

Change is the only constant but the pace of change can often vary. In 2014, the Hungarian antitrust community welcomed a year with less change than what had been customary in prior years. In our 2013 annual update we covered the substantial amendments to Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition ("Competition Act")\(^1\) carried out by the Hungarian Parliament by passing Act CCI of 2013 on the Amendments to the Competition Act ("Amendments"). These Amendments entered into force on January 1, 2014 and July 1, 2014, respectively, and were the most important legislative developments in Hungarian antitrust law in 2014.

B. MERGERS

Notable mergers in Hungary concerned the insurance, print media, and pharmaceutical/vaccine industries.

On April 28, 2014, the Competition Authority authorized the direct sole control by VIENNA INSURANCE GROUP AG Wiener Versicherung Gruppe ("VIG AG") over AXA Biztosító Zrt ("AXA Biztosító"), and, with this, also accorded sole indirect control over AXA Money & More Pénzügyi Tanácsadó Zrt ("AXA MoMo")\(^2\). Consequently, the VIG group acquired from the AXA group the Hungarian branch of its insurance activities.

On July 22, 2014, the Competition Authority authorized two closely related transactions. Firstly, Lumen Hungary Holding, a company of Vienna Capital Partners ("VCP"), purchased Hungarian newspapers from Axel Springer SE and Ringier AG.\(^3\) Secondly, Ringier Axel Springer Media AG acquired direct sole control over other Hungarian newspapers.\(^4\) In 2010, Axel Springer SE and Ringier AG sought to merge their Central Eastern European media interests in a jointly controlled undertaking, to be known as Ringier Axel Springer Media AG. The concentration required preliminary approval from the National Media and Information Authority ("NMIA"), the government authority entrusted to oversee media matters. The NMIA refused to issue a preliminary approval, thus the companies’ individually controlled Hungarian newspapers could not be

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\(^1\) [Unfair Trading Practices and Unfair Competition Act], (Hungary), available in Hungarian at http://njt.hu/cgi_bin/njt_doc.cgi?docid=26902.287066


placed under Ringier Axel Springer Media AG. Following the unsuccessful merger attempt, Axel Springer SE and Ringier AG sold some of their Hungarian newspapers to VCP. Their jointly controlled company, Ringier Axel Springer Media AG acquired Blick Kft and Axel Springer-Budapest Kiadói Kft from Axel Springer SE and Ringier AG, respectively.

On June 25, 2014, the Competition Authority authorized the merger of Central Group Media Holding Kft ("Central") and Sanoma Media Budapest Zrt ("Sanoma"). Central acquired direct sole control of Sanoma by purchasing one hundred per cent of its shares.

On October 29, 2014, the Competition Authority authorized the acquisition by Ringier Axel Springer Media AG ("Ringier") of two job search websites, "profession.hu" and "jobmonitor.hu". Ringier purchased the websites and all assets necessary for their operation from their operator, Sanoma Media Budapest Zrt (currently Centrál Médiacsoport Zrt, controlled by Central Group Media Holding Kft).

On December 22, 2014, the Competition Authority approved the acquisition of Baxter Vakcina Üzletág [Baxter Vaccine Business] by Pfizer Ireland Pharmaceuticals and Pfizer Manufacturing Austria GmbH. In addition to Hungary, the concentration was notified in Austria, Brazil, the Czech Republic, Germany, Portugal, and Spain.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In its October 20, 2014 decision in competition supervision proceedings initiated on March 22, 2011, the Competition Authority concluded that four newspaper publishing companies violated the law prohibiting agreements restricting competition. The Competition Authority imposed a total fine of HUF 2,164,869,000.00 (approximately USD 9 million) on Axel Springer Magyarország Kft ("Axel"), RUSSMEDIA Kft ("Russmedia"), Lapcom Kiado Zrt ("Lapcom"), and Pannon Lapok Társasága Kiadó Kft ("Pannon"). According to the decision, during the period between May 2000 and April 2010, Axel, Russmedia, Lapcom, and Pannon were part of a comprehensive, competition-restricting market division agreement with the objective of barring each from entering into the other’s markets. In addition, the Competition Authority found that the four companies at different times of the year in 2010 and 2011 engaged in concerted competition-restricting practices when they shared sensitive information with each other on the price of advertisements in their printed and online local county newspapers. More precisely, the agreements they entered into concerning their Sunday papers contained mutual anti-competitive and price fixing provisions. The parties agreed that they would not encroach on each other’s county and regional markets. The competition ban, in addition to the Sunday papers, extended to every printed and electronic

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9 Formerly Inform Média Kft.
10 Formerly Lapcom Lapkiadó és Nyomdaipari Kft.
11 The four companies’ respective involvement started at different times. Axel and Russmedia engaged in May 2000, Lapcom in May 2000, and Pannon in May 2002.
newspaper. The companies also negotiated the prices of products sold through vendors, as well as the prices charged for advertisers. The Competition Authority learned that the mutual anti-competitive provisions were deleted from the agreements on April 19, 2010. The companies challenged the decision of the Competition Authority in court, where judicial review proceedings are currently pending.

On June 13, 2014, the Competition Authority issued a decision against five companies for unlawfully sharing information in the contact lenses and related care products market.\(^\text{12}\) The competition supervision proceedings were launched on December 7, 2010 against CooperVision Optikai Cikkeket Forgalmazó Kft ("CooperVision"), FOTEX-OFOFÉRT Optikai és Fotóciikk Kereskedelmi Kft ("Fotex-Oofóért"), Johnson & Johnson Egészségügyi és Babáapolási Termékeket Gyártó és Forgalmazó Kft ("Johnson & Johnson"), Novartis Hungária Egészségügyi Kft ("Novartis"), and "Kleffmann & Partner" Piackutató, Szolgáltató Kft ("Kleffmann"). The Competition Authority found that the agreement and the concerted practices of CooperVision, Fotex-Oofóért, Novartis, and Johnson & Johnson violated Section 11 of the Competition Act. The Competition Authority also concluded that the anticompetitive practices of the companies violated Article 101 of the Treaty on the Functioning of the European Union, since their effect was the prevention, restriction or distortion of competition within the internal market. The total fine imposed on the companies was HUF 98,800,000.00 (approximately USD 437,000.00). Johnson & Johnson, however, was exempted from the fine under the Competition Authority’s leniency policy, and the proceeding against Kleffmann was terminated for lack of evidence proving the company’s participation and its intention to support the restriction of competition. The allegation in the proceedings was that CooperVision, Fotex-Oofóért, Johnson & Johnson, and Novartis, the three market leaders in the contact lenses and related care products market, operated an information sharing system disguised as a market research service with the assistance of Kleffman, a market research company. Between 2003 and 2010, the companies shared trade information that contained quantity and sales price data. The information sharing system was also suitable for sharing privately held trade secrets. This would allow for competition-restricting coordination in their practices and a reduction of the uncertainty stemming from the market behavior of certain companies. The companies initiated judicial review proceedings against the Competition Authority’s decision.

In three notable cases, the Competition Authority sanctioned companies for engaging in competition-restricting conduct relating to public procurement tenders. In the first case, the Competition Authority\(^\text{13}\) concluded that on December 19, 2014, OTYS ÚTTECHNIKA Kiolmatott Felelősségű Társaság, ÚT-GARANTOR Kiolmatott Felelősségű Társaság, and Kristály-Vár Építési, Kereskedelmi és Szolgáltató Kiolmatott Felelősségű Társaság agreed on the entity submitting the winning bid in two separate tender proceedings involving water damage in urban development and reconstruction projects. The Competition Authority imposed a HUF 43,560,000.00 (approximately USD 170,160.00)


fine. In the second case, which was decided on December 22, 2014, the investigated companies coordinated their bidding price and their bids in public tenders related to solar energy system installation, building and electrical energy project management, and building energy system modernization. The total fine imposed on ÉTER-1 Mérnöki és Tanácsadó Kft, EUROLARES Gépészeti, Kereskedelmi és Szolgáltató Kft, RVI Magyarország Tanácsadó Kft, QUALIKO Műszaki Tervezési és Tanácsadói Iroda Bt, SCHNEIDER Investment Ipari Szolgáltató és Kereskedelmi Kft, and AQUAPLUS Kütfúró, Építő és Termálenergetikai Kft was HUF 148,390,000.00 (approximately USD 557,400.00). In the third case, which was decided on May 8, 2014, the subject companies coordinated their bidding prices and divided the market among themselves in public tenders related to geophysical surveys of mines and complex well inspection surveys of thermal water wells. The Competition Authority imposed a total fine of HUF 7,940,000.00 (approximately USD 36,400.00) on GEO-LOG Környezetvédelmi és Geofizikai Kft and "GEOSERVICE" Geofizikai, Geológiai és Kútszelvényező Korlátolt Felelősségű Társaság.

**D. COURT DECISIONS**

The Budapest Capital Court of Appeals, in its March 5, 2014, judgment reversed and remanded to the Competition Authority for new proceedings the trial court’s judgment affirming the decision of the Competition Authority in a cartel case against several food processing and wheat milling companies. In the underlying 2008 case concerning twenty-five companies, the Competition Authority had imposed a total fine of HUF 2.3 billion (approximately USD 10,900,000.00), on seventeen out of the original twenty-five companies that were allegedly engaging in competition restricting practices. The Competition Authority found that the companies concluded bilateral and multilateral agreements to divide the flour and other wheat mill products market and fix minimum prices and price increases. The companies filed an action in the district court for judicial review proceedings. The trial court affirmed the decision of the Competition Authority. The appellants argued that after the trial court issued its judgment, a new law on agricultural and foodstuff products was passed, which was a new fact, not available during the trial. They contended that under the new statute their proceedings before the Competition Authority would be treated in a more favorable light. They claimed that the new law could be applied in their case based on the principle that new regulations can be applied retroactively if they were more favorable to the party of interest. The respondent Competition Authority countered that the new law only applied retroactively to pending administrative proceedings, and since the Competition Authority decision concluded this case, the new statute cannot be retroactively applied to appellants’ case. The appeals court agreed with the

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appellants that the underlying case was still pending until the final decision of the court in the judicial review proceedings, and found that the new, more favorable law could be retroactively applied to appellants’ competition proceedings.
ITALY
By Alberto Pera and Michele Carpagnano of Gianni, Origoni, Grippo, Cappelli & Partners

A. LEGISLATIVE DEVELOPMENTS

Annual fee to ICA – On January 22, 2014, the Italian Competition Authority ("ICA") set the annual contribution owed to it by companies registered at the Italian Chamber of Commerce. The contribution, which applies to companies with revenues higher than €50 million, has been fixed for 2014 at 0.06 per thousand of the turnover resulting from the last approved budget.\(^1\) The ICA also confirmed the contribution rate for 2015.\(^2\) This financing mechanism was introduced by the Decree Law No. 1/2012\(^3\) (the so-called "Cresci Italia" Decree), which empowered the ICA to determine the amount of and criteria for the contribution every year (within the maximum limit of 0.5 per thousand of the relevant turnover).\(^4\)

Threshold to mergers – On March 10, 2014, the ICA updated the thresholds that trigger pre-merger filing obligations. Currently, the combined turnover in Italy of all the undertakings concerned in the last financial year must exceed €489 million (formerly €482 million), while the aggregate turnover in Italy of the target in the last financial year must exceed €49 million (formerly €48 million).\(^5\) It is worth noting that the Decree Law No. 1/2012 provides that the two thresholds that trigger pre-merger filing obligations are cumulative.\(^6\)

Report for the annual law on competition – On July 4, 2014, the ICA adopted a report for the 2014 annual law on competition, which outlines to the Government and Parliament the need to adopt structural interventions and to accelerate the implementation of those already started in order to remove obstacles restricting competition. The specific requests for intervention set forth in the report concerned the following sectors: insurance companies, banks, telecommunications, fuel distribution, electricity and gas, the pharmaceutical sector, sea ports and airport infrastructure, healthcare, postal services, professional services, local public

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\(^1\) Contributo all’onere derivante dal funzionamento dell’Autorità garante della concorrenza e del mercato per l’anno 2014, Italian Competition Authority, available in Italian at [http://www.agcm.it/](http://www.agcm.it/).

\(^2\) Contributo all’onere derivante dal funzionamento dell’Autorità garante della concorrenza e del mercato per l’anno 2015, Italian Competition Authority, available in Italian at [http://www.agcm.it/](http://www.agcm.it/).

\(^3\) The Decree was subsequently converted by the Italian Parliament into ordinary law No. 27 of March 24, 2012.

\(^4\) On May 28, 2014, the ICA published two documents setting respectively “Criteria for the contribution to the functioning of the Italian competition authority for the year 2014” and “Instructions concerning the payment of the contribution to the functioning of the Italian competition authority for the year 2014”, which include information and operating instructions concerning the abovementioned contribution obligation. See Modalità di contribuzione agli oneri di funzionamento dell’Autorità Garante della Concorrenza e del Mercato per l’anno 2014 and Istruzioni relative al versamento del contributo agli oneri di funzionamento dell’Autorità Garante della Concorrenza e del Mercato per l’anno 2014, Italian Competition Authority, available in Italian at [http://www.agcm.it/](http://www.agcm.it/).

\(^5\) Rivalutazione soglie fatturato ex art.16, comma 1, della legge n.287/90, Italian Competition Authority, available in Italian at [http://www.agcm.it/](http://www.agcm.it/).

\(^6\) See Decree Law No. 1/2012, converted by the Italian Parliament into ordinary law No. 27 of March 24, 2012.
services, and public companies. Parliament is currently reviewing the report.

Guidelines for setting fines – On October 31, 2014, the ICA published its guidelines on the method for setting fines for antitrust infringements. This is the first time the ICA adopted its own guidelines for setting fines, which closely resemble the EC Guidelines on the Method of Setting Fines. The following should be highlighted:

- Calculation of the basic fine amount: the basic amount of the fine is related to a proportion of the value of sales (up to 30%), depending on the degree of infringement, multiplied by the number of years of infringement. For most serious infringements (i.e. price fixing, market sharing and output limitation), the proportion of the value of sales taken into account as the basic fine amount should not be less than 15%.

- Additional entry fee: irrespective of the effective participation of the undertaking to the infringement and of the duration of the infringement, the ICA can include in the fine amount a sum of between 15% and 25% of the value of sales (the "entry fee").

- Introduction of the "amnesty plus" program: the fine amount can be reduced up to 50% if, during the investigation, the company provides elements which may be decisive for ascertaining a different antitrust infringement.

- Specific value to compliance programs: the adoption of an effective compliance program, in line with national and European best practices, is regarded as a mitigating factor (-15% of the fine amount).

- Measures to ensure the deterrent effect of the fine: the fine amount can be increased by up to 50% if the company achieves significant worldwide revenues or belongs to a large group.

- Recidivism: the fine amount can be increased by up to 100% if the undertaking continues or the same or a similar infringement is repeated after the Commission or a national competition authority has made a finding of infringement in the past five years.

B. MERGERS

In 2014, 46 mergers were reported to the ICA and in only four cases has the ICA opened an investigation. This number has decreased from 2013, in which 84 mergers were reported. This is a consequence of the 2012 amendment to Article 16 of the Italian Competition Law (effective January 1, 2013), which provides that the two thresholds that trigger pre-merger filing obligations are cumulative (not alternative, as was the case under the previous regime).

On December 4, 2014, the ICA authorized—after an in-depth phase two analysis—the creation of a joint venture in the book distribution market between the Feltrinelli and Messaggerie groups. The joint venture was cleared subject to the implementation of commitments aimed at preventing anti-competitive effects on small and medium-sized publishers. In particular, the commitments addressed two issues: (i) the

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7 Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2014, No. AS1137 (Italian Competition Authority) available in Italian at http://www.agcm.it/.

8 Linee Guida sulla modalità di applicazione dei criteri di quantificazione delle sanzioni amministrative pecuniarie irrogate dall’Autorità in applicazione dell’articolo 15, comma 1, della legge n. 287/90, (Italian Competition Authority) available in Italian at http://www.agcm.it/.
continuity of contractual relations with small and medium-size publishers; and (ii) the option for small and medium-size publishers not dealing with the joint venture to begin contractual relationships on the same terms applied to other publishers.9

Moreover, in three cases the ICA, in light of new competitive contexts, revised commitments that had previously been conditions upon which mergers had been authorized. The sectors involved were the following:

- Insurance sector (Banca Intesa/Sanpaolo IMI and Unipol Gruppo Finanziario/Fondiaria SAI): the modifications of the conditions were authorized on September 9, 2014 and October 28, 2014 respectively.10

- Telecommunications (Telecom Italia/Seat Pagine Gialle): the modification of the conditions was authorized on January 29, 2014.11

C. CARTELS AND OTHER ANTICompetITIVE PRACTICES

In 2014, the ICA closed fifteen proceedings, of which four were examined under Article 2 of the Italian Competition Law 12 and 11 under Article 101 of the Treaty on the Functioning of the European Union (“TFEU”).13 The ICA also opened 12 cartel investigations, 10 of which were opened under Article 101 TFEU14 and two of which were

12 Pubblicazione dei metodi e degli strumenti di calcolo dei compensi professionali degli architetti, No. I781 (Italian Competition Authority) available in Italian at www.agcm.it.; Tariffario minimo per gli amministratori professionisti di condominio-Legge 4/2013, No. I774 (Italian Competition Authority) available in Italian at www.agcm.it; Sanità privata nella Regione Abruzzo, No. I769 (Italian Competition Authority) available in Italian at www.agcm.it; Case I762, Unione mutualistica tra notai del Veneto, No. I762 (Italian Competition Authority) available in Italian at www.agcm.it.
13 Roche-Novartis/Farmaci Avastin e Lucentis, No. I760 (Italian Competition Authority) available in Italian at www.agcm.it; Agenti monomandatari, No. I702 (Italian Competition Authority) available in Italian at www.agcm.it; Inverter solari ed eolici – imposizione prezzi minimi, No. I766 (Italian Competition Authority) available in Italian at www.agcm.it; Enervit – Contratti di distribuzione, No. I718 (Italian Competition Authority) available in Italian at www.agcm.it; Centrale d’acquisto per la grande distribuzione organizzata, No. I768 (Italian Competition Authority) available in Italian at www.agcm.it; Condotte restrittive del CNF, No. I748 (Italian Competition Authority) available in Italian at www.agcm.it; Ostacoli all’accesso al mercato di un nuovo operatore di telefonia mobile, No. I757 (Italian Competition Authority) available in Italian at www.agcm.it; Servizi di cabotaggio marittimo stretto di Messina, No. I763 (Italian Competition Authority) available in Italian at www.agcm.it; Mercati dei sistemi gestionali di base degli istituti di istruzione e del registro elettronico, No. I774 (Italian Competition Authority) available in Italian at www.agcm.it.
14 Mercato del Calcestruzzo in Friuli Venezia Giulia, No. I772 (Italian Competition Authority) available in Italian at www.agcm.it; Arca/Novartis – Italfarmaco, No. I770 (Italian Competition Authority) available in Italian at www.agcm.it; Forniture Trenitalia, No. I759 (Italian Competition Authority) available in Italian at www.agcm.it; Procedure di affidamento dei servizi ristoro su rete autostradale Aspi, No. I775 (Italian Competition Authority) available in Italian at www.agcm.it; Mercato della produzione di poliuretano espanso flessibile, No. I776 (Italian Competition Authority) available in Italian at www.agcm.it; Mercato
opened under Article 2 of the Italian Competition Law.\textsuperscript{15}

On February 27, 2014, the ICA, under Article 101 TFEU, imposed a fine on Hoffman-La Roche Ltd. and Novartis AG (and their Italian subsidiaries) of over €180 million for an anticompetitive agreement related to the sale of Avastin and Lucentis (two medicines with wide applications for the treatment of various eye diseases). According to the ICA, the companies colluded to impede the use of Avastin in order to increase the commercial performance of the much more expensive Lucentis.\textsuperscript{16}

On May 20, 2014, the ICA adopted a commitment decision that closed the investigation under Article 101 TFEU against seven major insurance companies (UnipolSai Assicurazioni, Assicurazioni Generali, Allianz, Società Reale Mutua di Assicurazioni, Società Cattolica di Assicurazione, Axa Assicurazioni, Groupama Assicurazioni). The investigation related to contractual arrangements that prevented brokers from dealing with more than one insurance company. The commitments made binding by the ICA modified contractual clauses that made it difficult for agents to take mandates from various insurance companies.\textsuperscript{17} The ICA decision has been challenged before the administrative Court by an association of brokers ("UNAPASS"). The Court, which already rejected a request from UNAPASS for a precautionary injunction,\textsuperscript{18} has not yet fixed a hearing date.

On July 9, 2014, the ICA made binding commitments offered by Enervit SpA—an undertaking active in the market for sports food supplements. This closed a 101 TFEU investigation concerning the imposition of resale price restrictions, absolute exclusive arrangements and permanent non-compete obligations. According to the commitments, Enervit cannot impose conditions on the pricing strategies of its distributors.\textsuperscript{19}

On September 17, 2014, the ICA adopted a commitment decision that closed the Article 101 TFEU investigation against Centrale Italiana, a joint purchasing group, and its members (Coop, Despar, Il Gigante Disco Verde and Sigma) regarding the coordination of their purchasing policies. The commitments, which the ICA made binding, addressed the dissolution of Centrale Italiana and the disruption of any form of commercial collaboration between the retailers.\textsuperscript{20}

On October 28, 2014, the ICA adopted a commitment decision that closed an Article 101 TFEU investigation aimed at verifying whether

\textsuperscript{17} Agenti monomandatari, No. I702 (Italian Competition Authority) available in Italian at www.agcm.it.
\textsuperscript{18} TAR Lazio Order, No. 4115 (Sept. 5, 2014) available in Italian at www.giustizia-amministrativa.it.
\textsuperscript{19} Enervit – Contratti di distribuzione, No. I718 (Italian Competition Authority) available in Italian at www.agcm.it.
\textsuperscript{20} Centrale d’acquisto per la grande distribuzione organizzata, No. I768 (Italian Competition Authority) available in Italian at www.agcm.it.
multilateral interchange fees ("MIFs") on bill payment services—defined centrally by the Bancomat Consortium (an association of financial institutes)—reduced the competition between banks and other non-banking operators active in the sector to the detriment of ultimate consumers. The commitments made binding by the ICA allowed for the commission to be reduced and adjusted in order to reflect operators’ costs.\(^{21}\)

During 2014, the ICA completed several investigations under EU and national law against the professional associations of notaries, physicians, architects, lawyers and condominium managers. In all of these cases, the ICA recognized that professional associations, when acting as the regulatory body of a profession carrying on an economic activity, are "undertakings" for the purpose of competition rules and therefore fall within the material scope of such competition rules. Specifically, the outcomes of the investigations were the following:

- In two cases, the ICA found violations of Article 101 TFEU and imposed fines accordingly: the Italian Bar Association was fined over €900,000 for limiting its members’ ability to fix their own fees and advertise their own law-firms on the internet;\(^{22}\) the Italian Association of Physicians and Dentists was fined over €830,000 for adopting rules of conduct and guidelines that restricted its members’ freedom to advertise their professional services.\(^{23}\)
- In two cases, the ICA found violations of the Italian Competition Law but did not impose fines: in one of the cases, the Association of Notaries in Treviso proposed to ensure its members a minimum monthly income regardless of the service provided;\(^{24}\) in the other case, the Confederation of Condominium Management Service Associations ("CONFIAC") fixed minimum tariffs for professional condominium managers.\(^{25}\)
- In one case, the ICA accepted and rendered binding the commitments submitted by the Rome, Florence and Turin Institutes of Architects. These commitments were made in the context of an investigation under Article 2 of the Italian Antitrust Law, which was aimed at ascertaining whether the parties had limited the ability of their members to fix their own fees by publishing a “fee calculation system” online. The commitments made binding by the ICA required that the fee calculation system be removed from the website and that the members be informed about their complete freedom to set their own fees.\(^{26}\)

\(^{21}\) Consorzio Bancomat, No. I773 (Italian Competition Authority) available in Italian at www.agcm.it (commission bill payments).
\(^{22}\) Condotte restrittive del CNF, No. I748 (Italian Competition Authority) available in Italian at www.agcm.it.
\(^{23}\) Restrizioni deontologiche federazione nazionale degli ordini dei medici chirurghi e degli odontoiatri, No. I738 (Italian Competition Authority) available in Italian at www.agcm.it.
\(^{24}\) Unione mutualistica tra notai del Veneto, No. I762 (Italian Competition Authority) available in Italian at www.agcm.it.
\(^{25}\) Tariffario minimo per gli amministratori professionisti di condominio-Legge 4/2013, No. I774 (Italian Competition Authority) available in Italian at www.agcm.it.
\(^{26}\) CNAPPC - Pubblicazione dei metodi e degli strumenti di calcolo dei compensi professionali degli architetti, No. I781 (Italian Competition Authority) available in Italian at www.agcm.it.
As anticipated, in 2014 the ICA opened 12 new proceedings concerning alleged anticompetitive agreements, all of which are ongoing at the time of this report. It is worth mentioning the following investigations:

- On January 29, 2014, the ICA opened an Article 101 TFEU investigation in order to verify whether Italfarmaco and Novartis (the only two producers of specific dosages of Octretide Acetate) put in place horizontal concerted practices which resulted in the absence of (price) competition between the companies, and in turn, higher expense for the National Health Service. On December 19, 2014, the ICA launched a market test on the commitments submitted by the parties in order to alleviate competition concerns.

- On May 7, 2014, the ICA opened an Article 101 TFEU investigation against Booking.com and Expedia in order to verify whether contracts with hotels limit competition in reservation services by preventing hotels from offering their services at better conditions through other booking channels.

- On October 8, 2014, the ICA opened an Article 101 TFEU investigation in order to ascertain whether CNS (Consortio Nazionale Servizi), Manutencoop Facility Management, EXITone and Kuadra coordinated their conduct in a public tender for the award of school cleaning services with the aim of sharing the market.

In 2014, the ICA launched two investigations in the market for the production and sale of ready-mix concrete. The investigations were aimed at verifying the existence of coordination among the undertakings in the participation of tenders. The first investigation, opened under Article 101, concerned the provincial markets of Pordenone, Treviso, Gorizia, Udine and Trieste. The second investigation, opened under Article 2 of the Italian Competition Law, concerned the provincial markets of Venice and Belluno.

The ICA launched a sector enquiry in 2014, together with the Telecommunications Authority ("AGCOM"), on the impact of static and dynamic competition on broadband deployment in Italy. The analysis, concluded during the same year, highlighted the need to establish a national strategic plan for infrastructure development to ensure investment and innovation.

The ICA closed two other sector inquiries in the same year. The first inquiry was into "district heating." The inquiry analyzed in critical terms the monopoly of vertically integrated operators, high switching costs and the calls for a specific pro-competition provision in the form of a framework law. The second inquiry was into

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27 Arca/Novartis - Italfarmaco, No. I770 (Italian Competition Authority) available in Italian at www.agcm.it.
28 Mercato dei servizi turistici – prenotazioni alberghiere online, No. I779 (Italian Competition Authority) available in Italian at www.agcm.it.
29 Gara CONSIP servizi di pulizia nelle scuole, No. I785 (Italian Competition Authority) available in Italian at www.agcm.it.
30 Mercato del calcestruzzo in Friuli Venezia Giulia, No. I772 (Italian Competition Authority) available in Italian at www.agcm.it.
31 Mercato del calcestruzzo in Veneto, No. I780 (Italian Competition Authority) available in Italian at www.agcm.it.
32 Mercati di accesso e reti di telecomunicazioni a banda larga ed ultralarga, No. IC48 (Italian Competition Authority) available in Italian at www.agcm.it.
33 Indagine conoscitiva sul settore del teleriscaldamento, No. IC46 (Italian Competition Authority) available in Italian at www.agcm.it.
energy and gas liberalization, which recognized—underlining the fast evolution of the markets—that the "critical issues" that originally justified the launch of the inquiry had now disappeared.\footnote{Stato dalla liberalizzazione dei settori dell’energia elettrica e del gas naturale, No. IC22B (Italian Competition Authority) available in Italian at www.agcm.it.}

**D. ABUSES OF DOMINANT POSITION**

In 2014, the ICA concluded one case with a finding of infringement\footnote{Akron-Gestione rifiuti urbani a base cellulosica, No. A444 (Italian Competition Authority) available in Italian at www.agcm.it.} and opened two new investigations\footnote{Conai - Gestione rifiuti da imballaggi in plastica, No. A476 (Italian Competition Authority) available in Italian at www.agcm.it; Incremento prezzo farmaci Aspen, No. A480 (Italian Competition Authority) available in Italian at www.agcm.it.} into suspected abuse of dominant positions. In the same year, the ICA closed two more cases. The first case was closed on the basis of commitments from the parties.\footnote{AQP - Opere di allacciamento alla rete idrica - inottemperanza, No. A385C (Italian Competition Authority) available in Italian at www.agcm.it.} The second case was closed after the ICA determined that a company had complied with commitments made binding by the ICA six years earlier.\footnote{NTV/FS, No. A443 (Italian Competition Authority) available in Italian at www.agcm.it.}

On February 19, 2014, the ICA closed a proceeding under Article 102 TFEU against several companies of the Italian incumbent rail operator (FS, RFI, Trenitalia, Grandi Stazioni, Centostazioni and FS Sistemi Urbani). The ICA accepted the commitments offered by the companies. In particular, FS agreed to open up access to train routes, reduce the cost of railway access by 15% and to provide rival rail operators with more space within stations.\footnote{NTV/FS, No. A443 (Italian Competition Authority) available in Italian at www.agcm.it.}

On February 27, 2014, the ICA fined the waste collector Hera (Hera S.p.A. and Herambiente S.p.A.) €1.9 million after having ascertained that it infringed Article 3 of the Italian Competition Law by favoring its recycling subsidiary in the disposal of waste paper. According to the ICA, the companies abused their monopoly and near-monopoly in the market for the collection and resale of waste in the Emilia Romagna region by unfairly favoring another Hera subsidiary, Akron, which produces pulp and sells it to paper mills\footnote{Akron-Gestione rifiuti urbani a base cellulosica, No. A444 (Italian Competition Authority) available in Italian at www.agcm.it.}.

The following two new investigations were opened:

- On November 19, 2014, the ICA opened an investigation into Aspen Pharma Trading and Aspen Italia in order to ascertain whether the companies abused their market power in the cancer drugs market in breach of Article 102 TFEU, by obliging Italy’s drug agency (AIFA) to accept significant price hikes.\footnote{Incremento prezzo farmaci Aspen, No. A480 (Italian Competition Authority) available in Italian at www.agcm.it.}

- On July 17, 2014, the ICA opened an investigation to verify whether Conai and Corepla abused their dominant position in breach of Article 102 TFEU in the market for waste generated from plastic packaging. The companies are suspected of excluding other service providers from the market by not
recognizing their autonomous waste management systems.\textsuperscript{42}

At the end of 2014, two more proceedings based on EU competition law were pending.\textsuperscript{43}

\section*{E. COURT DECISIONS}

Italian administrative courts reviewed two ICA decisions concerning the market for gas distribution in 2014. First, on February 12, 2014, the First Instance Administrative Court (the "\textsc{Tar Lazio}\textsuperscript{47}") annulled the ICA’s decision which prohibited an acquisition of joint control over Isontina Rete Gas (IRG) by Acegas-Aps and Italgas in Northeastern Italy. The Court, rejecting the ICA’s reasoning—according to which, such an operation would have eliminated competition in future tenders in the four geographical areas in which the companies involved were already dominant—considered that the operation would have led to a rationalization of the concessions, without altering the existing competitive dynamics.\textsuperscript{44} On January 26, 2015, the issue was examined by the Consiglio di Stato (the "\textsc{Council of State}\textsuperscript{45}"), which annulled the Tar Lazio judgment and upheld the ICA’s decision.\textsuperscript{45}

Second, on November 4, 2014, the Council of State\textsuperscript{46} annulled the decision by which the Tar Lazio\textsuperscript{47} overturned a fine of over €1.3 million that the ICA had imposed on 2iGas and LD for restricting competition by forming a Temporary Consortium to take part in a gas distribution tender (despite being able to bid individually as competitors). The Tar Lazio overturned the ICA decision, finding that the ICA neither provided any reason for limiting the geographic market to the tender areas nor demonstrated that the Temporary Consortium was used to reach an anticompetitive aim. The Council of State rejected the Tar Lazio’s arguments and upheld the ICA’s decision on the basis that lawful forms of cooperation, such as a Temporary Consortium, could be unlawful if used to reach the anticompetitive aim of sharing the market.

On February 12, 2014, the Council of State\textsuperscript{48} annulled the decision by which the Tar Lazio\textsuperscript{49} overturned a €10.6 million fine imposed by the ICA on Pfizer for abuse of dominance in the market of glaucoma medicines based on the active ingredient \textit{Latanoprost}. The Court analyzed the nature and effects of Pfizer’s behavior and concluded that the firm put in place a unitary and complex excluding strategy designed to prevent generic companies from entering the market with equivalent drugs. In fact, although the company’s behavior formally represented a lawful exercise of its patent rights, it was substantially anticompetitive since it was capable of impeding competitors’ access to the market.

\begin{footnotesize}
\begin{enumerate}
\item Conai - Gestione rifiuti da imballaggi in plastica, No. A476 (Italian Competition Authority) available in Italian at www.agcm.it.
\item Sea/Convenzione Ata, No. A474 (Italian Competition Authority) available in Italian at www.agcm.it; Fornitura acido colico, No. A473 (Italian Competition Authority) available in Italian at www.agcm.it.
\item Tar Lazio Judgment, No. 3046 (Feb. 12, 2014) (Italian Competition Authority) available in Italian at www.giustizia-amministrativa.it.
\item Consiglio di Stato Judgment, No. 334 (Jan. 26, 2015) available in Italian at www.giustizia-amministrativa.it.
\item Consiglio di Stato Judgment, No. 5423 (Nov. 4, 2014) available in Italian at www.giustizia-amministrativa.it.
\item Tar Lazio Judgment, No. 4478 (May 7, 2013) available in Italian at www.giustizia-amministrativa.it.
\item Consiglio di Stato Judgment, No. 693 (Feb. 12, 2014) available in Italian at www.giustizia-amministrativa.it.
\item Tar Lazio Judgment, No. 7467 (June 20, 2012) available in Italian at www.giustizia-amministrativa.it.
\end{enumerate}
\end{footnotesize}
On April 8, 2014, the Council of State\textsuperscript{50} annulled the decision by which the Tar Lazio\textsuperscript{51} overturned a €4.6 million fine imposed by the ICA on Coop Estense for abusing its dominant position by delaying the entry and expansion of its competitor, Esselunga, in the retail distribution markets in the province of Modena. According to the high administrative Court, the Tar Lazio erred in determining that the ICA did not adequately prove the existence of a causal link between Coop Estense’s behavior and Esselunga’s exclusion. In fact, a finding of abuse does not require proof of the actual effects of the conduct and thus it is unnecessary to look for a causal link between the conduct and the actual exclusion.

On September 18, 2014, the Council of State referred a preliminary ruling under Article 267 TFEU to the EU Court of Justice ("ECJ"), requesting clarification on the application of the leniency program. In particular, the Council of State has requested the ECJ to determine whether a legal link exists between the main application for immunity that an undertaking has submitted (or is about to submit) to the Commission and the simplified application for immunity submitted by that undertaking to an NCA in respect of the same cartel.\textsuperscript{52} The referral followed a request by DHL within a judgment pending before the Italian Administrative Supreme Court against a Tar Lazio decision\textsuperscript{53} that upheld a 2011 decision in which the ICA fined the members of an international shipping cartel.

On September 22, 2014, the Council of State\textsuperscript{54} quashed the Tar Lazio judgment\textsuperscript{55} that had annulled the ICA’s commitments decision in the Sky/Conto TV case. According to the Tar Lazio, the ICA can only accept commitments when they eliminate any competitive concerns raised by the conduct in question. In all other cases, the ICA should adopt an infringement decision, which will constitute evidence in the context of an action for damages. The Council of State rejected this interpretation on the basis that it would lead to the erroneous consequence of subjecting the exercise of powers of public enforcement (including the right to accept commitments, if considered suitable) to the different needs of the private enforcement system.

On October 24, 2014, the Council of State,\textsuperscript{56} upholding the Tar Lazio judgment,\textsuperscript{57} confirmed an ICA decision which found that 15 cosmetic companies had coordinated the price increase in the large-scale retail channel, thus infringing Article 101 TFEU. However, the Council of State reconsidered some fines after considering the duration of the infringement and the role played by the companies involved.

On December 2, 2014, the Tar Lazio upheld the Italian Competition Authority’s decision to fine the pharmaceutical companies Hoffman-La

\textsuperscript{50} Consiglio di Stato Judgment, No. 1673 (April 8, 2014) available in Italian at www.giustizia-amministrativa.it.
\textsuperscript{52} Consiglio di Stato Order, No. 4508 (Sept. 4, 2014) available in Italian at www.giustizia-amministrativa.it. The case is now pending before the European Court of Justice, No. C-428/14, OJ n. C462 (Dec. 22, 2014).
\textsuperscript{53} Tar Lazio Judgment, No. 3034 (Mar. 29, 2012) available in Italian at www.giustizia-amministrativa.it.
\textsuperscript{54} Consiglio di Stato Judgment, No. 4773 (Sept. 22, 2014) available in Italian at www.giustizia-amministrativa.it.
\textsuperscript{55} Tar Lazio Judgment, No. 3964 (Mar. 9, 2011) available in Italian at www.giustizia-amministrativa.it.
\textsuperscript{56} Consiglio di Stato Judgments, Nos. 5274, 5275, 5276, 5277, 5278 (Oct. 24, 2014); Consiglio di Stato Judgments, No. 4230 (Aug. 8, 2014) available in Italian at www.giustizia-amministrativa.it.
\textsuperscript{57} Tar Lazio Judgments, Nos. 3270, 3272, 3273, 3276, 3279, 3280 (April 11, 2012) available in Italian at www.giustizia-amministrativa.it.
Roche Ltd. and Novartis AG (as well as their Italian subsidiaries) for unlawful coordination and exploitation of regulatory procedure, which favored the sale of their most expensive drug. Both companies have appealed the decision before the Council of State, where the matter is now pending.

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THE NETHERLANDS

By Winfred Knibbeler of Freshfields Bruckhaus Deringer LLP

A. LEGISLATIVE DEVELOPMENTS

Following the merger of the Dutch Competition Authority, the Dutch Telecoms Authority and the Netherlands Consumer Authority into one single authority, called ‘the Netherlands Authority for Consumers and Markets’ or ‘ACM’, an Act revising the procedural powers of the ACM (the Streamlining Act) entered into force on August 1, 2014. This Act resolves several ambiguities that existed under the previous system and implements a number of changes. One of the key changes is the revised turnover threshold on which the ACM’s jurisdiction to review mergers is determined. Previously, mergers, acquisitions or newly set up joint ventures between two or more undertakings, with a combined worldwide turnover of EUR113,450,000 or above, and a turnover in the Netherlands of at least two undertakings of EUR30 million or more, required notification to the ACM. The first turnover threshold has now been raised to EUR150 million, whereas the second turnover threshold remains the same. Other important changes concern clarifications regarding the scope of legal professional privilege (“LPP”) and the right to remain silent for ex-employees that are questioned in cartel investigation proceedings. The Act now stipulates that LPP also applies to legal advice concerning matters that fall within the scope of the Electricity Act and the Telecommunication Act. Furthermore, the Act limits the rights of ex-employees to remain silent in cartel investigations concerning their previous employer.

In addition, in 2014, the Ministry of Economic Affairs published revised leniency rules that apply to companies or individuals that inform the ACM of cartel infringements (leniency applicants). Generally, leniency applicants who are first to inform the ACM of a cartel and meet the requirements for leniency are fully exempt from fines if they apply for leniency before the ACM has started an investigation. Now, applicants can also obtain full immunity from fines even if the ACM (on its own motion) has already started an investigation into the reported cartel conduct, provided that the ACM had not yet sent out a statement of objections and the leniency applicant provides contemporaneous evidence which the ACM can prove the existence of the cartel infringement. With the new changes, companies or individuals that report a cartel but are not first in line can obtain more significant reductions of their potential fines compared to the previous leniency rules. Previously, all parties that came second or later were eligible for a reduction of their potential fine amounting to between 10% and 40%. Under the new rules, the second leniency applicant can obtain a 30%-50% reduction of their fine, the third applicant, between 20%-30% and every subsequent

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1 See Staatsblad 2014, no. 266, available in Dutch at www.overheid.nl.

2 See The revised leniency rules which are available in English via: www.acm.nl/en/publications/publication/13315/Policy-rules-regarding-fines-and-leniency/
applicant that submits new and relevant information can obtain a reduction of their potential fine of up to a maximum of 20%.

**B. MERGERS**

Also in 2014, consolidation in the healthcare sector continued. In two merger notifications the notifying hospitals requested that the ACM allow derogation from the statutory standstill obligation (i.e. the obligation not to implement the merger before clearance is granted). In the *Stichting Reinier Haga Groep – Stichting ’t Lange Land Ziekenhuis* case the hospitals argued that *Stichting ’t Lange Land* hospital was no longer able to fulfil its obligations due to tax debts and claims for overdue payments to medical staff.\(^3\)

The ACM agreed that denying the request for a derogation from the standstill period could seriously jeopardise the continuity of *Stichting ’t Lange Land* hospital and lead to irreversible harm. Allowing the merger to take place immediately would enable *Stichting ’t Lange Land* hospital access to financial resources to improve its liquidity position. The ACM granted derogation from the standstill obligation on the condition that both hospitals would not take any further steps to integrate operationally or organisationally.

In the *Riagg Rijnmond – Parnassia Groep* case, the notifying parties requested a derogation from the standstill obligation because Riagg Rijnmond found itself in a state of bankruptcy.\(^4\) The ACM agreed that if the notifying parties would have to wait until the standstill period had lapsed, there would be a serious risk that all medical staff and patients would have left. This would result in loss of value and thus irreversible harm. Therefore, ACM, again, allowed a derogation from the standstill obligation on the condition that both hospitals would not take any further steps to integrate operationally or organisationally.

The ACM required a second phase procedure in the *Albert Schweitzer Ziekenhuis – Rivas Zorggroep* case.\(^5\) ACM concluded that the merging parties are the closest competitors in the relevant market and that competition will decrease after the merger. ACM analysed the geographical regions from which patients visiting the hospitals originate and what the travel time for patients from those regions would be. ACM concluded on this basis that the merging parties are each other’s most likely alternative for patients. This conclusion was confirmed by health insurers. Although the geographical area where patients are solely dependent on the hospital services of the merging parties appeared to be limited, ACM found that competition from other hospitals in the remainder of the geographical market may not be sufficient to compensate for the potential loss of competition following the merger. Also health insurers that buy health care from hospitals do not appear to have sufficient countervailing buying power. ACM therefore required a second-phase investigation.

What is interesting about this case is how the ACM further developed its assessment of hospital mergers. Whereas the focus in previous hospital merger cases was mainly based on views of other market players and patient organisations, the ACM presently seems to rely also on factual data. These cases show that the ACM is taking a more balanced approach.


approach between factual data and market parties’ views.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

Similar to 2013, the ACM imposed several fines for cartel infringements in 2014. It is significant that for the first time the ACM fined three investment firms for cartel activities of a portfolio company. The ACM concluded in two separate decisions that the investment firms exercised control over the respective infringing portfolio companies and were therefore to be held liable on the basis of parental liability rules. In the first decision, Bencis Capital Partners B.V. was fined for a non-disclosed amount between EUR 1 and 1.5 million (approx. USD 1.12 and 1.7 million). Bencis Buyout Fund II General Partner B.V. was held jointly and severally liable for the fine. In the second decision, the ACM fined Capital Investors Group Limited and CVC Capital Partners Europe Limited for an amount of EUR 450,000 (approx. USD 505,000) each.

In its decision, the ACM held the investment firms liable for the participation of Dutch flour producer Meneba in a cartel that was fined by the ACM in 2010. According to the ACM decision of 2010 (which is still under appeal), this so-called ‘flour cartel’ lasted from 2001 until 2007.

In the former decision, the ACM concluded that Bencis Capital Partners B.V. exercised control over Meneba from 26 November 2004 until 16 March 2007 because it held the majority of the quorum in the shareholder’s meeting and had the right to appoint the majority of the members of the supervisory board (which in turn had the power to appoint or discharge the management board) and the right to discharge the entire supervisory board. Furthermore, Bencis Capital Partners B.V. had decision-making rights in respect of the annual accounts of Meneba. The ACM therefore concluded that Bencis Capital Partners B.V. exercised control over Meneba during the infringement period and could be held liable for the infringement of its (indirect) subsidiary.

In the latter decision, the ACM indicated that Capital Investors Group Limited and CVC Capital Partners Europe Limited exercised control over Meneba in the period before 26 November 2004. The ACM found that Capital Investors Group Limited and CVC Capital Partners Europe Limited had the right to appoint and discharge the management board and certain veto rights concerning financial and managerial decisions. The ACM concluded that the fines for Capital Investors Group Limited and CVC Capital Partners Europe Limited would amount to EUR 135,5 million (approx. USD 152 million), on the basis of the corporate structure that existed during the infringement period. However, as control over Meneba was lost in 2004 and both investment firms no longer form an economic entity, the fines were capped at EUR 450,000 (approx. USD 505,000).

In 2014, the ACM published a decision concerning a fine of EUR 6 million (approx. USD 6.7 million) for 13 distributors of collections of weekly periodicals that was imposed in November 2013. The ACM fined both the infringing companies and their directors. According to the ACM the companies had allocated the market amongst each other and agreed not to poach each other’s customers. Furthermore, the ACM found that they regularly exchanged commercially sensitive information. According to the ACM the cartel held a

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8 ACM Decision, 7 November 2013, case 7244, available at www.acm.nl.
combined market share of 32% in 2004 which increased to 85% in 2011 after a new cartel agreement was forged in 2010 which covered more market participants. The fines for individual companies varied from EUR 10,000 (approx. USD 11,200) to EUR 1.2 million (approx. USD 1.35 million).

D. ABUSE OF DOMINANCE

ACM conducted two large investigations into an alleged abuse of dominance in 2014. In the Buma/Stemra case, the ACM closed the case after Buma/Stemra offered commitments to remedy potential competition law concerns. Buma/Stemra is a Dutch organisation that collects remuneration for IP rights on music in the Netherlands on behalf of composers, lyricists and authors. The organisation has a statutory monopoly in collecting remuneration for broadcasting music via certain channels, but not for broadcasts on the internet. Buma/Stemra, however, did not offer rights holders an easy possibility to partially transfer their IP rights to it, but rather promoted the transfer of all rights. Consequently, individual composers, lyricists and authors were deprived of the opportunity to broadcast their works on the internet themselves. Buma/Stemra offered to make its system for the transfers of rights more flexible allowing rights holders an easier way to partially transfer their rights to Buma/Stemra.

The second decision concerns an investigation into an alleged abuse of dominance by AstraZeneca. ACM sent a statement of objections to AstraZeneca accusing it of abusing a dominant position in the market for the drug Nexium from 2002 until 2010. ACM found that AstraZeneca supplied hospitals with Nexium for a significantly reduced price compared to those charged to public pharmacies. ACM found that if medical staff in hospitals would prescribe patients Nexium, house doctors would subsequently prescribe Nexium as well for repeated treatment of patients even though generic and better priced options were available. ACM therefore established that prescriptions of medical staff in hospitals had an appreciable influence on decisions of doctors outside the hospital in prescribing medication. Hence, ACM considered that AstraZeneca would have an incentive to increase its market share within hospitals by offering Nexium below cost in order to recoup those costs in the non-hospital (extramural) market. This resulted in a competitive disadvantage for producers of the generic variant of Nexium on the extramural market for the drug because those producers could not profit from prescriptions in the hospital market. Furthermore, the ACM found evidence that the growth of the market share of the generic variant of Nexium stagnated; however, they could not determine whether that was as a result of AstraZeneca’s market strategy or due to other factors such as the fact that the generic medicine was not a true substitute. The ACM considered the fact that AstraZeneca provided convincing arguments to cast sufficient doubt on whether or not AstraZeneca could follow a strategy regardless of its competitors and concluded that there was insufficient proof of AstraZeneca actually holding a dominant position in the relevant market.

It is interesting to note that this case demonstrates inter alia that the ACM has spent considerable resources in this investigation that lasted about 4 years and that this investigation, as well as AstraZeneca additional information on the therapeutic effectiveness of generic variants of Nexium and switching behavior of
patients, seems to have changed its preliminary conclusions on the existence of dominance.

E. COURT DECISIONS

An interesting case concerning the appeal case against the ACM decision regarding the capsicum cartel in which ACM fined one of the undertakings concerned on a different legal ground than provided in the statement of objections. The court ruled that the statement of objections should indicate in which capacity (e.g. as part of an economic entity) an undertaking is accused of cartel conduct. The court noted that the final decision imposed fines on one of the companies because ACM ruled that it formed an economic entity with other infringing companies, whereas in the statement of objections it was accused of cartel conduct in an individual capacity. The court therefore ruled that the rights of defence were breached. The court, however, also ruled that ACM could still impose a fine on the company in question insofar the statement of objections would provide sufficient grounds for such a fine as ACM would not be allowed to conduct further investigations at this stage of the proceedings. This would not violate the principle of ne bis in idem.

It is also worth noting that the ACM also fined a consulting undertaking in this case that was not active in the relevant market, for facilitating the cartel. The fine was, however, based on the turnover generated by advising the cartel which resulted in a relatively low number of EUR 5,000 (approx. USD 5,600).
A. LEGISLATIVE DEVELOPMENTS

Extensive amendments to the Norwegian Competition Act that were adopted in 2013 entered into force on January 1, 2014.\(^1\) At the same time certain regulations relating to the changes were also amended and entered into force.\(^2\)

The main amendments to the Act relate to merger control. The most important change was the significant increase to filing thresholds. According to the amended Section 18, a concentration is only subject to merger notification if:

(i) the combined aggregate Norwegian turnover of the undertakings concerned is more than NOK 1 billion (approximately EUR 116 million) and

(ii) at least two undertakings concerned each have Norwegian turnover exceeding NOK 100 million (approximately EUR 11.6 million). Additionally the Norwegian Competition Authority ("NCA") retains the power to require notification of concentrations not meeting the thresholds and to intervene against such concentrations.

There were also amendments to the rules pertaining to surprise inspections (dawn raids) in order to increase legal certainty of the undertaking. These changes include, amongst others, amendments to Section 25 restricting the NCA’s power to seize original documents and requiring that the Court’s decision authorising a dawn raid must now define the scope of the search. This includes a description of the purpose of the surprise inspection, the type of infringements the NCA is investigating and the markets into which the NCA is investigating. Amendments also include codification of the treatment of electronic seizures allowing the undertaking to be present when the NCA examines electronic evidence in order to identify legally privileged and exempted documents.

Another key change was the abolishment of criminal sanctions for undertakings. As a result, criminal prosecution and sanctions are now applicable only to private individuals and not to undertakings. Accordingly, undertakings are subject only to civil procedures and administrative fines.

Finally, it should be noted that an amendment to Section 12 of the Act has empowered the NCA to reach formal settlement decisions, modelled on the power of the
European Commission to adopt Article 9 decisions.

Further, there is currently an ongoing revision of the NCA decisions appeal system. An expert committee reviewed possible alternatives to amending the current appeal system, and published its conclusions in a report dated 11 November 2014. The majority of the committee members took the view that, as a rule of thumb, an autonomous administrative appeal commission should be established with the power to review all administrative decisions from the NCA, i.e. also including decisions that are currently being appealed in the ordinary court system. The expert committee's report has been handed over to the Government for a final decision on whether an appeal commission shall be established and, if so, the scope of its powers.

Moreover, there is an ongoing legislative investigation to assess whether the new EU Directive on Antitrust Damage Actions would require amendments to the existing Act in order to be incorporated into Norwegian law.

In 2014, the NCA also published guidelines on project cooperation between undertakings.

**B. MERGERS**

The NCA intervened in three concentrations in 2014. On June 24, 2014 the NCA blocked the merger between Norsk Gjenvinning AS and Avfall Sør Bedrift AS. The parties to the concentration are active within waste collection and treatment industry. The NCA found that the merger would significantly restrict competition within the treatment markets in several municipalities in the South of Norway. The NCA concluded that the concentration would combine the two leading players in the relevant markets, and that the parties were the only market players with the necessary capacity and facilities to police each other's market behaviour. The barriers to entry were found to be high as it is difficult to establish facilities in the market.

The NCA also approved two concentrations pursuant to certain conditions. The first case involved the merger of Elixia and Health & Fitness Nordic, the two largest players in the Norwegian fitness centre market. The merger was accepted on February 12, 2014 provided that the parties divested several local fitness facilities in the affected markets to an independent acquirer, including the respective customer base and contracts.

The second case involved Nortura SA’s acquisition of 100 % of the shares in the companies Prima Slakt AS and Jæren Eiendomsinvest AS, and 49 % of the shares in

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The NCA concluded on December 22, 2014 that the acquisition would significantly restrict competition within the national market for the sale of slaughtered cattle, sheep, and pigs. The concentration was decided subject to conditions relating to sales to certain undertakings within the Nortura Group being fulfilled for the next five years, and to the condition that the seller, Prima Gruppen AS, retained sole control of NorPri AS.

In 2014, the NCA also scrutinized the TeliaSonera's acquisition of Tele2, which was notified in August 2014 within the market for mobile telephones. The acquisition involved a merger of two of the three largest mobile players in the mobile market in Norway. In its Phase II Statement of Objections, in December 2014, the NCA notified the parties that the NCA might intervene against the concentration. The acquisition was cleared with conditions on February 5, 2015, after remedies were proposed by TeliaSonera.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Although cartels have been a priority of the NCA for many years, there have not been many cases and even fewer cartel decisions by the NCA during the last few years. This trend has continued as there were no new cartel decisions by the NCA during 2014. However, the Director General of the NCA stated in a speech in September 2014 that there are several Statements of Objections in the pipeline and also several investigations that have not yet been made public. The NCA pronounced that it carried out dawn raids in six cases in 2014. Only two of the cases have been made public; one in the book distribution industry (April 2014) and one within the aviation sector (June 2014), where the NCA provided assistance to the EFTA Surveillance Authority ("ESA").

One of the major competition law cases in Norway in 2013 and 2014 was the NCA’s investigation of a joint purchasing and distribution agreement between NorgesGruppen and ICA (two of the four grocery retail chains in Norway). The agreement included cooperation on procurement and wholesale operations.

On February 13, 2014, the NCA issued a Statement of Objections notifying the parties that the agreement was in contravention of Section 10 of the Act, which prohibits anti-competitive agreements. The NCA's Statement of Objections is kept from public access, but it was stated in the NCA's press release that the reason for the prohibition was the concern that the parties had a high combined market share in Norway, and a strong position in local markets. The agreement would give the parties the opportunity to exploit their market power to the detriment of consumers. The agreement would also make it possible for NorgesGruppen to restrict competition between the parties as NorgesGruppen, to a large extent, would be able to determine ICA's purchasing terms. The NCA did not want to risk having the two parties coordinate their behavior in the market. However, on November 5, 2014, before the NCA reached a final decision, it received a

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notification stating that ICA had entered into an agreement with another competitor, Coop, whereby Coop was to purchase all shares in ICA. The concentration is currently under consideration by the NCA, and has led to the suspension of the NCA's assessment of the cooperation agreement between NorgesGruppen and ICA.

D. ABUSES OF DOMINANCE

The NCA did not adopt any decisions regarding abuse of dominance in 2014. The NCA has an ongoing investigation against Telenor (the incumbent and largest player in the Norwegian telecom sector) for alleged abuses of dominance in the Norwegian mobile market. Both the NCA and the ESA conducted dawn raids at Telenor's premises in December 2012. On March 26, 2014, the ESA stated that they had commenced formal antitrust proceedings against Telenor to investigate whether they may have infringed the competition rules in the EEA Agreement. The ESA is examining whether Telenor has charged prices that result in an illegal margin squeeze on its competitors in respect of the provision of retail mobile data services and of bundles of retail mobile telecommunications services. The ESA also intends to investigate whether clauses in Telenor’s retail agreements with customers for the supply of mobile telecommunications services give rise to market foreclosure concerns.

E. COURT DECISIONS

In 2013, the NCA issued a cartel decision, in its first major leniency case in Norway, in the asphalt sector with an all-time high fine. One company, NCC, was fined NOK 140 million (approximately EUR16.5 million) for colluding, by way of market sharing, price fixing and bid rigging and the exchange of other strategic information in connection with asphalt tendering for road construction projects in several counties during the period 2005 - 2008. The other cartel participant, Veidekke, was granted amnesty for a fine of NOK 220 million (approximately EUR 26 million), since it had applied for leniency and provided the NCA with information that led to the disclosure and proof of the collusion.

NCC appealed the NCA decision to the District Court of Oslo and claimed that the decision should be annulled. The proceedings were held in the beginning of 2014 and NCC argued that the individual in NCC responsible for colluding had not acted on behalf of the company and had exceeded his power of attorney. Further, NCC argued that the fine was too high. The court did not agree with NCC that the company was not responsible for the individual's action. The fine was however reduced significantly to NOK 40 million (approximately EUR 4.7 million). Both the NCA and NCC have appealed the court's judgment to the Court of Appeal.

Another prohibition decision of the NCA was overturned by the District Court of Follo in 2013. This was the NCA's decision, V2011-12

Ski Taxi BA/ Follo Taxisentral BA/ Ski Follo, concerning taxi services.\textsuperscript{14} The NCA found that competitors had restricted competition by submitting a joint tender for a public contract for delivering transportation services to a hospital's patients. The NCA's decision was overturned by the Court. The Court found that the parties could have submitted separate individual bids and that there was no illegal bid-rigging between competitors. The NCA appealed the court decision, and the appeal proceedings were held in January 2015. The judgment has not yet been delivered.

\textsuperscript{14} Ski Taxi BA/Follo Taxisentral BA/Ski Follo, issued on July 24 2011, Decision V2011-12, Judgment, \textit{available in Norwegian at \url{http://www.konkurransetilsynet.no/no/Vedtak-og-uttalelser/Vedtak-og-avgjørelser/Ski-Taxi-BA-Follo-Taxisentral-BA-og-Ski-Follo-Taxidrift-AS--ileggelse-av-overtredelsesgebyr-og-palegg-om-opphor/}}.
PORTUGAL

By João Paulo Teixeira de Matos of Garrigues LLP

A. LEGISLATIVE DEVELOPMENTS

For the first time since their creation in 2003, the Statutes of the Portuguese Competition Authority (“PCA”) have been revised, notably to strengthen the Authority's independence and increase the transparency of its activity. A few of the most relevant aspects of the new Statutes are briefly described below.

The regime on incompatibilities and impediments was significantly reinforced. As an example, the Statutes now establish that all the members of the PCA’s staff (not only the Board members but also the other workers) are precluded from holding, during the period of their functions in the PCA, any shareholdings or other interests in any undertaking or association of undertakings.

However, despite this and other measures to strengthen the independence of the PCA, the new Statutes have maintained, with some minor changes in wording, the possibility of an exceptional appeal to the Government of a merger prohibited by the PCA. In those circumstances, the Government may authorize a merger when the advantages to the national economy surpass the disadvantages to competition.

Reference should also be made to a most welcomed innovation of the new Statutes: prior to the approval of any regulation with external effects, the PCA must disclose the respective project for public discussion purposes for a period of not less than 30 days, so that any interested party may present commentaries and suggestions. Hence, a formerly non-mandatory best practice is now required by law, thus contributing to the transparency of the PCA’s activity.

B. MERGERS

On July 31, 2014, the PCA issued one of the few prohibition decisions since its creation in 2003. The anticipated concentration concerned the acquisition of joint control by Controlinveste Media – SGPS, S.A. ("Controlinveste"), NOS, SGPS, S.A. ("NOS") and Portugal Telecom,


4 On January 28, 2013, when the merger control filing took place, the entity that would acquire joint control was ZON Multimédia, Serviços de Telecomunicações e Multimédia – SGPS, S.A. (“Zon Multimédia”). However, on August 2013, this entity merged with Optimus, SGPS, S.A., another relevant Portuguese media and communications undertaking, giving rise to a new entity, ZON Optimus, SGPS, S.A. Later on, on June 2014, this later entity was renamed NOS, SGPS, S.A. Hence, although the entity changed its corporate structure and name during the proceedings, we will refer to the same
SGPS, S.A. ("PT") over Sport TV Portugal, S.A. ("Sport TV"), Sportinveste Multimédia, SGPS, S.A. e P.P.TV – Publicidade de Portugal e Televisão, S.A.

Although the concentration affected several markets in the electronic communications and media sector, for these purposes it is necessary to focus on the markets in which the PCA has identified the most relevant competition concerns: the national market for premium sports pay-TV channels and the national market for pay-TV in Portugal.

Sport TV is the leading provider of premium sports pay-TV channels in Portugal and until 2013 it was the sole provider. Recently, with the appearance of Benfica TV, Sport TV has been subject to some competitive restraints; however, due to its historic dominance and more extensive scope of contents broadcasted, it still remains the dominant player.

The demand in the premium sports pay-TV channels market is composed of players operating in the downstream market for pay-TV, which integrate premium sports pay-TV channels into their offerings to their clients. NOS and PT have extremely high joint market share in the national market for pay-TV, with other relevant players being Cabovisão and Vodafone.

In this market context, the PCA concluded that the merger would give rise to significant impediments to competition in terms of customer foreclosure, input foreclosure and coordinated effects.

Regarding customer foreclosure, the PCA concluded that, if NOS and PT, the two most relevant players in the downstream market of pay-TV, would acquire (with Controlinveste) joint control of Sport TV, they would have the capacity and the incentive to foreclose the market (or make market entry extremely difficult) for other providers of premium sports pay-TV channels, actual or potential competitors of Sport TV.

On the other hand, in what concerns input foreclosure, the PCA found that the merger was highly likely to make it very difficult for the competitors of NOS and PT, i.e., the other pay-TV operators, notably Cabovisão and Vodafone, to obtain the supply of premium sports pay-TV channels to include in their offerings to clients, since the main provider of such channels, Sport TV, would be under the joint control of PT and NOS (with Controlinveste).

Finally, the PCA also raised concerns regarding the competition effects of coordination because the concentration of the two most relevant players in the national market for pay-TV would hold similar control stakes in Sport TV, which provides one of the most relevant inputs for the market: premium sports pay-TV channels.

During the proceedings the parties offered several commitments in an effort to eliminate PCA’s competition concerns, which were considered by the PCA (after a market test) to be insufficient.

The merger control proceedings lasted for more than a year and a half, making this one of the longest merger control cases the PCA has dealt with. This was due to the number of interested third parties that opposed the merger (amongst many others, Cabovisão, Vodafone and Benfica TV) and the time taken to negotiate the commitments.
C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On June 26, 2014, the PCA fined the undertakings Farminveste 3 – Gestão de Participações, SGPS, Lda., Farminveste – Investimentos, Participações e Gestão, S.A. (“Farminveste”) and Associação Nacional de Farmácias (“ANF”) for implementing a merger without undertaking the required notification procedure before the PCA.\(^5\)

The decision concerns a concentration which occurred in 2008 by which ANF acquired control, through its subsidiary Farminveste, over Glintt, a company active in the information technology sector. The concentration was ultimately notified to the PCA in 2009, further to an *ex officio* procedure carried out by the PCA forcing the undertakings to do so, and was approved in May 2010.\(^6\)

Notwithstanding this approval, in January 2012, the PCA initiated an administrative offence procedure to investigate the parties’ conduct during the whole process, which resulted in a decision to impose a global fine in the amount of 149,278 Euros on the undertakings on December 28, 2012.\(^7\)

This decision was afterwards appealed by the parties and annulled by the court due to procedural irregularities in particular the violation of the parties’ defense rights. The court thus referred the case back to the PCA for the procedural irregularity to be rectified.

Later, on June 26, 2014 the PCA issued a new decision fining the undertakings. However, on this occasion a settlement procedure took place. This is one of the innovative aspects of the new Portuguese competition legal regime established by Law no. 19/2012, of May 8. During the investigation, the undertakings presented a settlement offer whereby they acknowledged responsibility for the infringement. The PCA accepted the settlement offer and reduced the fines to a global amount of 118,837 Euros.

Although this is not the first time a settlement decision was issued by the PCA,\(^8\) it was the first time a settlement decision was used within an administrative offence procedure related to the non-notification of a concentration. In fact, the PCA has, since its creation in 2003, on very few occasions applied fines to undertakings as a result of the failure to notify a concentration.

D. COURT DECISIONS

In the above mentioned merger case Ccent. 4/2013 – Controlinveste*ZON Optimus*PT/Sport TV*Sportinveste*PPTV – one of the factors that led to the competition concerns that justified PCA’s prohibition decision was the dominant position held by

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\(^8\) The first settlement decision adopted by the PCA’s was in case PRC 2011/01 (decision of July 18, 2013), concerning cartel practices in the national market for polyurethane foam, where fines were applied to Flex 2000 – Produtos Flexíveis S.A.; Flexipol – Espumas Sintéticas, S.A. e Eurospuma – Sociedade Industrial de Espumas Sintéticas, S.A. (the decision may be consulted in Portuguese at [http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisoes_da_AdC/Paginas/lista.aspx](http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisoes_da_AdC/Paginas/lista.aspx) - last consulted on February 27, 2015).
Sport TV in the national market for premium sports pay-tv channels.

It is therefore interesting to make reference to an antitrust decision of the PCA of 2013, now confirmed in court in 2014, in which Sport TV was fined precisely for the abuse of such dominant position.\footnote{PCA Press Release, available in English at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201408.aspx?_lst=1&Cat= 2014 (last consulted on February 27, 2015).}

Hence, on June 20, 2013, after an investigation had been initiated in 2010 further to a complaint presented by Cabovisão, the PCA announced its decision to fine Sport TV in the amount of 3,730,000 Euros for abuse of dominant position in the national market for premium sports pay-TV channels.

The PCA concluded that, between 2005 and 2011, Sport TV used its dominant position in the market for premium sports pay-TV channels to impose discriminatory contractual conditions, in particular in terms of price, in the distribution agreements executed with the different pay-TV operators for the broadcasting of the Sport TV television channels.

This abusive conduct was found not only to restrict competition in the market for premium sports pay-TV channels, where Sport TV has a dominant position, but also in the downstream pay-TV market, in which one of the pay-TV operators with which Sport TV has corporate links, ZON Multimédia (now NOS), was favored to the detriment of its competitors.

The PCA’s decision was appealed by the parties and on June 4, 2014, was upheld in court. The court maintained the PCA’s finding of an abuse of dominant position, although it did reduce the amount of the fine to 2.7 million Euros.
RUSSIA

By Vassily Rudomino, Ksenia Tarkhova, Roman Vedernikov and Alla Azmukhanova of Alrud

A. LEGISLATIVE DEVELOPMENTS

In 2014, the procedure for post-transaction notifications was abolished in order to decrease the administrative burden on the Federal Antimonopoly Service of the Russian Federation (the "FAS"). Under a new federal law,¹ as of January 30, 2014, Article 30 of the 2006 federal law "On Protection of Competition" (the "Competition Law") ² has become invalid. However, this amendment does not apply to specific intra-group transactions which may still be subject to post-transaction notification requirements under a special procedure.

In September 2014, the Government of the Russian Federation approved a draft law that significantly amended the Competition Law and referred it to the State Duma (lower house) of the Russian Parliament for consideration. These amendments are commonly called the "Fourth Antimonopoly Package."³

The Fourth Antimonopoly Package proposes to:

- expand the application of warnings for acts of state and municipal authorities in relation to unfair competition and other forms of abuse of dominant position;
- introduce a procedure of pre-transaction approval for the formation of state and municipal enterprises;
- abolish the registry of business entities having a market share over 35% for certain types of commodities;
- grant the Government of the Russian Federation the right to determine the rules of non-discriminatory access to commodities in highly-concentrated markets where there are violations of antitrust legislation;
- conclude joint venture agreements with pre-transaction approval using merger control rules;
- empower the FAS to revise decisions of FAS territorial offices and to give explanations regarding the practical application of antimonopoly legislation;

³ О внесении проекта федерального закона "О внесении изменений в Федеральный закон "О защите конкуренции""...[On the introduction of the draft federal law "On Amendments to the Federal Law
agreement between purchasers may also be recognized as a cartel;

- exclude the provision that an agency agreement may not be recognized to be a vertical agreement; and

- exclude possibility of recovering both turnover-based fines and illegally-received income as a result of violating antitrust legislation.

In order to become effective, the Fourth Antimonopoly Package must be approved in three readings by the State Duma, then sent for approval to the Federation Council, and finally signed by the President of the Russian Federation.

The FAS has also prepared certain amendments to the Competition Law regarding the entering into of joint venture agreements. Joint venture agreements concluded between competitors without the establishment of a legal entity will now require preliminary approval by the FAS (provided that the respective thresholds are met).

Other significant amendments were made in the sphere of companies of strategic importance. On November 4, 2014, the President of the Russian Federation, Vladimir Putin, signed an amendment to the federal law "On the Procedures for Foreign Investments in Companies of Strategic Importance for National Defense and Security" (the "Strategic Investments Law") that came into force on December 6, 2014. These amendments provide for specific exclusions from the application of the Strategic Investments Law in the cases of: (i) intra-group transactions between foreign investors and strategic companies where both the foreign investor and the strategic company are controlled by the same natural person or legal entity; and (ii) a foreign investor who is controlled by a constituent entity of the Russian Federation where the foreign investor has more than 75% of the voting shares (participatory interest) in strategic companies using subsoil plots of federal importance prior to the transaction being made. The Strategic Investments Law will apply where a foreign investor acquires rights of ownership, possession, or use of property that relates to fixed-production assets of strategic companies and where such value exceeds 25% of the total value of their assets as of the latest reporting date.

The recent amendments also define the term "agreement," include the obligation for foreign investors to notify the appropriate oversight body on completion of any transaction that was previously approved in accordance with the Strategic Investments Law, and exclude from the definition of "strategic activities" activities involving the use of agents of infectious diseases.

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(mainly by companies involved in food production). Moreover, where necessary, an applicant may apply to the competent authority to delay a pre-transaction approval decision.

It is also worth noting that after first reading by the State Duma, the draft bill on collective actions is now being revised. These revisions include amendments proposed by non-governmental organizations and the academic community which would increase the number of claimants necessary for filing a collective action from five to twenty and require that all claimants request the same remedy.

Overall, the introduction of such significant amendments demonstrates Russia's continuing progress in the field of antitrust law, but also highlights the need for further developments in order to keep up with current economic changes and unique market factors.

B. MERGERS

As a consequence of the changes in thresholds for the purpose of merger control enacted under the Second and Third


agreements where the parties have combined assets over 7 billion rubles (approximately €121 million or US$131 million) or combined revenues over 10 billion rubles (approximately €173 million or US$187 million) or if either party is already in the FAS's registry.

As indicated by the FAS in its 2014 report, one of the most important transactions it considered in 2013 was the merger between Omnicom Group Inc. (USA) and Publicis Groupe S.A. (France), which resulted in Omnicom acquiring the right to control the business activities of several Russian entities such as Optimum Media Buying Limited, Optimum Media Limited, and others.

Another notable transaction the FAS considered was the acquisition of biomedical company Life Technologies Corp. (India) by Thermo Fisher Scientific (USA). In that case, the FAS undertook an in-depth analysis of the markets where the parties operated, ultimately approving the merger despite its possible anticompetitive effects. This transaction was nominated as one of the Top 5 competition transactions of 2014 by the Global Competition Review.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In recent years, cartel detection and deterrence has been one of the FAS's biggest priorities. Consequently, a significant number of cartels have been discovered (the majority in socially-essential industries) and the parties have been penalized more than 9 billion rubles (approximately €156 million or US$168 million), with criminal charges being brought in some cases.

According to the FAS's published statistics, in 2013, 68.6% of its cases related to cartels. By comparison, only 44% of its 2012 cases were cartel-related. In 2013, the FAS prosecuted 24.5% more cartel violations than it did in 2012, though the number of administrative violations of Article 14.32 of the Administrative Code of the Russian Federation ("entering into an anticompetitive agreement") decreased from 1,537 to 1,231. However, the total amount of fines imposed on Code violators increased to 3.93 billion rubles (approximately €68 million or US$73 million).

One of the largest fines was imposed by the FAS in March 2014 on two cartel participants in the Norwegian fish market. CJSC Russian Fish Co. was fined more than 173.7 million rubles (approximately €3 million or US$3.25 million). The second participant of the cartel, "Russkoe More-Kaliningrad", LLC was fined more than 10.9 million rubles (approximately €189,000 or US$204,000).9

In another case, in October 2014, the Moscow Arbitration Court upheld the FAS's decision that an agreement about the importation of swai fish from Vietnam was anticompetitive.10 The FAS had established that Russian importers including CJSC Russian Fish Co., CJSC Atlantic-Pacific, and AMIFISH Ltd, among others, had concluded an anticompetitive agreement (a cartel) that resulted in price fixing for swai fish. Moreover, the FAS found that the Association of Production and Trading Enterprises of the Fish Market, a non-commercial organization, had coordinated this anticompetitive activity.

This case is unique in that it is one of the first examples of successful cooperation between the FAS and a foreign antimonopoly body. As a direct result of joint Russo-Vietnamese cooperation, the Vietnamese Ministry of Agriculture dismantled the administrative committee for swai fish exports to Russia, and Vietnamese producers are now able to sell their catches to buyers in Russia directly.

In terms of criminal penalties for cartel formation, it is only recently that Article 178 of the Criminal Code has been regularly used, although its effectiveness still hinges on the degree of cooperation between the FAS and law enforcement authorities. Between 1996 and 2013, 380 criminal cases were initiated under Article 178 and 60 parties were convicted of creating or participating in a cartel.

Most notable was the Novgorod District Court's May 14, 2014 ruling which will significantly impact the application of Article 178. In that case, the court found that the founder and director of "Novomost-53" LLC, Vyacheslav Samoilov, had formed a cartel agreement with "Transbalstroy" LLC and "SK Baltiysky Region" LLC and had forced them into refusing to participate in an auction for a government road and bridge building contract worth 21 million rubles (approximately €376,000 or US$401,000). Consequently, Novomost-53 won the tender.\footnote{ФАС России [FAS Russia], Вступил в силу приговор участнику картельного соглашения [Entered into force verdict party cartel agreement], Press Release, October 3, 2014. Available online at <http://www.fas.gov.ru/fas-news/fas-news_35790.html>.

Samoilov was found guilty of violating, \textit{inter alia}, Part 2 of Article 178 of the Criminal Code and was sentenced to three years and eight months in prison with four years' probation. The court also imposed a 300,000 ruble fine (approximately €7,100 or US$7,600) and prohibited him from engaging in specific activities for two-and-a-half years. Although the maximum penalty under Part 2 of Article 178 is seven years imprisonment, the court took into consideration Samoilov's admission of guilt and assistance to the investigation in determining his sentence.

A further fact worthy of note is that the FAS has continued to develop its leniency program. In 2013, it received 29 leniency applications, up from only 13 in 2012.

As the world's economy becomes more integrated, Russian markets are increasingly becoming of interest to tens of thousands of foreign legal business entities, some of which are attempting to operate their businesses in ways which contradict provisions of Russia's antimonopoly legislation. In this respect, the FAS will continue to protect the economic interests of the Russian Federation against predatory international cartels by enforcing domestic antimonopoly regulations.

In terms of international cooperation, it must be reiterated that Russia plays a vital role in the world economic system and, since 2012, is a member of the World Trade Organization. The FAS is also a member of the International Competition Network, the United Nations Conference on Trade and Development, and has chaired the Interstate Council on Antimonopoly, in addition to initiating semi-annual international competition conferences among the BRIC countries (ex. 2009 in Kazan, 2011 in Beijing and 2013 in New Delhi).

According to the Global Competition Review's 2013 efficiency rankings of competition authorities, the FAS ranks seventeenth in the world with a three-star rating, on par with the national competition authorities of Austria, the Czech Republic, Finland, Israel, Norway, Poland, Portugal, South Africa, Sweden and Switzerland,
and ahead of countries such as Belgium and Denmark.

As a means of strengthening international cooperation with foreign competition regulators, both on bilateral and multilateral bases, between 2009 and 2012 the FAS signed cooperation agreements with its counterparts in Austria, Hungary, Italy, Mexico, Serbia and Spain, as well as with the European Commission. Such agreements set out the bases of cooperation, including the effective and timely exchange of information. In 2013, existing cooperative relationships with China, Finland and South Korea were updated.

In order to increase the efficiency of investigating international cartels, the FAS proposed the creation of an International Anti-Cartel Convention and a special working group has been organized to draft its terms. Adoption of the Convention would establish a uniform approach for state authorities to deal with cartels, and would include "international" cartels as a specifically dangerous threat to national economies, all while providing a uniform basis for penalizing such behaviour. The Convention would also help define the basis of the relationships between various national authorities and provide clear guidelines for the exchange of information and for joint antimonopoly investigations. One such proposal is the creation of a supranational antimonopoly authority which would coordinate the Convention and seek to implement its provisions.

D. ABUSE OF DOMINANT POSITION

The FAS has become more transparent in publicizing cases of abuse of dominant position. In 2013, the FAS revealed 3,370 violations of Article 10 of the Competition Law (abuse of dominant position), up 10% from 2012.

For example, on April 28, 2014, the Seventh Commercial Court of Appeal upheld the decision of the Kemerovsky Region Office of the FAS which imposed a fine of more than 5 million rubles (approximately €90,000 or US$96,000) on "Russian Railways" OJSC ("RZD") for abuse of dominant position in the market of railway cargo transportation. RZD had forced its counterparty to cancel cargo dispatches and had imposed discriminatory conditions on its market counterparties.

Another example is that a large insurance company, "Rosgosstrakh" OJSC was found liable for abuse of its dominant position for imposing unprofitable contractual terms on the insurance market for automobile owners. The Tatarstan Republic Office of the FAS imposed a fine of more than 158 million rubles (approximately €2.8 million or US$3 million).

E. COURT DECISIONS

According to the FAS's report on the state of competition in Russia, in 2013, most of its decisions were upheld by the courts. There were approximately 2,500 appeals launched from the FAS's decisions and a further 2,000 appeals from its administrative punishments; only around 600 appeals of decisions and 550 appeals from punishments were granted. This trend has continued in 2014, as the courts have generally upheld the most significant decisions of lower
For example, on March 14, 2014, the Moscow Commercial Court confirmed the FAS's decision that "Novo Nordisk" LLC's due diligence business practices had not conformed with Russian antimonopoly legislation (the due diligence provisions included compliance with the American Foreign Corrupt Practices Act).  

Similarly, on August 19, 2014, the Federal Commercial Court of the Moscow Region confirmed the lower courts' findings that 26 fishing companies had engaged in cartel behavior with regard to the market for Alaskan Pollock, and upheld the aggregate fine of 120 million rubles (approximately €2.16 million or US$2.3 million).  

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This year was marked by the first decisions of the newly created super-regulator, the National Markets and Competition Commission ("CNMC"), which started its activity in October 2013 and which was met with certain skepticism about its antitrust enforcement capacity.

A. MERGERS

On April 3, 2014, Repsol, one of the main operators of gas stations and direct gas sales in Catalonia, notified the CNMC of its intention to acquire exclusive control over Petrocat, an oil company which at that time was owned 45% by Repsol, 45% by Cepsa and 10% by the Institut Català d’Energia. The fifth transitional provision of the Spanish Act 11/2013 limited the possibility of Repsol acquiring gas stations in regions where it already held a market share at the retail level of more than 30%. This was the case in Catalonia and Madrid. According to the CNMC, the market test showed that the operation would have a negative impact on competition as it would increase Repsol’s share in the market of direct sales of a type of diesel known as diesel C in certain areas of Catalonia, and would eliminate an important competitor. Consequently, Repsol secured clearance through the following commitments: (i) the sale of 23 gas stations; (ii) the commitment that operators other than Repsol would provide a minimum stock of petrol and diesel from gas stations managed by Petrocat for a fixed period of time; and (iii) the disinvestment of the gas station owned by Repsol and managed by Petrocat in Tagament (Barcelona).

On October 16, 2014, the CNMC cleared in the first phase, subject to conditions, the acquisition of exclusive control by the Spanish supermarket chain DIA over another supermarket chain (Grupo El Árbol), through the acquisition of all of the shares in the company. The Spanish Authority imposed an obligation on DIA to divest 7 of the 451 stores owned by El Árbol to reduce the horizontal overlap in those geographic areas where, post-transaction, DIA’s market shares would have been significant. The concentration between DIA and El Árbol represents one of the largest operations in the recent restructuring of the commercial sector in Spain.

On November 24, 2014, the CNMC cleared in the second phase the acquisition of Schibsted Classified Media Spain, S.L. by milanuncios.com, which are two portals dedicated to classified advertisements. Responding to concerns that the transaction would eliminate one of the main competitors, the conditions imposed by the CNMC basically consisted of the grant of an exclusive license to a third-party operator (Autoanuncios of the Vocento Group) for the commercial exploitation of online classified advertisements in the motor section of milanuncios.com.

1 Law 11/2013, of July 26 Measures to support entrepreneurs and stimulate growth and job creation.

2 REPSOL/PETROCAT, Case C/0550/14, CNMC Decision dated April 3, 2014.

3 DIA /GRUPO EL ÁRBOL, Case C/0600/14, CNMC Decision dated October 16, 2014.
B. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On January 2, 2014, the CNMC adopted a decision which imposed fines totaling over €3 million on Aeropuertos Españoles y Navegación Aérea ("AENA") and eleven car rental companies. In its decision, the CNMC found that there had been a single and continuous infringement in the exchange of commercially sensitive information between car rental companies, who were concession holders in a large number of Spanish public airports, with the necessary cooperation of AENA for more than 3 years (from April 1999 until September 2012). According to the decision, AENA shared monthly reports, containing invoicing details and the number of car rental contracts in 31 airports belonging to its network, with the car rental companies. This would have allowed the companies to have precise knowledge of their competitor's market shares, the number of contracts broken down and how the position of competitors developed over time. This would have significantly reduced strategic uncertainty. Finally, the CNMC concluded that AENA acted as a "necessary cooperator", a concept which is not expressly defined in the Spanish Competition Act 4 ("LDC"), in enabling the cooperation required for the infringements to take place.5

Also, on January 21, 2014, the CNMC adopted a decision in which it found that the State Postal and Telegraph Company ("Correos") had engaged in an abuse of a dominant position having prevented "alternative operators" from competing in the postal services’ division for large corporate customers. Additional Provision One of the Law on Postal Services ("the LSP")6 gave Correos the task of managing the postal service network for a period of fifteen years after it came into force. According to the CNMC, this meant that Correos became, de facto, a vertically integrated company with a clear dominant position in the wholesale market of access to the postal network for "alternative operators," and in the retail market for the provision of traditional postal services to the senders of mass mailings. The CNMC concluded that between 2010 and 2012, Correos had squeezed its competitors’ margins in the retail market by applying much higher average prices to "alternative operators" in the wholesale market compared to the average prices of the retail market, thus favoring Correos’ position in the retail market. As a result, the competitors had to incur losses in order to match or beat Correos’ prices in the market, which led to existing competitors being excluded and significant barriers to entry being introduced. The breach, defined as being very serious by the CNMC, resulted in a fine of €8,178,698.7

On July 8, 2014, the CNMC imposed a fine of €2.13 million on several fire extinguishing equipment manufacturers for operating a price-fixing and market-sharing cartel from 2010 to 2012. The investigation was initiated following a leniency application, which was submitted by one of the cartel participants in July 2012, and which gave rise to several dawn raids at the headquarters of the affected companies. According to the CNMC, the core cartel was formed by three of the companies, which then exerted pressure on the remaining three to join in. As a result, the amount of the fine imposed on the first three companies was increased, taking

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6 Law 43/2010, of December 30, on the universal postal service, the rights of users and the postal market.  
into account the aggravating circumstance of their role as leaders or instigators of the cartel.\(^8\)

On October 29, 2014, the CNMC also fined the mobile telecom operator Telefónica Móviles €25.7 million for anti-competitive practices. Since 2006, Telefónica Móviles had included so-called permanence commitments in contracts signed with SMEs, which created obligations for the customers of Telefónica for a period of 12, 18 or 24 months, and were "sweetened" with special rebates. Essentially, the CNMC found that these customers were penalized for switching operators, and the penalties became higher as the SME became closer to the end of its contract. In addition, permanence was automatically renewed. The CNMC determined that such commitments resulted in restrictive effects on competition because they disproportionately limited customers' ability to change operators. Furthermore, the CNMC also concluded that such practices substantially increased the subscriber acquisition costs of competitors and effectively excluded some of them from the market. As a result, the CNMC fined Telefónica €25.78 million, which was calculated by taking into account its market share in the SME segment, the scope and duration of the infringement and its effect on customers and competitors.\(^9\)

On November 6, 2014, thirteen paper and carton recovery companies and their industry association ("UDER") were fined €3.8 million for operating a cartel in Spain. The CNMC took the view that, since 2007, the companies had entered into market-sharing and price-fixing agreements and also shared resources and sensitive commercial information. These practices were acknowledged in documents signed by the members of UDER. As for the market of paper and carton waste recovery, the anticompetitive agreements focused on non-competition clauses among partners, market sharing and price fixing. And as for the covered paper and carton market, the agreements would have allowed the companies to jointly fix prices, share commercially sensitive information and agree on quantities of the supplied product.\(^10\)

The CNMC also imposed a €1.18 million fine on Endesa for abusing its dominant position in the electrical installations market, which was reserved for the operator between 2009 and 2012. The Authority decided that Endesa had abused its privileged position in the distribution networks by arbitrarily applying the industry standard in accordance with its own interest. The CNMC increased Endesa’s fine by 10%, since this was the second time that Endesa had been punished for abuse of a dominant position in the electrical installations market.\(^11\)

On October 27, 2014, the CNMC imposed a €4.73 million fine on 24 manufacturers of wooden pallets and the industry association, Calipal Spain. The companies formed a cartel to fix prices and commercial terms from November 2005 to November 2011. These companies also exchanged confidential and disaggregated information on pallet production figures from July 1998 to November 2011. The CNMC also identified Calipal as having had a key role in the creation, organization and operation of the cartel.\(^12\)

Finally, on November 14, 2014, the Council of the CNMC fined the Spanish Society of Authors

\(^8\) Equipos contra incendios, Case S/0445/12, CNMC Decision dated June 26, 2014.
\(^9\) Contratos de permanencia, Case S/0422/12, CNMC Decision dated October 29, 2014.
\(^10\) Recogida de papel, Case S/0430/12, CNMC Decision dated November 6, 2014.
\(^12\) Palés, Case S/0428/12, CNMC Decision dated September 22, 2014.
and Publishers ("SGAE") €3.1 million for abusing its dominant position in the management of public broadcasting and intellectual property rights of authors of musical works that were exploited in music concerts held in Spain. In particular, the SGAE’s conduct negatively affected concert promoters who had to pay much higher rates than those charged in other European countries. In 2012, the SGAE had already been fined €1.7 million for arbitrarily charging catering services, due to different prices being set at restaurants and facilities for the celebration of weddings, communions and baptisms.  

C. COURT DECISIONS

One of the major recent developments has been the setting of fines in competition law cases, especially in relation to cartels.

In 2014, the National Appeals Court (Audiencia Nacional or "AN") upheld, either completely or partially, several appeals brought by companies, who were sanctioned by the CNMC, based on a new doctrine regarding the calculation of the fines. In the AN’s view, the CNMC had wrongly applied the criteria for the quantification of the sanctions laid down in both the LDC and in the CNMC’s own Communication.

The AN offered a different interpretation of Article 63 of the LDC, and the maximum limits established therein, according to which the CNMC would be entitled to impose a fine of up to 1%, 5% or 10% of the total turnover of the infringing undertaking in the business year immediately preceding the one in which the fine is imposed, depending on whether the infringement in question was minor, serious or very serious, respectively. This interpretation is consistent with similar developments in other EU Member States (for example, Germany). The AN held that the legal maximum of 10%: (i) should be interpreted as an "upper limit of a range of

13 Conciertos SGAE, Case S/0460/13, CNMC Decision dated November 6, 2014.
The dispute has recently been resolved by a landmark judgment of the Spanish Supreme Court (*TS*), which was handed down on January 29, 2015,\(^\text{15}\) that partially overturned the AN’s interpretation of Article 63 of the LDC. Essentially, it confirmed that the 10% limit for fines is not a cap under Spanish law, but instead, is based on the higher ceiling of a possible range which is based on the company’s total turnover. The TS clarified, however, that such upper limit applies to the total turnover of the company.

The TS judgment, therefore, rejects the CNMC’s practice of calculating the applicable fine primarily based on the turnover generated during the infringement period with the products affected by the infringement and then capping – if necessary – the fine at 10%, which is also the interpretation under EU law. For that reason, the TS decision annuls the CNMC’s Notice on the method of setting fines,\(^\text{16}\) which was similar to the EU Notice,\(^\text{17}\) and refers to the fine-setting criteria laid down in Article 64 of the LDC (among other things, dimension and characteristics of the market affected by the infringement, market share of the infringing undertaking(s), duration of the infringement), specifying that these criteria should be applied in accordance with the proportionality principle. Ultimately, it left open the question of whether such additional guidance will have to be provided through legislative amendments or revised fining guidelines.

Other important judgments in 2014 are described below.

The AN, in its judgment of May 7, reduced the €900,000 fine imposed by the CNMC in 2011 on the Spanish cosmetic, toiletry and perfumery association (STANPA) for facilitating a cartel in the sector of professional hair care products. This cartel involved the regular exchange of very sensitive information, such as future prices and non-solicitation agreements. The cartel was allegedly active between 1989 and 2008, although STANPA only intervened beginning in 2003. Eight companies were considered members of the cartel and received fines ranging from €299,000 to €23 million. Of these companies, Henkel was granted immunity from any fine due to its leniency application. STANPA appealed the decision to the AN on the grounds that its alleged participation as “necessary cooperator” or “facilitator” in the cartel was not covered as possible offenders under the Spanish Competition Act. Any fine imposed on the basis of such a charge would be unconstitutional. The Court, nevertheless, concluded that as from 2003, STANPA received from and sent to each of the members of the cartel strategic individual information. In addition, STANPA convened and participated in the meetings of the cartel. The Court, therefore, held STANPA liable for the infringement;\(^\text{18}\) although, the Court accepted that STANPA’s involvement only took place from


\(^{16}\) Communication of the National Markets and Competition Commission on the quantification of sanctions arising from violations of Articles 1, 2 and 3 of the Spanish Competition Act 15/2007 of 3 July 2007 and Articles 81 and 82 of the European Community Treaty.


\(^{18}\) In line with the landmark EU judgment in AC Treuhand (T-27/10, AC Treuhand v Commission, ECLI:EU:T:2014:59), it seems clear that facilitators are susceptible of being fined for competition infringements.
2003 to 2008 and, therefore, the corresponding fine should not be fixed using the same parameters as for its members. Thus, the fine was considered disproportionate and reduced from €900,000 to €450,000.  

On December 10, the TS upheld an appeal brought by the Spanish Electricity Industry Association (UNESA) and declared an inspection, carried out by the now defunct National Competition Commission ("CNC") at the association’s headquarters in 2009, illegal. The TS annulled the inspection order for a dawn raid conducted by the CNC in November 2009 at the headquarters of UNESA as part of an investigation which resulted in a fine of €61 million being imposed on the association and companies in the sector. The aim of the investigation was to "verify the existence and extent of possible coordination within UNESA" without further specification. UNESA (of which Endesa, Iberdrola, Gas Natural Fenosa, E.ON and EDP Spain are members) appealed against this inspection on the basis, inter alia, that it was not sufficiently justified. While the AN rejected UNESA’s appeal, the TS allowed it. UNESA argued that the inspection had infringed Articles 18 and 24 of the Spanish Constitution concerning the right to inviolability of the home, the right to the secrecy of communications between lawyer and client and the right to privacy, together with the breaches of Article 40 of the LDC and Article 13 of the Competition Regulation, which regulates the conditions for the conduct of inspections.

The TS found that while the inspection order would not require detailed factual information about the scope of the inspection, it must have "sufficient specifications to indicate the object and purpose of the authorized investigation." More specifically, the Court detected flaws in the underlying reasoning of the CNC Director of Investigation’s order. The order must indicate "the object and purpose of the inspection, the research subjects, data, documents, operations, information and other elements that are subject to the inspection, the date on which the inspection is to be performed and its extent." In this case, the order "did not contain the minimally required specifications." Therefore, the TS annulled the inspection order; although, it did not comment on the impact of its decision on the documents that were seized in the course of this inspection.

Another judgment of the TS shows that the Spanish courts are prepared to allow a non-appellant cartel member to benefit from the appeals of others. This decision conflicts with other EU case law. The TS ruled that Mercadona was also entitled to reimbursement of a fine of €431,000, after successful appeals by other members of the alleged cartel against the level of their own fines.

On June 21, 2007, CNMC’s predecessor, the CNC, ruled that SOS CUÉTARA, S.A. ("Cuétara"), MERCADONA, S.A. ("Mercadona") and others had agreed on minimum sale prices for bottled olive oil, and imposed several fines on the alleged cartel members, including a fine of €431,000 on Mercadona.

Cuétara appealed against this decision, alleging an infringement of its right to have exculpating evidence heard to demonstrate that there had been no cartel agreement. On December 10, 2010, the TS annulled the fine imposed on Cuétara. Mercadona, however, did not appeal against the decision and did not

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appear in any of the other parties’ appeals, deciding instead to pay the fine. Once the TS had allowed Cuétara’s appeal, Mercadona sought to rely on this ruling and sought reimbursement of the fine. On June 2, 2014, the TS overruled the AN’s earlier refusal to accede to such request and found in favor of Mercadona, stating that the reasoning followed for Cuétara should apply to all undertakings “affected” by the administrative decision. Specifically, the TS recognized Mercadona’s right to be reimbursed for the full amount of the fine it had paid, holding that Mercadona had been part of the sale price agreement, and therefore, should be permitted to take advantage of the annulment of the underlying administrative decision. Thus, any affected company is lawfully entitled to request the enforcement of a judgment, regardless of whether it has been party to the proceedings.  

In addition to setting an important precedent for Spain, which may have consequences in addition to the annulment of cartel infringement decisions, it should be noted that this judgment did not follow (or even mention) the earlier case law of the General Court of the European Union and other EU Member States courts, including the UK’s High Court, in which it has been held that the successful appeal by one party against a fine imposed by a decision does not affect the position of those who have not appealed.

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24 Lindum Construction Co Ltd & Ors v The Office of Fair Trading, EWHC 1613 (Ch).
A. LEGISLATIVE DEVELOPMENTS

Two notable amendments were made to the Swedish Competition Act (2008:579) (“Act”), effective August 1, 2014.

Firstly, a possibility to “stop the clock” during merger control review was introduced. The Swedish Competition Authority (“SCA”) may use this possibility where the parties to a concentration do not comply with an injunction to supply information needed to assess the concentration. This applies both during the first and second phase review periods. The clock may also be stopped by the SCA at the request of a party.

Secondly, a “marker system” was introduced for companies that apply for leniency to escape administrative fines for breach of the rules prohibiting anticompetitive cooperation. The marker system means that an applicant that can provide basic information on the breach may receive additional time to gather further information during which it retains its “place in the queue”. Only the first company to provide necessary information to the SCA can receive full immunity. This amendment brings the Swedish system in line with the model program developed by the European Competition Network.

B. MERGERS

The most talked about merger case in 2014 was the merger between Sweden’s two leading property agent franchises, Swedbank Franchise (“Swedbank”) and Svensk Fastighetsförmedling (“SFS”). In its judgment, the Stockholm District Court granted a motion by the SCA to block the merger. The case is interesting on both procedural and substantive grounds: procedurally, as it involves an already completed merger; and substantively, as it involves an in-depth analysis of the application of competition law to franchises. The parties had (legally) closed the deal shortly after signing as the transaction did not meet the thresholds for mandatory notification. However, the parties did meet the thresholds under which the SCA may require the parties to file and the case came under the SCA’s review. Following second phase review, the SCA filed a motion with the Stockholm District Court to block the merger.

The court found that a number of factors taken together served to show that the franchisors exercised detailed, day-to-day level control over the local franchisee branches as well as

1 Swedish Competition Act (2008:579), Chapter 4, Section 16 a.
2 Id., Chapter 3, Section 12 and 14 a.
4 Stockholm District Court Case T 3629-14, judgment of December 16, 2014.
as the importance for local agencies to be part of a property chain. Therefore, it was relevant to analyze the impact of the merger on the various franchisees rather than simply on the market for “franchise concepts”, which the parties had argued for. In light of this analysis, the parties' combined market shares on local markets for property agent services would exceed 50% in over 74 local markets for property agent services, out of which around 30 areas would see combined shares of between 70% and 100%.

Moreover, as a result of the merger Swedbank would obtain a 50% share in the leading Swedish property search website, Hemnet. The court found that Hemnet had a near monopoly position on the market and was an unavoidable trading partner. The court was therefore concerned that Swedbank’s stake in the search website would enable it to change Hemnet’s business model and, for example, favor its own property agencies over competitors. Swedbank has appealed the decision to the Market Court and a judgment was expected by early April 2015.

The SCA also entered into second phase investigations in two other cases in 2014. Both transactions were ultimately unconditionally cleared. The first concerned telecom operator TeliaSonera’s acquisition of Zitius, QNetworks, QServices, QMarket, and Riksnet and created horizontal issues primarily relating to the provision of communications operator services. The second, Swedish dairy company Arla’s acquisition of cheese wholesaler Falbygdens Ost, raised both horizontal and vertical issues as both parties sell cheese to the food retail trade and food service sector, and Arla also delivers cheese to Falbygdens Ost for refining and reselling.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

Vertical restraints, which have historically not been an area of focus of the SCA, gained some attention during 2014. The SCA is investigating online travel agents Booking.com and Expedia in two separate cases concerning their use of so-called Most Favored Nation (“MFN”) or “price parity” clauses. The investigation runs in parallel with similar investigations in several other European countries. The clauses in question require hotels to offer to the online travel agent the same or lower prices for hotel rooms as what the hotels offer in other sales channels (including other online travel agents and the hotels’ own direct sales channels).

According to the preliminary assessment of the SCA, the clauses risk leading to an unlawful restriction of competition. A concern is that the clauses give the online travel agents an incentive to increase the commission they charge hotels, since they are assured in any event of being given the best possible room price by hotels. The MFN may also constitute a barrier to entry since an online travel agent cannot compete by offering a low commission in exchange for lower hotel room prices. Booking.com has offered to amend its contract terms to allow hotels to provide lower room prices to other online travel agents, but is seeking to maintain the restriction on hotels from offering lower prices through their own sales channels, e.g. hotels’ own websites.


Booking.com commitment was accepted by the SCA on April 15, 2015.\(^8\)

Another vertical case concerned resale price maintenance ("RPM") by online retailer 13:e Protein Import, which markets a broad range of health products.\(^9\) Following an anonymous tip that 13:e Protein Import had sent out a price list with a lowest price to be applied to certain protein powder products by its online distributors, the SCA launched an investigation. The SCA found that distributors had adjusted their prices and that the conduct constituted vertical price maintenance, a so-called hardcore restraint which is presumed to be covered by the prohibition of anticompetitive cooperation. However, the SCA decided to close the case for reasons relating to the authority's case priority policy considering the low market share (\(< 3\)%) of 13:e Protein Import on the market for protein powder products in Sweden.

A rather peculiar horizontal case was also opened and closed in October 2014. The case concerned the SCA's investigation into the Swedish Banker's Association's ("SBA") recommendation concerning the level of capital repayment of mortgages (amortization) that should be required for the banks' customers.\(^10\) The SCA found that if banks are limited in their ability to set individualized amortization requirements, their ability to compete against one another is reduced. Furthermore, branch-wide amortization conditions reduce the incentive for customers to switch bank and creates a lock-in effect. The SBA agreed to retract its recommendations and the investigation was closed. Interestingly, a month later, the Swedish financial regulator released its own amortization recommendations, remarkably similar to those of the SBA.\(^11\)

As for classic cartels, the SCA submitted summons applications with the Stockholm District Court to impose administrative fines in two cases. One concerns an agreement between moving companies not to compete for foreign moving contracts.\(^12\) The other concerns a bid rigging cartel in a procurement concerning data communications services.\(^13\) Both cases were pending before the court at the time of writing.\(^14\)

**D. ABUSE OF A DOMINANT POSITION**

Telecom operator Tele2 was the defendant in a case brought by telecom operator Verizon before the Stockholm District Court, concerning a claim for restitution and damages.\(^15\) This case represents an example of a direct private damages action based on an alleged abuse of dominance. The case concerned fees paid by Verizon to Tele2 for the provision of call termination in Tele2's network from 2001 to 2004. During this time, Tele2 also provided call termination for Swedish incumbent TeliaSonera. As a result of a regulatory dispute over the fees paid by TeliaSonera for the same service, Tele2's fees to TeliaSonera for an overlapping time period were ultimately decided by the administrative court in 2007. Following these court proceedings, Tele2 had to repay and credit

\[^{11}\] See: [http://www.swedishbankers.se/Sidor/LinkedPages/Banken%C3%B6reningen-vill-st%C3%A4rka-sin-amorteringsrekommendation.aspx](http://www.swedishbankers.se/Sidor/LinkedPages/Banken%C3%B6reningen-vill-st%C3%A4rka-sin-amorteringsrekommendation.aspx)


\[^{14}\] The SCA also conducted two dawn raids, which have (at least not yet) lead to any decisions. One concerned environment and waste sector (dnr 598/2014) and one concerned the transport sector (dnr 184/2014).

\[^{15}\] Stockholm District Court Case T 20621-10, judgment of February 7, 2014.
certain amounts to TeliaSonera, which allowed TeliaSonera to release a reservation in the accounts of SEK 389 million (approx. US $56.7 million). This in turn led Verizon to demand that Tele2 should retroactively adjust the fees paid by Verizon as well. When Tele2 refused, Verizon brought the case to court, alleging abuse of dominant position through (retroactive) price discrimination.

The court dismissed Verizon’s claim. While finding that the relevant market consisted of the market for call termination in Tele2’s network, where the operator had a 100% market share, the court found no abuse. Tele2 had originally offered equivalent prices. The retroactive price difference arose as a result of TeliaSonera’s decision to take legal action against Tele2 under the regulatory framework, an option which would have also been available to Verizon. Furthermore, the court concluded that the retroactive lump sum payment to TeliaSonera would not have led to a competitive disadvantage for Verizon. The court also dismissed the allegation of abuse by discrimination (short of a margin squeeze) in favour of Tele2’s own downstream (fixed line) operations.

Another interesting case, which started as an attempted merger, has since turned into a suspected abuse of dominance case. As reported in the merger section of this chapter last year, lock and security products company ASSA ventured to acquire rival Prokey, but abandoned the deal following the SCA’s application to the court to block the merger. As part of the merger proceedings, the SCA reviewed internal ASSA documents which led it to suspect potential abuse of dominance by ASSA. This would have taken the form of margin squeeze, conditional rebates and quantity rebates against locksmiths and installers.

As a result of these suspicions, the SCA raided the premises of ASSA and its subsidiary Copiax. Key word searches during the raids revealed documents that the SCA considered to indicate separate abuses against resellers and end customers. The SCA therefore requested permission from the Stockholm District Court to perform a broader search upon the material already seized. ASSA argued that the SCA had engaged in an unlawful fishing expedition by using search terms unrelated to the originally suspected infringement and by spending an unreasonably long time reviewing documents allegedly indicating other infringements.

Applying the principles from the EU General Court’s decision in the Deutsche Bahn case, the Stockholm District Court found that provided that the search terms applied appeared relevant for the purposes of the suspected infringement, the authority should be permitted to read the documents. A finding of information which indicates a separate infringement must in such cases be deemed to have been found “fortuitously”. In the court’s view, the second infringement was closely related to the first, and the use of broad search terms could be relevant. As such, the SCA had chosen its original search terms in good faith and the evidence of the separate infringement had been found fortuitously. ASSA appealed the decision to the Market Court and also requested that it ask for a preliminary ruling from the European Court of Justice. The request for a preliminary ruling was

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16 Stockholm District Court Case Å 842 – 14, decision of March 17, 2014.

17 Joined cases T-289/11, 290/11 and 521/11 Deutsche Bahn AG et al v Commission judgment of September 6, 2013. An appeal is currently pending before the ECJ (Case number C-583/13 P).
rejected by the Market Court. The decision on substance is still pending.

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A. LEGISLATIVE DEVELOPMENTS

Cooperation Agreement with the EU

On December 1, 2014, the Agreement between the European Union and the Swiss Confederation concerning Cooperation on the Application of their Competition Laws ("Cooperation Agreement") entered into force.¹ It is the first so-called second generation EU agreement with third countries allowing for an exchange of information between the Swiss and the EU competition authorities without the consent of the undertakings concerned.

The Cooperation Agreement contains the following provisions (which are traditionally included in competition cooperation agreements):

- The duty for the European Commission and the Swiss Competition Commission ("ComCo") to mutually notify each other about enforcement activities which may affect “important interests” of the other party (Article 3).

- The possibility for the competition authorities to coordinate their enforcement activities when dealing with related matters (Article 4).

- A set of rules on how to avoid conflicts of interest when applying competition law (so-called negative comity, Article 5) and on the possibility of each competition authority requesting that the other carry out enforcement activities with regard to anticompetitive activities in the latter’s territory which affect important interests of the requesting party (so-called positive comity, Article 6).

- The right to exchange information with the consent of the undertaking which provided the information (Article 7(3)).

The core element of the Cooperation Agreement is, however, the previously mentioned right of the authorities to exchange information gathered during investigations without the undertakings’ consent if the following conditions are fulfilled (Article 7(4)):

- A formal request from either agency;

- The requested information is already in the possession of the other agency;

- Both agencies investigate the “same or related conduct or transaction”;

- The requested information has not been obtained under leniency or settlement procedures (unless the undertaking which provided the information has given its consent for the information to be shared); and

- The use of the requested information is not prohibited under any procedural rights or privileges applicable to the enforcement activities (e.g. the right

¹ Available in English at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.347.01.0003.01.ENG; see also the section on the Cooperation Agreement in the chapter on Switzerland in last year’s ABA Int’l Section Year in Review (2013).
against self-incrimination and the legal professional privilege).

The use of transmitted information is subject to certain limitations. The receiving authority can, in particular, only use the information in an investigation regarding the same or related conduct and for the purpose defined in the information request. Moreover, the transmitted information may not be used in criminal proceedings against individuals. Finally, the information exchanged must be kept confidential, although the Cooperation Agreement provides for several exceptions to the principle of confidentiality. In particular, the European Commission may under certain conditions disclose information received to the competition authorities of the member states of the EU.

Revision of the Cartel Act

The proposal for a revision of the Swiss Federal Act on Cartels and Other Restraints of Competition ("the Cartel Act") has been commented on in previous editions of this publication. In 2013 and 2014, the proposal for a revision has been discussed in the two chambers of the Parliament (Council of States and the National Council). While the Council of States supported the revision, the National Council twice refused to enter into a debate on the matter which resulted in its failure. However, in the months following the dismissal, new proposals for a revision of the Cartel Act, each with a rather limited scope, have been brought forward by several members of the Parliament. Most attempts for a revision of the Cartel Act must be seen in the political context of Switzerland being perceived as a place where prices are higher than in its neighbouring countries and where politicians and different stakeholders are trying to take action against this “island of high prices.”

B. MERGERS

The year 2014 has been marked by several mergers in the media sector. However, ComCo has not prohibited (or only approved under conditions or obligations) any mergers in 2014, and only conducted preliminary assessments (phase I investigations). However, on November 25, 2014, ComCo announced that it will carry out an in-depth assessment (phase II investigation) of the planned merger of the Swiss search engines local.ch (a subsidiary of Swisscom, Switzerland's telecommunication incumbent) and search.ch (a subsidiary of Tamedia, one of Switzerland's leading media companies) into a joint venture of Swisscom and Tamedia since, according to ComCo, the preliminary assessment indicated that the merger could create or strengthen a dominant position.

2 For an English translation of the Cartel Act see http://www.admin.ch/ch/e/rs/c251.html.
5 It is likely that some of the latest merger control decisions of 2014 had not yet been published at the time when this article was written.
C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On June 30, 2014, ComCo terminated its investigation against Jura Elektroapparate AG ("Jura"), a manufacturer and distributor of home appliances mainly known for its coffee machines. ComCo examined, *inter alia*, the commitments of distributors, contained in selective distribution agreements with Jura, to refrain from selling Jura coffee machines online. Since ComCo came to the conclusion that such commitments did not fall within any of the categories of violations in the Cartel Act which are subject to direct sanctions, and since Jura and ComCo had entered into an amicable settlement under which Jura – consistent with a previous ComCo decision of 11 July 2011 – agreed to allow its distributors to sell the products online, ComCo left open the question whether the prohibition of online sales constituted an unlawful agreement under the Cartel Act.

In a decision dated November 17, 2014, ComCo held that five resellers of door mountings had met on an annual basis between 2002 and 2007 to fix minimum margins for the resale of the products of one specific manufacturer. One additional company had only participated in the 2007 meeting. ComCo concluded that such agreement constituted an illegal price-fixing arrangement amongst competitors and imposed sanctions on the resellers of 185,500 Swiss francs in total, despite there being no proof that the meetings had an impact on the prices. The investigation was initiated by a leniency application, which resulted in the applicant company being granted total immunity. The door hardware decision is in contradiction with ComCo's previous practice on the application of Article 5 of the Cartel Act. According to Article 5(1) an agreement is only unlawful (i) if it significantly restricts competition and is not justified on grounds of economic efficiency, or (ii) if it eliminates effective competition. According to ComCo's earlier case law, an agreement was only prohibited if it had at least some actual negative impact on competition. ComCo's new interpretation of Article 5 Cartel Act is based on two judgments of the Swiss Federal Administrative Court ("FAC") of December 19, 2013 regarding the prohibition of parallel imports of toothpaste into Switzerland provided under a contract between the Swiss manufacturer Gaba International AG and its Austrian distributor Gebro Pharma GmbH. Gaba and Gebro had appealed against ComCo's decision of 2009. In these proceedings, the FAC had decided that the mere existence of vertical agreements for which the Cartel Act contains a presumption of elimination of effective competition (i.e. vertical agreements on fixed or minimum prices or on an allocation of territories) includes an irrefutable presumption ("a maiore ad minus") that the


agreement leads to a significant restriction of competition within the meaning of Article 5(1), regardless of its actual effects on competition.\textsuperscript{10} In its decision of November 17, 2014, ComCo referred to \textit{Gaba} and \textit{Gebro} and concluded that such \textit{per se} significant restrictions of competition based on the nature of an agreement must apply more so to horizontal agreements for which the Cartel Act presumes an elimination of effective competition (i.e. horizontal agreements on prices, quantities and the allocation of territories or customers) and that such agreements are prohibited regardless of their actual effect on competition. ComCo’s change of approach to Article 5 is even more surprising, not only because an appeal is pending against the \textit{Gaba} and \textit{Gebro} judgments before the Swiss Federal Court ("\textit{FC}")\textsuperscript{11}, but also since the FAC contradicts these decisions in its judgments of September 23, 2014 in a case relating to mountings for windows and window doors (see Section E below).

On December 1, 2014, ComCo closed its investigation into the credit card market by approving an amicable settlement between its secretariat (the investigating authority) and all parties involved, including both companies that issue credit cards (issuers) as well as companies that promote the acceptance of credit cards to merchants and conclude contracts with them (acquirers).\textsuperscript{11} The settlement provides for a reduction of the average domestic interchange fee from 0.95 % to 0.44 % for transactions made with MasterCard and Visa credit cards. The interchange fee is the fee paid by the acquirer to the issuer when a Swiss credit card is used for payment at a Swiss merchant. The fee is passed on to the merchants by including it in their service charge. In its decision, which was its third decision on the matter, ComCo maintained that interchange fees result from an agreement which affects competition as the fees are determined and applied collectively by all companies involved. In its previous decisions, ComCo had held that multilateral interchange fees could be justified if their level was based on certain network cost elements which also benefitted the merchants. However, in its decision of December 1, 2014, ComCo now refers to the so-called “merchant indifference test.” According to this test, a multilateral interchange fee agreement is justified only if the fee is reduced to a level where it makes no difference for merchants whether a payment is made by cash or by credit card. The “merchant indifference test” has also been applied by the European Commission in its latest decision on the matter, and forms the basis for the proposed regulation of interchange fees in the EU.\textsuperscript{12} According to the amicable settlement with the Secretariat of ComCo, the reduction of the interchange fees will take place in two stages: first to 0.7 % as of August 1, 2015, and then 0.44 % as of August 1, 2017. In addition to what is foreseen in the current draft for an EU regulation, the Swiss regime provides for a maximum average amount and not a cap. Fluctuations of the maximum interchange fee levels in the EU regulation will be reflected \textit{mutatis mutandis} in Switzerland. Furthermore,

\textsuperscript{10} Decisions B-506/2010 and B-463/2010 of the FAC of December 19, 2013, available in German at \url{http://www.bvger.ch/publiws/pub/search.jsf} (search terms “Gaba Gebro”); see also Section E below.


\textsuperscript{12} For information on the current status of the proposed regulation in the EU see \url{http://ec.europa.eu/competition/sectors/financial_services/payments_en.html}.
the amicable settlement provides that the non-discrimination rule (prohibition of price differentiation based on means of payment) may be introduced again.

On March 31, 2014, following a preliminary investigation initiated in September 2013, 
ComCo, as well as many other competition authorities and market regulators world-wide, opened an investigation against the Swiss banks UBS, Credit Suisse, Zürcher Kantonalbank and Bank Julius Baer, as well as the foreign financial institutions JP Morgan Chase, Citigroup, Barclays Bank und Royal Bank of Scotland, regarding alleged manipulations of foreign exchange rates. Suspected violations include the exchange of confidential information, a coordination of price levels with regard to transactions with other market participants, coordinated actions to influence the WM/Reuters Fix as well as the coordination of the purchase and selling of currencies in relation to certain counterparties.

Furthermore, in July 2014, ComCo opened an investigation against several companies which are active in the field of leasing and financing of cars. According to ComCo’s press release of July 15, 2014, the Secretariat of ComCo (investigating authority) is in possession of information which indicates that these companies have exchanged information on leasing rates and the financing of automobiles, such as interest rates, contract terms, commissions to be paid to resellers and other expenses which could have resulted in price fixing agreements.

D. ABUSE OF DOMINANT POSITION

On July 29, 2014, ComCo imposed a fine of 1.88 million Swiss francs on the Schweizerische Depeschenagentur (“SDA”), the Swiss news agency, for abuse of its dominant position. Between the end of 2008 and the beginning of 2010, SDA had granted exclusivity rebates to certain media companies on the condition that those companies exclusively use SDA’s basic news service. This meant that the companies did not subscribe to the service provided by SDA’s competitor, AP Switzerland. According to ComCo, such behaviour amounted to an abuse of SDA’s dominant position in the market since it hindered AP Switzerland competing with SDA, and also affected competition between SDA’s media customers on the downstream market due to the selectivity of the rebates. ComCo and SDA concluded an amicable settlement under which SDA agreed not to conclude exclusivity sourcing agreements with its customers in the future. In addition, SDA agreed to implement a transparent and cost-based rebate scheme and to grant all media companies in Switzerland non-discriminatory access to its services in order to ensure that competition on the downstream media and advertising market is not distorted.

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On July 14, 2014, ComCo terminated its investigation against ETA SA Manufacture Horlogère Suisse (“ETA”), a subsidiary of the Swatch Group. The subject of this investigation were unilateral price increases and changes of purchasing conditions for mechanical watch movements which ETA had implemented in 2009. ComCo came to the conclusion that there were not sufficient indications that ETA’s conduct was discriminatory, especially since both the price increases as well as the changes of purchasing conditions applied equally to all clients, and since ComCo had approved the gradual reduction of supply of mechanical watch movements under an amicable settlement of October 21, 2013.\footnote{Press Release, ComCo, WEKO stellt Verfahren gegen ETA ein (31 July 2014), available in German, French and Italian at https://www.news.admin.ch/message/index.html?lang=de\&msg-id=53861.}

\section*{E. COURT DECISIONS}

On September 23, 2014, the FAC annulled a decision of ComCo of 2010 in which ComCo had fined several companies for allegedly having coordinated price increases for window and window door mountings in 2006.\footnote{Decisions B-8399/2010, B-8404/2010 and B-8430/2010 of the FAC of September 23, 2014, available in German at http://www.bvger.ch/publiws/pub/search.jsf (search term “Fenstertürbeschläge”).} The FAC held that there was insufficient proof for either the existence of an agreement among the parties or, even if such existence is presumed, the fact that such an agreement had a significantly restrictive effect on competition. In particular, according to the FAC, it was not clear whether the announcement of the price increases was the result of a meeting amongst the parties in 2006 or of an earlier agreement on price increases amongst the manufacturers at EU level which included the enforcement of the agreement in Switzerland. The agreement at EU level had itself led to an investigation by the EU Commission, and resulted in a fine.\footnote{Decision of the European Commission of March 28, 2012, provisional version of the decision in German and summary of decision in English available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39452.} The decision of the FAC is of significance for the application of Article 5 of the Cartel Act. As mentioned above in Section C, an agreement is only unlawful (i) if it significantly restricts competition and is not justified on grounds of economic efficiency or (ii) if it eliminates effective competition. Article 5 further contains a rebuttable presumption that certain “hard-core” horizontal (Article 5(3)) and vertical agreements (Article 5(4)) lead to an elimination of effective competition. Contrary to its decisions in \textit{Gaba} and \textit{Gebro} (see Section C above), the FAC confirmed what had been, prior to \textit{Gaba} and \textit{Gebro}, the generally accepted interpretation of Article 5 that, regardless of the nature of an agreement, a certain conduct is, in view of the effects based approach of Swiss competition law, only inadmissible if the authority can prove that the conduct did in fact lead to a significant restriction of competition. Both the \textit{Gaba} and \textit{Gebro} decisions as well as two of the three window and window door mountings decisions of the FAC are currently pending before the Federal Supreme Court, Switzerland’s final court of appeal.
UKRAINE

By Timur Bondaryev of Arzinger

A. LEGISLATIVE DEVELOPMENTS

In 2014, Ukraine introduced several laws which are important in light of further harmonization of national competition legislation to EU standards, principles and approaches. In this context, Chapter 10 "Competition" of the European Union - Ukraine Association Agreement (the "Agreement") is noteworthy. This Chapter obliges Ukraine, inter alia, to ensure the effective application of laws to counter: (1) agreements and concerted practices between undertakings, which have the purpose or effect of impeding, restricting, distorting or substantially lessening competition; (2) the abuse by one or more undertakings of a dominant position in the territory of either Party; and (3) concentrations between undertakings, which result in monopolization or a substantial restriction of competition in the market in the territory of either Party.

Ukraine must ensure that breaching undertakings have the right to be heard and to present evidence before sanctions are applied. The powers of courts or other independent judicial institutions include the right to determine, or, at the undertaking’s request, the right to review the sanctions or obligations applied by the Antimonopoly Committee of Ukraine (the "AMCU").

Based on the foregoing, the prior steps should consider: (1) the adoption of methodology for fine setting and calculation; and (2) working out and providing for the open access to the guidelines on principles applied to assess horizontal mergers. Many of the requirements related to state aid and public procurement enforcement are set out in the Agreement, which, needs to be introduced into the national legislation. The majority of the commitments related to state aid and public procurement must be enacted over a three-year period.

As it is committed to fulfilling its obligations, Ukraine has already adopted the Law of Ukraine "On State Aid to Business Entities", dated July 1, 2014 ("Law on State Aid") and Law of Ukraine "On Public Procurement" dated April 10, 2014 ("Law on Public Procurement"). Provisions of the Law on State Aid mainly follow the provisions of the EU legislation relating to the granting of state aid in the various sectors of economy. The application of the regulation shall play a decisive role in ensuring equal competitive conditions in the market, establishing a workable monitoring system regarding the aid provided by the State or territorial communities.

In autumn 2014, all draft antitrust laws that were drafted prior to the signing of the Agreement were withdrawn from the Parliament of Ukraine. Now, the AMCU is expected to begin

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4 For example: [On amendment of the Law On Protection of Economic Competition re perpetuation of evidence within the AMCU investigations] (No. 2955, Draft Law, issued April 20, 2013), available at
its systematic work to fulfill Ukraine's competition obligations under the Agreement. Practitioners and market players expect to be involved in a public discussion of the draft laws and other initiatives around the AMCU activity.

Meanwhile, professional organizations have demonstrated an intention to expedite the implementation of requirements under the Agreement, and have already drafted amendments to Ukraine’s "On Protection on Economic Competition" (the "Competition Law"). For example, the Competition Committee of Ukrainian Bar Association has drafted "On Amendment of the Law of Protection of Economic Competition regarding simplified procedure of consideration of merger applications." The proposed draft envisages the introduction of a short procedure for merger clearance, which will take 25 days. Currently, the procedure takes 45 days. The short procedure applies when a combined market share of all merging parties does not exceed 10 per cent or one of the undertakings does not participate in the relevant market in Ukraine and the market share of other party does not exceed 15 per cent. The proposed amendments partially duplicate the provisions of the Commission Implementing Regulation No 1269/2013 of 5 December 2013 in regard to short merger clearance procedure. At the same time, the draft law does not cover significant issues such as pre-merger consultation procedures.

B. MERGERS

Based on available information, the AMCU did not block any transactions in 2014. In late 2013, one of the most remarkable approved transactions was one between a local chain of DIY markets Epicenter and Novaya Liniya. This merger resulted in Epicenter's monopoly in the market, allowing it the possibility to use its market power to dictate terms on the market. Its market share is estimated as 86% of DIY market. The transaction was approved without remedies.

The Competition Law requires clearing both local and foreign-to-foreign transactions, subject to meeting notification thresholds which remain very low (EUR 12 million in global sales or assets, and EUR 1 million for each of at least two merging parties, and EUR 1 million in Ukraine for at least one merging party). Thus, the AMCU consistently applied a very formal approach in determining the need to obtain merger clearances.

Taking into consideration uncertain economic situations, domestic transactions decreased significantly in 2014. In this regard, the AMCU carefully and proactively monitored the transactions that were carried out by non-resident companies and had no direct effect on the Ukrainian market, but, at the same time, were caught by thresholds. The AMCU publicly reminded the companies of the need to legalize their relations of control that had arisen as a result of the merger.


result of merger without AMCU’s clearance. The authority monitored the media, such as online news sources about foreign-to-foreign transactions, on an ongoing basis in 2014. Based on the relevant results of this monitoring, the AMCU sent notices to the companies explaining the Competition Law’s requirements on prior merger clearances. At the same time, the authority clearly stated that in order to determine the amount of the fine, it would take into account a number of factors, including the voluntary application for a clearance for an already closed transaction and the payment of the appropriate fee; cooperation in the ongoing proceedings; and the recognition of a violation. Based on publicly available information, the AMCU adheres to the mentioned approach, and average fine amounts range from several thousand to several hundred thousand UAH. The broad range in fines means that merging parties are uncertain about potential liability. Determination of the basis on which fines are calculated (local or group-wide) remains at the discretion of the AMCU.

With respect to the recent practice of applications’ review, the AMCU has begun to focus its attention on the details of transactions financing, despite the fact that there were no changes in legal background. In addition, under the application review procedure, the Ukrainian authority often requests information related to the merging parties’ prior compliance with Ukrainian antitrust laws.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2014 bid rigging remained the most common anticompetitive concerted practice prosecuted by the watchdog. Amendments to the Law on Public Procurement prohibit companies that bid-rig from participating in public procurement for three years. This provision ensures fair competition in public procurements, and is expected to become an effective warning to all companies looking to participate in procurements.

The AMCU did not issue any multimillion dollar fines in 2014 (though it did in 2013). For instance, two suppliers of hardware and software solutions and equipment were fined for UAH 1 million (approximately USD$85,000 or 4.5% of its revenue) and UAH 200,000 (approximately USD$85,000 or 9% of its revenue), respectively, for bid rigging for the procurement of computer equipment held by a major Ukrainian gas company. One of these suppliers increased the cost of goods by nearly three times by raising the margin and procuring the goods through an intermediary (instead of the distributor under the agreement). This had the effect of the misapplication of more than UAH 98 million (approximately USD$8.3 million) in public funds.10

In 2014, the AMCU continued its high-profile investigation in the retail market that began in 2012. According to the AMCU, the retailer chains’ anticompetitive concerted actions consisted of imposing unreasonable requirements on manufacturers and suppliers, which therefore raised consumer prices. In particular, certain retail chains set unjustified payment delays (varying from 30 to 120 days); established unreasonable additional services (up to 35 different services); and set a one-sided penalty system, which put on suppliers all risks related to the deterioration of goods, low sales, and logistics. The AMCU also claims that 18 food retailers coordinated their behavior with the help

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of the market research company, AC Nielsen. The AMCU therefore alleges that the retail chains received the results of price monitoring for consumer goods that were presented in competitors' sales chains. Using this information, the retail chains formed their pricing policies. Possible fines may be up to 10% of annual turnover of food retailers (up to approximately UAH 20 billion).

In late 2014, the AMCU voiced its intent to apply symbolic fines and to impose behavioral measures on large retail chains in order to establish new rules for the retail market. The investigation triggered market players with professional organizations to initiate active work on developing a code of conduct for suppliers and retailers.11

D. BID-RIGGING

The AMCU proceeded with a consideration of cases on bid rigging. The authority fined two companies operating in wholesale of fuel for a total of UAH 340,000 (approximately USD $30,000) for bid rigging for the procurement of petroleum bitumen for public funds. The authority also fined two companies UAH 400,000 (approximately USD $34,000) and 1,000 (approximately USD $85,000) for bid rigging in the tender held by a branch of a state aviation plant.

It also fined two companies UAH 400,000 and 1,000, respectively, for bid rigging in the tender held by a branch of a state aviation plant.12

E. ABUSE OF DOMINANCE

In 2014, the AMCU instituted proceedings in more than 2,000 abuse of monopoly (dominance) cases. The highest penalties were issued against monopolists in the markets of electricity supply, regional markets for local telephone services, and regional retail markets of gasoline and motor fuel. For example, the AMCU imposed a fine of UAH 50 million (approximately USD $4.3 million as of the date of the decision) on a Ukrainian utility company for abuse of monopoly (dominance) for putting additional obligations on consumers to enable grid connection.13

The AMCU fined another Ukrainian energy company UAH 400,000 (approximately USD $31,000 as of the date of the decision) for abuse of monopoly (dominance) in the market of issuance of technical conditions. When determining the amount of the fine, the AMCU took into account that the company recognized the violation and took measures to eliminate its consequences.14

Finally, a telecommunications monopolist was fined UAH 400,000 (approximately USD $30,900 as of the date of the decision) for unreasonably switching over 2 million subscribers from tariffs based on hourly rates to cumulative ones that resulted in an increase in subscription fees.15

The AMCU continues to counter abuses by monopolist companies on regional markets that set unreasonable prices for motor fuel (compressed natural gas) and apply various fuel


retail prices to gas stations all over the network in the regions in which they hold monopoly.

F. COURT PRACTICE

In 2014, the main focus in court practice was on unfair competition cases, particularly the dissemination of misleading information. The Supreme Economic Court of Ukraine (the "SECU") decided such a case in December of 2014. One of the largest producers of dairy products, "Lactalis-Ukraine", was alleged to have mislead consumers by placing the designation "Tvorog" (which, in Ukrainian and Russian means "lactic cheese") on the product package under the brand name "President". The AMCU found that according to the information placed on the other (back) side of the packaging, the product does not, in fact, contain sour milk cheese, but consists of fermented milk product.\(^{16}\)

The AMCU filed the company UAH 10 million (approximately USD$1.25 million as of the date of the decision). The court of first instance accepted the claim of the company in full, but the court of appeal reversed the court decision. The company appealed to the SECU, which reinstated the decision of the court of first instance, and ruled in favour of the company. In so doing, the SECU formed important conclusions for court practice development.

In particular, the court noted that the AMCU did not bring evidence that the company had failed to adhere to requirements for product labeling. In addition, the decision demonstrates that the results of the AMCU’s consumer survey should establish how consumers perceive the information on the package of the product and how the package design influences consumers. For the first time in Ukrainian court practice, the SECU successfully applied a "reasonable consumer" standard in consideration of unfair competition cases. In the "Lactalis-Ukraine" case, the court stated that there was no reason to agree with the AMCU’s conclusion that consumers choose a product based on the information from one side of a packaging only.

Another important appeal was a decision of the SECU involving PJS "Galychyna,"\(^{17}\) one of the major dairy companies. The territorial subdivision of the AMCU found that the company misled consumers by placing a products trademark "From the pure Carpathians" on a package of milk products, when only 20% of unpasteurized milk for further milk processing originated in the ecologically clean area of the Carpathians. The rest came from other regions of Ukraine. Notwithstanding that a word combination "From the pure Carpathians" was a registered trademark, the court uphold the AMCU's decision. The court stated that even though a registered trademark secures the rights to labelling of the product, it does not entitle a company to disseminate misleading information and does not negate rights of other persons to obtain true information about foodstuffs, in particular, true information about the origin of raw materials.

The SECU also ruled on the appeal of four leading companies in the retail market for petroleum products, which were accused of anticompetitive "parallel" behavior prohibited by para 3 of Article 6 of the Competition Law. The territorial subdivision of the AMCU found that companies concurrently adjusted their retail gasoline prices at their gas-filling stations in regional market, although the objective reasons for similar actions in the market were absent.\(^{18}\)

Considering the abovementioned transitional period associated with the process of implementing EU standards and taking into


\(^{17}\) See http://reyestr.court.gov.ua/Review/39057383.

account the absence of methodology for fine setting, the AMCU will remain one of the most independent regulators with large discretion. In this regard, to avoid multimillion dollar fines, companies should take preventative measures such as adopting and introducing antitrust compliance programs.
A. LEGISLATIVE DEVELOPMENTS

2014 heralded a significant change to the institutional structure of the UK competition law regime, with the creation of a new, single competition authority, the Competition and Markets Authority (“CMA”). The CMA fully took over on April 1, 2014, replacing the Office of Fair Trading (“OFT”) and the Competition Commission (“CC”).

The Enterprise and Regulatory Reform Act 2013 (“ERRA”), which created the CMA, also introduced changes to the UK antitrust, mergers and markets regimes. In particular, the CMA has a new power to compel individuals to answer questions in Competition Act 1998 (“CA”) investigations and may impose new civil penalties on businesses and individuals for failing to comply with investigations.

Further, the dishonesty requirement has been removed from the UK criminal cartel offence, which is intended to make it easier to bring criminal prosecutions against individuals. That said, a new exemption and new defences were introduced as well.

The UK’s merger notification regime remains voluntary. However, the CMA now has enhanced powers to impose hold-separate undertakings and businesses which fail to comply risk significant penalties of up to 5 per cent of worldwide turnover.

New statutory time limits have been introduced for market studies. There is also a new CMA power to conduct investigations into practices across multiple markets.

Further, in January 2014, a bill was introduced to Parliament that is intended to make a number of significant changes to private competition litigation in the UK. In particular, the bill proposes the creation of opt-in as well as opt-out collective actions for competition law claims on behalf of both consumers and businesses in the specialist UK Competition Appeal Tribunal (“CAT”). The proposed opt-out collective action will enable consumers and businesses to seek redress for anti-competitive behaviour via a representative body in respect of an entire class of affected consumer (other than those who expressly choose to opt out). The changes would also give the CAT increased jurisdiction to hear stand-alone competition damages actions and to grant injunctions. The new provisions are expected to enter into force in October 2015.

The UK’s Financial Conduct Authority (“FCA”) and Payment Systems Regulator (“PSR”) will also each obtain concurrent competition law powers on April 1, 2015. The FCA will obtain powers relating to financial services to enforce the prohibitions in the CA on anti-competitive behaviour and to carry out market studies and make market investigation

2 Id.
references to the CMA under the Enterprise Act 2002. The PSR (which was created in April 2014) already has concurrent powers relating to market investigations and will obtain concurrent CA powers in relation to participation in payment systems. As with the other concurrent UK regulators (except for Monitor, the UK healthcare regulator), the FCA and PSR will be required to consider using their CA powers before using their licence enforcement powers.

B. MERGERS

In 2014, there were eighty phase 1 merger decisions taken, slightly up from the number in 2013 (73). Undertakings in lieu of reference were accepted at phase 1 in only one case.4

The de minimis exception was used to clear three mergers, where the CMA considered that the markets concerned were not of sufficient importance to justify a detailed investigation.

Four mergers were referred for a more detailed phase 2 review in 2014. In one case, the parties subsequently abandoned the merger following the use of a new procedural right of the merging parties to suspend the phase 2 review for up to up to 3 weeks to consider whether to proceed with the merger proposal. In that case, which concerned the budget gym sector, unusually, the CMA raised concerns that the merger might affect both actual and potential competition based on the parties’ expansion plans.5

A final report was issued in five phase 2 merger investigations in 2014. All were cleared unconditionally except for one. In April, following a phase 2 inquiry into the acquisition by Breedon Aggregates of assets from Aggregate Industries UK, the CMA identified a substantial lessening of competition and required the divestment of two plants (one producing asphalt and one ready-mix concrete) and imposed a price control remedy.6

In terms of phase 2 clearances the (then) CC formally cleared, by a majority, the anticipated acquisition by Ericsson of Creative Broadcast Services ("Red Bee Media") in March. One member of the phase 2 inquiry panel issued a dissenting opinion, expressing concerns that the merger may cause a deterioration in market structure. Also, in March, the (then) CC cleared the completed joint venture between Tradebe Environmental Services and SITA UK regarding healthcare risk waste services.7

In August, the CMA relied on the failing firm defence to clear the merger of Alliance Medical and IBA Molecular at phase 2.8 Absent the merger, the CMA concluded that the IBA business would have exited the market.

Also in August, the CMA cleared Omnicell/MTS’s proposed acquisition of

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SurgiChem at phase 2 in relation to adherence packaging.  

In addition, in June, following the remittal of the case by the CAT, the CMA confirmed an earlier decision barring Eurotunnel from operating its MyFerryLink service from Dover.  

The CMA concluded that it has jurisdiction over Eurotunnel’s acquisition of 3 ferries and related assets, which it believes meets the legal definition of an ‘enterprise’ under the Enterprise Act 2002. That CMA decision was upheld in a subsequent appeal to the CAT, but is further being appealed to the English Court of Appeal.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March, the (then) OFT fined Hamsard 3149 (Hamsard), £387,856 for cartel conduct.  

The OFT found that Hamsard and the Lloyds Pharmacy group had agreed to share the market for the supply of prescription medicines to care homes in England.

The (then) OFT also issued a CA decision in March in relation to pricing restrictions regarding the online sale of mobility scooters.  

found that agreements between Pride Mobility Products and eight of its UK online retailers prevented the retailers from advertising online below Pride's recommended retail price, in breach of Chapter 1, CA.

As regards the criminal cartel offence, the CMA is continuing its investigation into suspected criminal cartel conduct in respect of the supply in the UK of galvanised steel tanks for water storage. So far, three men have been charged with dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks. One individual pleaded guilty in January 2014. The trial is listed to take place in June 2015. As above, following the introduction of ERA in April 2014, the UK competition authorities no longer need to show dishonesty in order to establish the criminal cartel offence. However, the new test only applies to conduct which takes place after April 1, 2014, and the water tank prosecutions are taking place under the old UK ‘dishonesty’ provisions.

There were also developments in the area of market investigations, which concern entire business sectors as opposed to the behaviour of individual companies.

In June, the CMA announced that it would be conducting a full phase 2 sector investigation into the GB energy market. The reference to the CMA came from Ofgem, the UK’s energy regulator. The root and branch investigation, which covers both the retail and wholesale sectors, will consider whether any features of this


market prevent, restrict or distort competition and, if so, what action might be taken to remedy them. The CMA is required to publish its final report by December 25, 2015.

In November 2014, the CMA launched a phase 2 in-depth market investigation into the UK personal current account and SME retail banking sectors, following concerns about the effectiveness of competition in these areas.\(^\text{14}\) The CMA is working closely with the FCA in this regard. The CMA is required to publish its final report by May 5, 2016.

Three market investigations were completed in 2014:

(a) In January, the aggregates market investigation completed. The (then) CC found an adverse effect on competition in the GB sectors for cement and granulated blast furnace slag and is seeking certain divestment and behavioural remedies from certain large cement producers. Appeals have been launched in the CAT against the CC’s final decision.

(b) In April, the CMA reported on the private healthcare market investigation finding structural features giving rise to an adverse effect on competition. The CMA ordered certain divestment and behavioural remedies. Aspects of the CMA’s final decision were appealed and one of the CMA’s findings has been quashed and remitted to the CMA. Other aspects remain under appeal.

(c) In September, the CMA announced measures to increase competition in the car insurance market and reduce the cost of premiums for drivers.\(^\text{15}\)

D. ABUSES OF A DOMINANT POSITION

In June, the CMA accepted binding commitments from Certas Energy UK ("Certas") and DCC that aim to improve competition in the road fuels market in the Western Isles of Scotland.\(^\text{16}\) The CMA raised concerns that Certas may have abused a dominant position in relation to the supply of road fuels to filling stations in this particular location. The commitments end contracts that required many filling stations on the islands to buy fuels exclusively from Certas for 5 years, and improve access to certain marine terminals.

In September, the CMA accepted binding commitments from epyx Limited ("Epyx").\(^\text{17}\) These address concerns that Epyx may have abused its dominant position in the market for the supply of service, maintenance and repair platforms in the UK. The commitments remove certain provisions from Epyx’s contracts with fleet companies and vehicle repairers that were


believed to have hindered the emergence of rival systems.

E. COURT DECISIONS

In April, the UK Supreme Court handed down its judgment in Deutsche Bahn v Morgan Crucible, clarifying the rules on limitation periods and the effect of successful appeals on non-appealing cartelists. In relation to time limits for bringing follow-on damages actions under English law, the UK Supreme Court ruled that a European Commission decision establishing an infringement constitutes a series of individual decisions addressed to its addressees. Further, the only relevant decision establishing infringement in relation to a non-appealing addressee is the original Commission decision (even if another addressee successfully appeals against it).

Also in April, in Akzo Nobel NV, the UK Court of Appeal ruled that a UK merger prohibition can be enforced against a business even though it has no physical presence in the UK.

In September the CAT heard the first ever judicial review of a UK commitments decision in the Hotel Online Booking case. The CAT quashed the (then) OFT’s decision and remitted the matter back to the CMA.

In October, the High Court issued a key ruling regarding the application of the limitation rules in competition damages actions in Arcadia Group v Visa. The High Court concluded that, provided sufficient public information is available to plead a cause of action, time will start running for limitation purposes. The Court concluded that “the trigger for the running of time for limitation purposes is not the discovery of every potentially relevant fact in the broadest sense.” The action was brought in the context of a damages action by retailers against various Visa entities.

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2014 saw the Competition Bureau of Canada ("the Bureau"), Canada’s federal antitrust enforcement agency, achieve remedies on consent in several mergers, including structural and behavioural remedies that concerned both horizontal and vertical effects. As concerns criminal developments, the Bureau achieved guilty pleas in several ongoing international and domestic cartel investigations, including investigations into automobile parts, ocean freight and government procurement. The Bureau also discontinued its investigation into LIBOR. In 2014, the Bureau achieved a settlement in an abuse of dominance case that provided for the payment of substantial administrative monetary penalties. Developments in litigation in 2014 included a court decision that found an evidentiary rule of Canadian competition law to be unconstitutional in criminal cases and an appellate decision that rejected the proposition that abuse of dominance cannot be committed by a trade association against its members.

A. LEGISLATIVE DEVELOPMENTS

While there were no significant legislative amendments passed in 2014, the government of Canada did introduce a controversial amendment to the Competition Act ("the Act") that would permit the Bureau to investigate and report on, but not challenge, “price gaps” between products or a class of products sold in Canada and the United States. The proposed amendments would also change the affiliation rules in the Act to treat partnerships, sole proprietorships and trusts in a similar manner to corporations, and, as such address long-standing inconsistencies in the way the Act treats different forms of business associations. 

Additionally, the Bureau released new written guidance detailing its approach to communications during the course of its inquiries, to price maintenance and to intellectual property:

- The new Bulletin: Communication during Inquiries, describes the Bureau's approach to communications with parties to a proposed transaction or inquiry, industry participants and the public;

- The new Enforcement Guidelines: Price Maintenance (Section 76 of the Competition Act) describe the Bureau’s approach to the enforcement of resale price maintenance in the wake of the

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1 Competition Act, R.S.C. 1985, c. C-34.


3 Ibid., ss. 2, 6-19


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2009 decriminalization of the conduct, and the Bureau’s failed challenge to MasterCard and Visa’s rules prohibiting merchants from charging additional fees for or declining to accept certain cards; and

- The new Intellectual Property Enforcement Guidelines represent a minor update from the last version, released in 2000, with changes largely reflecting legislative amendments over the past 14 years. It is expected that the Bureau will tackle more contemporary intellectual property issues, such as reverse payments and standard-essential patents (“SEPs”), in a future phase of consideration.

B. MERGERS

In 2014, the Bureau was active in seeking both structural and behavioural remedies in merger transactions, notwithstanding its traditional preference for the former. Among the most substantial transactions reviewed in 2014 was the CAD $12.4 billion acquisition of Shoppers Drug Mart, Canada’s largest drugstore chain, by Loblaw, Canada’s largest grocery chain, which was approved subject to the divestiture of 18 stores and nine grocery store pharmacies in specific geographic areas. Also, and significantly, the consent agreement restricts Loblaw’s ability to apply its existing vendor programs to Shoppers suppliers for a five year period. These existing Loblaw programs can result in suppliers paying compensation to Loblaw in order for it to achieve a specific profit margin, where the compensation is based on the flyer prices of competing retailers.

The Bureau also required behavioural commitments in the GardaWorld/G4S transaction, although no consent agreement was entered into. Divestitures of stores and business lines were required in connection in the Agrium/Viterra transaction, and 34 of 74 of the newspapers acquired in the Transcontinental Media/Quebecor Media transaction were required to be divested.

The Bureau cleared Burger King’s CAD $12.5 billion acquisition of Canadian doughnut and fast

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food chain Tim Horton’s without remedies, citing effective remaining competition and low barriers to entry in the fast food sector.\textsuperscript{14}

Although below the threshold for pre-merger notification, the Bureau obtained remedies from Bell Aliant regarding its acquisition of telecommunications provider Ontera.\textsuperscript{15} When considered alongside the Bureau’s challenge to the Tervita/Complete transaction (see section E below), this transaction signals the Bureau’s continued interest in smaller and non-notifiable transactions.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Although the Bureau began 2014 by announcing that it was discontinuing its investigation into LIBOR,\textsuperscript{16} it had an active year in cartel enforcement, advancing charges and/or achieving settlements in both international and domestic cartel investigations. The Bureau’s investigation into automobile parts yielded a CAD $4.5 million fine against Japanese bearings manufacturer NSK\textsuperscript{17} and a CAD $4.7 million fine against Panasonic.\textsuperscript{18} Two corporations and two individuals involved in the ocean freight industry pleaded guilty to price fixing charges and were fined approximately CAD $1.7 million.\textsuperscript{19}

The ongoing investigation into the Quebec construction industry led to bid-rigging charges being laid against an individual and a company.\textsuperscript{20} Charges were also laid against a company and six individuals for alleged involvement in a bid-rigging scheme regarding the provision of IT services to the Government of Canada.\textsuperscript{21}

D. ABUSES OF DOMINANCE

The Bureau discontinued two investigations into abuse of dominance, one against Canadian National Rail Company regarding its rail pricing strategy for lumber shipments in Western Canada\textsuperscript{22} and one against drug manufacturer

\begin{itemize}
\item \textsuperscript{15} Position Statement, Can. Competition Bureau, Competition Bureau Statement Regarding the Proposed Acquisition of Ontera by Bell Aliant (Oct. 1, 2014), \texttt{available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03823.html}.
\item \textsuperscript{17} Press Release, Can. Competition Bureau, Japanese Bearings Manufacturer Fined $4.5 Million (Jan. 30, 2014), \texttt{available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03652.html}.
\item \textsuperscript{21} Press Release, Can. Competition Bureau, Criminal Charges Laid Against a Company and Six Individuals Involved in Bid-Rigging Scheme (May 2, 2014), \texttt{available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03734.html}.
\end{itemize}
Alcon Canada for alleged product switching. The Bureau also settled its abuse of dominance challenge against Reliance Comfort and Direct Energy regarding their water heater return policies that allegedly prevented consumer switching. In addition to behavioural commitments, Reliance Comfort agreed to pay an administrative monetary penalty ("AMP") of CAD $5 million and CAD $500,000 towards the Bureau’s investigation costs. The CAD $5 million penalty is significant because it signals that a cessation of abuse of dominance conduct may not be sufficient, alone, to settle a challenge by the Bureau and that a significant penalty will be sought in order to settle on consent. Indeed, CAD $5 million represents 50% of the maximum penalty applicable for a first instance of abuse of dominance.

Several settlements with publishers were also reached in the Bureau’s investigation into eBook MFN pricing restrictions. Although eBook retailer Kobo is in the process of challenging those settlements in the Competition Tribunal ("the Tribunal"), Canada’s specialized economic court that has jurisdiction over civil reviewable conduct. Although not a party to any of the settlements, as an affected party, Kobo was provided notice of the consent agreement and sought to challenge it on the basis that its terms could not be the subject of an order by the Tribunal. Although not determinative of Kobo’s challenge, Crampton C.J. of the Tribunal found that such a challenge considers only a limited inquiry – akin to a jurisdictional challenge – and that the Tribunal could not consider evidence of the existence of the underlying conduct.

The Bureau also applied to the Federal Court seeking documents from major suppliers regarding its investigation into alleged restrictive trade practices by Loblaw, which investigation was referred to by the Bureau in early 2014 in its press release regarding its approval of Loblaw’s acquisition of Shoppers Drug Mart.

E. COURT DECISIONS

In February 2014, the Federal Court of Appeal overturned a Tribunal decision that dismissed the Bureau’s challenge to the Toronto Real Estate Board’s restrictions on access to the Toronto Multiple Listing Service and sent the case back to the Tribunal for reconsideration on

25 Ibid.
28 Competition Act, R.S.C. 1985, c. C-34, s. 106(2).
the merits.\textsuperscript{32} This case is significant because it addresses whether an industry association can potentially engage in anticompetitive behaviour for the purposes of the abuse of dominance provisions.

In March 2014, the Supreme Court of Canada heard arguments in the \textit{Tervita} appeal,\textsuperscript{33} the first litigated merger case since 2005, which concerns a non-notifiable transaction that was successfully challenged by the Bureau before two lower levels of court. The decision was ultimately released in early 2015 and overturned the decisions of the Tribunal and the Federal Court of Appeal, permitting the merger to proceed without remedy. The Supreme Court of Canada found that the Bureau had not quantified quantifiable anticompetitive effects in a manner that would permit them to be weighed against the limited efficiencies advanced by Tervita, as required by the Act’s efficiencies defence.\textsuperscript{34}

A class action concerning alleged price fixing for polyether polyol products was certified in March 2014.\textsuperscript{35} Like many antitrust class actions in Canada, this one had been on hold for a significant period of time, in this case for two years, pending the outcome of the Supreme Court of Canada’s “Trilogy,” which ultimately decided that indirect purchasers have a cause of action in Canada.\textsuperscript{36}

In November, the Ontario Superior Court of Justice declared subsection 69(2) of the Act, which creates a reverse evidentiary onus on an accused or party in certain circumstances, to be unconstitutional in criminal proceedings. Subsection 69(2) provides that in any proceeding under the Act before the Tribunal or a court, there are presumptions that acts of agents are deemed to have been carried out with the authority of the principal and that a record in the possession of a party is proof that the party had knowledge of its contents, that anything recorded in the record as having been done was done, and that a the record’s apparent author did in fact author the record.\textsuperscript{37} In response to a challenge by the accused, Warkentin J. concluded that this provision was contrary to the presumption of innocence guaranteed by the \textit{Charter of Rights and Freedoms}\textsuperscript{38} and, as such, was of no force and effect in criminal proceedings. However, Warkentin J. also expressly held that her decision did not prevent the use of the provision in a civil proceeding before the Tribunal.\textsuperscript{39}

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\textsuperscript{32} Commissioner of Competition v. Toronto Real Estate Board, 2014 FCA 29.
\textsuperscript{33} Tervia Corporation v. Commissioner of Competition, SCC Docket 35314.
\textsuperscript{34} Tervita Corporation v. Commissioner of Competition, 2015 SCC 3.
\textsuperscript{35} Crosslink Technology Inc. v. BASF Canada, 2014 ONSC 1682
\textsuperscript{37} Competition Act, R.S.C. 1985 c. C-34, s. 69(2).
\textsuperscript{38} Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 7 & 11(d).
\textsuperscript{39} R. v. Durward, 2014 ONSC 4194.
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MEXICO

By Gerardo Calderon-Villegas of Baker & McKenzie Abogados, SC

A. LEGISLATIVE DEVELOPMENTS

A new competition law came into force in July, strengthening the Federal Economic Competition Commission’s ("Cofece") powers, and introducing new powers and novel legal concepts, some of which are controversial.

The law contemplates: (i) strengthened dawn raid powers (allowing access to any place, storage or electronic device, or other source of evidence and compelling explanations regarding any document or information obtained during the raid) and coercive measures (Cofece may order the arrest of individuals for obstructing an investigation); (ii) decisions to initiate an investigation will no longer be published in the Federal Official Gazette; and (iii) Cofece will have powers to file a claim or complaint regarding presumed criminal conduct in antitrust matters, with no need to wait until a final resolution is issued by the Plenary in the administrative stage.

New offenses have been created: (i) the exchange of information between competitors, when resulting in, or having the purpose of, price fixing, allocation of markets, restricting output or rigging bids, has been incorporated as an independent cartel violation; and (ii) companies with a dominant position may not restrict or grant discriminatory access to "essential inputs" or engage in conduct resulting in a margin squeeze. Additionally, Cofece will have authority to order measures to eliminate "barriers to free competition", to conduct studies to look for market power, and to order divestitures.

For mergers: (i) filing thresholds were modified so that only annual sales originating in Mexico or assets in the Mexican territory are taken into consideration; (ii) mergers cannot be completed until clearance is obtained, making Mexico’s a suspensory regime; (iii) the time for assessing mergers increased from thirty-five to sixty business days (plus an additional forty days in complex cases); and (iv) Cofece is obliged to inform the parties of any possible risks to competition that may result from a transaction, in order for the parties to submit remedies or conditions proposals.1

B. MERGERS

Cofece resolved over eighty-five concentrations, all of which were authorized (four with conditions). Significant authorizations included: (i) the acquisition of Merck’s consumer care business by Bayer; (ii) the acquisition of Farmacias Ahumada by Alliance Boots; and (iii) the clearance of the alliance between Toyota and Mazda to jointly manufacture a new compact car.2

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1 Decreto por el que se expide la Ley Federal de Competencia Económica y se reforman y adicionan diversos artículos del Código Penal Federal [Decree on the Federal Antitrust Law amending and supplementing the Federal Penal Code], Diario Oficial de la Federación [DO], 23 de mayo de 2014 (Mex.).

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Cofece initiated six investigations for cartel conduct in: (i) healing materials; (ii) airport ground transportation; (iii) cranes and dragging services in Guerrero; (iv) maritime transportation in Quintana Roo; (v) music rights licenses; and (vi) latex products. As of December 31, there were fourteen ongoing investigations.

Furthermore, Cofece sanctioned diverse real estate agents (companies and individuals) for a total amount of approximately US$4 million for price fixing of commissions. Cofece sanctioned five appliance companies for approximately US$14.7 million for price fixing in the market for hermetic compressors.

D. ABUSE OF DOMINANCE

Cofece initiated only one new investigation for abuse of dominance conduct, in the market for air gases. Specific conduct being investigated includes tying agreements, exclusivity, and raising of rivals’ costs. As of December 31, there were eight ongoing abuse of dominance investigations.

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4 Note that as of July 7, 2014 Cofece no longer publishes decisions to initiate investigations and therefore additional investigations might have been initiated.


A. LEGISLATIVE DEVELOPMENTS

The House Judiciary Committee approved a bill to amend the Clayton and Federal Trade Commission Acts, which would align the standards and processes for Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) review and litigation of proposed mergers and acquisitions. Under the current system, some industries’ mergers and acquisitions are reviewed by the FTC and others by the DOJ. If the merger or acquisition is challenged by the DOJ, any proceedings are brought in federal court under the Clayton Act; however, if the merger or acquisition is challenged by the FTC, proceedings are through administrative adjudication under the FTC Act.

If the bill becomes law, the FTC would adjudicate contested mergers in federal court under the Clayton Act’s standards, rather than its Part III administrative review. The bill would subject final judgments in FTC merger cases to judicial scrutiny to ensure that the agency’s decrees are in the public interest and, additionally, would unify the agencies’ preliminary injunction standards. The Senate has not yet addressed the proposed bill.

B. MERGERS

Three companies—Embarcadero Technologies, Flakeboard America Ltd., and Louisiana-Pacific Corp.—abandoned proposed mergers after the DOJ expressed concern about the transactions’ likely anticompetitive effects. In addition to abandoning its proposed merger, seven

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2 Id.
Flakeboard America Ltd. agreed to disgorge $1.15 million in profits and pay a civil penalty of $3.8 million based on its unlawful pre-merger coordination, following the announcement of the proposed acquisition.\(^7\)

The DOJ also litigated a rare post-acquisition merger suit, challenging the legality of Bazaarvoice Inc.’s acquisition of its main rival, PowerReviews. In January 2013, the DOJ filed a civil antitrust suit against Bazaarvoice, the leading provider of online reviews and ratings platforms, alleging that Bazaarvoice’s acquisition of PowerReviews in June 2012 had eliminated the company’s only significant rival.\(^8\) On January 8, 2014, following a three-week trial, Judge William H. Orrick of the U.S. District Court for the Northern District of California concluded that the acquisition of PowerReviews violated Section 7 of the Clayton Act. In April 2014, the DOJ and Bazaarvoice agreed that as a remedy for this antitrust violation, Bazaarvoice would divest all assets of PowerReviews. The agreement also provided that Bazaarvoice would take additional measures to restore competition in the market, including providing services to allow the purchaser of PowerReviews to build its customer base and waiving trade-secret restrictions for employees hired by the purchaser.

**C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

In 2014, the DOJ Antitrust Division continued its investigation and prosecution of individuals and companies for their participation in conspiracies involving (i) the manipulation of the London Interbank Offered Rate (LIBOR), (ii) price fixing of automobile parts, (iii) bid rigging and fraud at municipal foreclosures, and (iv) bid rigging and price fixing of marine hose. In particular, the DOJ continued to secure large criminal fines from its LIBOR and auto parts investigations. For its manipulation of submissions for LIBOR, Lloyds Banking Group agreed to pay an $86 million criminal fine in July 2014.\(^9\) In 2014, five individuals were criminally charged by the Justice Department for their roles in manipulating LIBOR and two have pleaded guilty.\(^10\)

For their roles in a conspiracy to fix prices and rig bids for automotive parts, ten Japanese companies agreed to plead guilty in 2014 and, in combination, paid nearly $628 million in criminal fines.\(^11\) In total, the DOJ has charged forty-eight individuals to date in the auto parts conspiracy and thirty-two have pleaded guilty.\(^12\) The DOJ

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\(^10\) See Press Release, U.S. Dept of Justice, Former Mitsuba Executive Agrees to Plead Guilty to Bid Rigging and Price Fixing on Automotive Parts Installed in U.S. Cars (Dec. 1, 2014),
also prosecuted defendants in California, Georgia, and New Jersey for their roles in rigging bids at municipal foreclosure and tax lien auctions. In 2014, a total of 51 individuals pleaded guilty for bid rigging and fraud at public real estate foreclosure auctions in Northern California alone.

In other cartel news, the DOJ secured the first litigated extradition on an antitrust charge for a former executive of a rubber hose manufacturer who pleaded guilty to a conspiracy to rig bids, fix prices, and allocate market shares of marine hose sold in the United States.

D. MONOPOLIZATION

The DOJ tried a case against American Express, alleging that the company’s “anti-steering” rules violate antitrust law. American Express’s anti-steering rules prohibit merchants from offering discounts and other incentives to customers to encourage them to use other credit cards, such as MasterCard and Visa, which charge merchants less to process payments than American Express. During the seven-week trial in the U.S. District Court for the Eastern District of New York, AmEx and the DOJ hotly disputed numerous issues, including the relevant market, the effects on competition, and American Express’s market power.

In February 2015, the District Court held that American Express’s conduct violated Section 1 of the Sherman Act. The District Court concluded that the relevant market was the market for general purpose credit and charge card network services, rejecting both American Express’s arguments that the market for debit cards should be included for purposes of the analysis and the government’s contention that a separate market existed specifically for travel and entertainment-related purchases. First, as to indirect evidence, the Court determined that American Express’s 26.4% share of the relevant market was compelling evidence of market power and that market share alone would likely not have been sufficient to sustain the government’s claims, had American Express not possessed a “highly insistent or loyal cardholder base” that “effectively prevents merchants from dropping American Express.” The Court also held that the government had proved harm to competition based on its direct evidence from American Express, other credit card companies, and merchants that American Express’s restrictions in fact prevented price competition between credit card companies by “render[ing] merchant demand for [credit card] network services less responsive to changes in the price charged for those services.” The Court further held that the


18 Id. at *129–33.

19 Id. at *195.
government had proven that American Express’s contractual agreements with merchants had prevented providers of lower-cost services from entering the market.

The District Court reserved a decision on the appropriate remedy for a later date, and has not yet issued a decision as to remedy.

E. COURTS DECISIONS

On November 26, 2014, the Seventh Circuit Court of Appeals affirmed dismissal of the vast majority of Motorola’s claims after rehearing Motorola Mobility LLC v. AU Optronics Corp. The issue on appeal was whether AUO’s sales of LCD panels to Motorola’s foreign subsidiaries that were then incorporated into phones and shipped to other countries, including the United States, were excluded from the reach of the Sherman Act because the conduct did not have a “direct” effect on U.S. commerce as required by the Foreign Trade Antitrust Improvements Act (“FTAIA”). While the court said it was possible for price-fixing abroad to have a foreseeable, substantial effect on U.S. commerce that would bring it within the reach of the Sherman Act, it found that Motorola’s claim was barred by the FTAIA’s requirement that “the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action.” Thus, the court held that Motorola was not the proper plaintiff to bring an antitrust suit in the United States because the harm was incurred by Motorola’s foreign subsidiaries and not the parent company itself. On January 12, 2015, the Seventh Circuit denied Motorola’s petition for rehearing en banc and amended its earlier decision.

In a criminal case brought by DOJ’s Antitrust Division charging a price-fixing scheme of TFT-LCDs sold directly to U.S. companies, the Ninth Circuit upheld the trial convictions of AUO and its executives. Without deciding whether the evidence was sufficient to affirm on the basis of “domestic effects” under the FTAIA, the court affirmed the defendants’ convictions on the grounds that the defendants’ conduct constituted import trade under the Sherman Act that was not precluded by the FTAIA. The court also held that the $500 million fine imposed was proper because the Alternative Fine Statute allows the court to impose a fine based on the gains to all of the coconspirators and does not require the court to apportion the fine among the coconspirators. On January 30, 2015, the Ninth Circuit denied the defendants’ petition for a rehearing en banc and amended its earlier decision.

The U.S. Supreme Court granted certiorari in North Carolina State Board of Dental Examiners v. FTC, a case concerning whether the North Carolina quasi-public board of dental examiners could be found to have violated the antitrust laws for allowing only dentists to use teeth-whitening technology. In 2003, the board sent cease-and-desist letters to commercial teeth-whitening services in shopping malls and other non-medical facilities. The FTC filed a complaint against the board, accusing it of engaging in anticompetitive conduct, but the board claimed that it was protected from liability because it operated as a state agency and was entitled to state-action immunity from the federal antitrust laws. On February 25, 2015, the Supreme Court ruled...
against the board, finding that North Carolina’s state board of dental examiners was subject to antitrust scrutiny under the Sherman Act and Federal Trade Commission Act. In reaching that decision, the court found that a state agency composed of "active market participants"—here, a board responsible for supervising the practice of dentistry composed primarily of practicing dentists—was not immune to federal antitrust laws as a sovereign actor unless the state "actively supervised" that agency.\footnote{North Carolina State Bd. of Dental Exam’rs v. Federal Trade Comm’n, No. 13-534 (Feb. 25, 2015).}
A. LEGISLATIVE DEVELOPMENTS

On September 17, 2014 the Argentine Congress passed Law No. 26,993, amending, among other things, Law No. 25,156 (the "Antitrust Law"), named “Consuming Relationships Conflict Resolution System” (the "Amendment Law").

The first major change included by the Amendment Law is a clarification of the authority that would be in charge of the enforcement of the Antitrust Law, eliminating the Supreme Court-approved double-tier system held by the Antitrust Commission and the Secretary of Trade, which stood in place of the legislated-but-never-established Antitrust Tribunal.

Pursuant to the new Section 17, "The Executive Power will determine the enforcement authority of this law". It is important to bear in mind that this draft was modified when being analyzed in Congress, since the original draft expressly stated that the Secretary of Trade would be the enforcement authority. As such, it remains to be seen which authority the Executive Power will appoint, whether it will be the Secretary of Trade or other body (the "Enforcement Authority"). All references included in the Antitrust Law as regards the Antitrust Tribunal will now have to be considered as applying to the Enforcement Authority, as per Section 21. Pursuant to the new Section 19, this Enforcement Authority "will be assisted" by the Antitrust Commission. The powers vested in the Enforcement Authority and the Antitrust Commission have now been clearly allocated pursuant to the provisions set out in Sections 18 and Section 20, the latter of which sets out for the Antitrust Commission a series of investigative (but not determinative) powers.

Another major amendment is related to appeals. Under the original draft of the Antitrust Law, Section 52 clearly set out that appeals on the imposition of sanctions were subject to a stay of execution, whereas prohibition orders, the rejection or conditioning of a merger control case or the dismissal of a claim on an anticompetitive matter would not be subject to a stay. Under the Amendment Law, said Section now makes no distinction between orders, removing the possibility of a stay of execution. The new provision now also includes the setting of a solve et repele system, by means of which the appeal will only be granted if the fines have been paid, unless "irreparable harm" can be shown.

The Amendment Law has also shortened of the time to file an appeal from fifteen working days under the prior Section 53 to ten working days.

The Amendment Law has also settled another important issue: the applicable Court of Appeals. Over the last decade there has been a discussion as to whether appeals should go to the Federal Court of Appeals on Civil and Commercial Matters or the National Court of Appeals on Criminal Economic Matters. Both appellate bodies have issued resolutions on matters arising from the Antitrust Law. Pursuant to the new Section 53, upon the filing of an appeal, "...the enforcement authority will send the appeal with its answer to the National Court of Appeals on Consumer Relations or the applicable Court of Appeals..." (the latter
reference regards appeals outside of Buenos Aires). The National Court of Appeals on Consumer Relations is also created by means of the Amendment Law, and will serve as reviewing body of the "administrative sanctions" set under the Antitrust Law.

Finally, the Amendment Law includes a radical change as regards the supplementary procedural law. While the Antitrust Law has a series of procedural provisions of its own, former Section 56 set out that in those cases not foreseen by the Antitrust Law, the provisions of the Criminal Procedural Code were to be applied; the Administrative Procedural Law was not applicable to the Antitrust Law. Under the new Section 56, it will be the Administrative Procedural Law which will be applicable to those cases not set out in the Antitrust Law, pointing towards a decriminalization of the Antitrust Law and its re-interpretation as an economic instrument for the State.

B. MERGERS

In 2014, the number of notifiable transactions greatly increased due to the devaluation of the Argentine Peso. The once USD 200,000,000 threshold in 1999 (namely, the year of the enactment of the Antitrust Law) is now averaging USD 23,000,000. As such, the Antitrust Commission has never dealt with as much merger control notifications as it has over the course of this year.

Due to the significant workload (there have been over 90 new merger cases filed throughout 2014), there has been a great delay and the 24 month review timeframe keeps increasing. There have only been 20 full clearances and 2 conditional approvals based on ancillary restraints.

As regards its review of cases, on March 5, 2014, Resolution No. 25\(^1\) was issued, authorizing a proposed transaction by means of which Tiptop Energy Limited ("Tiptop") acquired 100% of the capital stock and voting rights of Occidental Argentina Exploration and Production Inc. and related companies. In this case, the Antitrust Commission considered the ultimate controlling affiliate of Tiptop, starting with Sinopec International Petroleum Exploration and Production Corporation, which in turn is controlled by China Petrochemical Corporation which is controlled by the Supervision and Administration of State-Owned Assets Commission ("SASAC") (China’s monitoring body of State Owned Enterprises ("SOEs"). As explained in the Antitrust Commission’s opinion, the SASAC was created to redefine the relationship between the Chinese government and its "vital companies". Pursuant to the Antitrust Commission’s decision, both the economic group controlled by China and the companies included in the Transaction were involved in the exploration and exploitation of oil and gas, resulting in horizontal and vertical relationships.

While the Antitrust Commission raised no concerns with respect to the transaction, this new case reaffirms the Antitrust Commission’s position regarding the control exercised by China over SOEs through the SASAC. This analysis is of particular importance to cases regarding the first landing exemption, since Chinese companies will have to show that the Chinese Government does not control the undertaking, should they want to exercise said exemption. In

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\(^1\) Resolution No. 25 of the Secretary of Commerce, March 5, 2014, Case “Winfirst International Petroleum Spain S.A.; Tiptop Energy Limited y Vintage Petroleum South America Holdings Inc. s/ Notificación Artículo 8 Ley 25.156” (Conc. 883); Docket No. 0064762/2011.
addition to this, Chinese companies will also have to carry out a competitive assessment of other Government owned companies in the country when carrying out a competitive analysis of a transaction subject to merger control in Argentina.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On December 12, 2014, Resolution No. 271 was issued whereby the Antitrust Commission condemned eight (out of twelve that are active in Argentina) car terminals to pay the highest fine ever for price fixing. The claim was started in 2008 against the car dealers present in the Customs Special Area (“Área Aduanera Especial”) for a presumed infringement of the Antitrust Law, derived from an alleged breach of Law No. 19,640 (the ”Tax Law”). The complainants alleged that the car dealers did not transfer the tax exemptions set by the Tax Law to the final consumer. However, after several years, in 2012, the Antitrust Commission decided to accuse almost all car terminals operating in Argentina stating that, as they were the ones that should have transferred the tax exemptions, they were violating the Antitrust Law and obtaining undue profits.

Pursuant to the analysis of the Antitrust Commission, the car terminals were charging in the Customs Special Area the same price as in the rest of the Argentine territory where the tax exemptions did not apply. Therefore, the prices for cars in the Customs Special Area were higher than they should be. According to the Antitrust Commission, this conduct amounted to conscious parallel behavior. That is, unlike previous cartel cases, the Antitrust Commission did not have evidence to prove an express agreement. As a consequence, the Antitrust Commission brought the case solely on the basis of conscious parallelism, with no evidence of an agreement.

In conclusion, this case is the first one in which the Antitrust Commission uses the notion of conscious parallelism in order to impose a sanction for collusion. Bearing this in mind, it is even more striking that the sanction imposed by the Antitrust Commission is the highest fine ever (approximately US$ 125,000,000 at the current exchange rate).

In addition to this major collusion investigation, it must also be taken into account that, due to the current inflationary situation in Argentina, the Antitrust Commission has ordered the commencement of four major market investigations encompassing over 250 companies of consumer-sensitive industries:

- An investigation into the pharmaceutical market and vertical relations in the industry
- An investigation into the sale of consumer goods in supermarkets and hypermarkets and vertical relations in the industry
- An investigation into raw materials for industry
- An investigation into raw materials for construction

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The Antitrust Commission is using the same tools in all of these investigations, namely the issuance of extensive requests for commercially-sensitive information, followed-up with witness interviews with senior company executives. The type of information being requested includes: trade names and trademarks by product line; price lists for the past five years; customer lists; market shares; competitor lists; whether the products are imported or are locally manufactured; distribution channels; cost structures; profit margins; installed capacity; expected plans to increase the installed capacity; exports (for which products and in which circumstances); and financial statements for the last five years.

As of today, only one collusion investigation has been initiated based on these enquiries, namely a market-wide probe into the pharmaceutical market due to a series of simultaneous price increases in March 2014.\footnote{Case “Asociación Protección Consumidores del Mercado Común del Sur c/ Loma Negra Cía. Industrial Argentina S.A. y otros”, National Supreme Court, February 10, 2015.}

Regarding unilateral conduct, the new Civil and Commercial Code includes a provision regarding the prohibition for 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 4 of the Antitrust Law in order to accurately define if 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 Enforcement Authority. Under this new scenario, Courts would be able to prosecute these cases without the intervention of the regulator.

**D. COURT DECISIONS**

After the Supreme Court confirmed on May 7, 2013 the fines imposed by the Antitrust Commission in 2005, on several cement companies as well as the cement trade association due to collusion, on February 10, 2015, the Supreme Court, in a related case, revoked the decision of the National Commercial Court of Appeals regarding a related class action. The Supreme Court accepted the defense filed by the cement companies (lack of standing) and rejected the claim due to the fact that the claimant a consumer association.\footnote{Case “Asociación Protección Consumidores del Mercado Común del Sur c/ Loma Negra Cía. Industrial Argentina S.A. y otros”, National Supreme Court, February 10, 2015.}

The consumer association argued that cement companies had charged a higher price for cement to cement consumers, therefore causing harm to them. As such, the claimant sued for damages by means of a class action, representing a wide range of cement consumers: (i) a global class that involved almost all cements consumers, (ii) another class including indirect consumers, and (iii) a subclass of indirect consumers.

However, the Supreme Court decided not to allow the lawsuit. The Supreme Court stated that, in order for a class action to be admitted, the petitioner shall offer a “*certain, objective and easily verifiable*” definition of the class that it desires to represent. As the Supreme Court...
considered that the consumer association was not able to determine in a precise manner the affected group, it considered that the requirements for the admissibility of the class action had not been satisfied.
BRAZIL

By Maria Cecilia Andrade and Ana Carolina Estevão of Mattos Muriel Kestener Advogados

A. LEGISLATIVE DEVELOPMENTS

Since May 2012, CADE's Resolution No. 2 has set out the procedures to file a transaction under the previous merger control regime and also defined the forms to be used to submit summary and ordinary transactions to the Brazilian Antitrust Authority. Additionally, it also established: (i) the concept of economic group; (ii) the scope of transactions that shall be filed under the summary proceeding; and (iii) in which cases the acquisition of minority stakes is subject to compulsory notification.

Resolution No. 2 was amended in 2014 by CADE’s Resolution No. 9, to: (i) alter the concept of economic group for investment funds; (ii) exempt from the compulsory notification the scenario of consolidation of control; (iii) increase from 20% to 30% the market share of vertically integrated companies for the transaction to be eligible for the summary proceeding.

Another important development in 2014 was the publication of CADE’s Resolution No. 10, defining the concept of an associative agreement for the purposes of mandatory filing, pursuant to Art. 90, item IV of Law No. 12,529/11. According to the new regulation, an agreement shall be considered associative if its term exceeds two years and results in horizontal or vertical cooperation or in risk sharing, creating an interdependent relationship between the parties. According to the new rules, an interdependent relationship takes place when the parties’ joint market shares exceed 20%; or, in the case of vertical agreements, one of the parties has at least a 30% market share and the agreement provides revenue or loss sharing, or results in exclusivity.

Besides that, the Brazilian competition authority has adopted regulation implementing an electronic system for processing documents that will seek to provide more efficiency and transparency to the agency’s procedure. The system was implemented on January 2, 2015.

CADE has also commenced a public consultation regarding the rules of the consultation procedure, by which companies seeking guidance on Brazilian Antitrust Law may

1 CADE’s Resolution No. 2, effective as of May 29, 2012. Available at http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Concentra%C3%A7%C3%A3o.pdf
2 CADE’s Resolution No. 9, effective as of October 1st, 2014. Available at http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%209%20-%2001outubro2014%20-%20Altera%C3%A7%C3%A3o%20Res%202012.pdf
3 CADE’s Resolution No. 10, effective as of January, 2015. Available at http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%2010%20-%2004%20de%20novembro%20de%202014.pdf
make inquiries of the competition authority. There is still no forecast for when this will come into force.

Although interested parties may already make inquiries of CADE regarding the application of the Antitrust Law, the new regulation provides some objective criteria regarding this procedure. The inquiries may be related to: (i) the interpretation of the Law and its regulations regarding mergers, considering a transaction or hypothetical transaction; (ii) the lawfulness of acts, contracts, business strategies or conduct of any kind, already implemented by the interested party; or (iii) the lawfulness of acts, contracts, business strategies or conducts of any kind, already designed and planned, but still not implemented by the interested party. The regulation also establishes the data to present to CADE to allow it to analyze the inquiry.

The Consultation Procedure will be automatically rejected if: (i) presented by third party not involved in the transaction; (ii) is related to practices under investigation by CADE or that have already been considered to be unlawful; (iii) require the analysis of data other than the data provided for the inquiry; (iv) involve purely hypothetical questions; (v) involve issues outside CADE’s jurisdiction; or (vi) relate to an issue already determined by CADE.

According to the regulation, the Consultation Procedure shall be decided within 150 days from its assignment to a Commissioner. The answer to the consultation shall be binding on CADE’s Tribunal and the interested parties, for up to 5 years.

**B. MERGERS**

In October, CADE approved with restrictions a merger between Innova S/A, a petrochemical unit of Petrobras, and plastic producer Videolar S/A. The approval was conditional on the signature of a Merger Control Agreement committing the parties to execute measures that aim to prevent potential anticompetitive effects.

In the education sector, two mergers – Kroton’s acquisition of Anhanguera and Estácio Participações S/A’s buyout of distance learning company Uniseb - were approved with restrictions by CADE. The approval was conditional on the fulfillment of several measures provided in a Merger Control Agreement. In the merger between Estácio and Uniseb, the commitment was to not increase offerings in long-distance education courses in several cities. This was a novel condition, since structural remedies could not be imposed due to a federal regulation that prohibits the transfer of single courses among educational institutions.

On November 12, CADE rejected the first merger since the New Antitrust Law entered into

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6 See Art. 9, §4 and 23 of the New Antitrust Law: “Art. 9 - § 4 The Tribunal may answer queries about ongoing practices, upon the payment of a fee and the submission of relevant documents.” “Art. 23. Procedural fees shall apply to the cases under Cade’s jurisdiction, which shall be equivalent to forty-five thousand reais (R$ 45,000.00) when the case has as a triggering event the presentation of the acts set forth in Article 88 of this Law, and equivalent to fifteen thousand reais (R$ 15,000.00) for cases having as a triggering event the submission of inquiries set forth in § 4 of Article 9 of this Law”.


force. The acquisition of Solvay Indupa by Braskem S/A\textsuperscript{10} was rejected because CADER's Tribunal considered it would affect competition in the PVC product market in South America. The companies are the two only producers in the Brazilian market of PVC. According to CADER's Tribunal, the merger would affect competition in Brazil, since imports do not offer effective rivalry.

On December 9, CADER's General Superintendent issued an opinion in the merger between Rumo Logística e Operadora Multimodal S/A and América Latina Logística S/A – ALL,\textsuperscript{11} challenging the merger before CADER's Tribunal since it could limit access to infrastructure and result in discriminatory practices. Rumo operates in the market of multimodal logistic services for sugar export through the Port of Santos and is part of the Cosan Group, the biggest Brazilian exporter of sugar cane. ALL owns railroad concessions, including the one that leads to the Port of Santos, through with most of the Brazilian sugar is exported. With the transaction, Cosan Group would become ALL's main shareholder.

On December 9, 2014, CADER's General Superintendent issued an opinion in the merger between Continental AG and Veyance Technologies Inc., challenging it before CADER's Tribunal. The companies involved are manufacturers of automotive parts, rubber products, hoses, industrial equipment, and other products.\textsuperscript{12} The transaction was notified in 12 jurisdictions and with waivers in place, was the subject of intense cooperation between the Competition Authorities of Brazil, United States, Canada, Germany and Mexico.

On December 10, CADER's Tribunal approved with restrictions the multijurisdictional merger involving Holcim Ltd and Lafarge S/A,\textsuperscript{13} conditional on the signing of a Merger Control Agreement, to divest several assets in the cement and ready-mix concrete markets. CADER's Tribunal agreed with the General Superintendent's opinion, finding that the transaction would result in a high market concentration in the cement and ready-mix concrete markets in some Brazilian locations.

\textbf{C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES}

On May 28, CADER condemned a cement cartel.\textsuperscript{14} The fines imposed on six companies, six individuals and three organizations amounted R$ 3.1 billion (roughly US$ 1 billion). The motion for clarification is still pending judgment, but this is the first time CADER has imposed divestment penalties in a cartel case.

In the judgment session held on December 10, CADER has signed 7 Cease and Desist Agreements in cartel investigations.\textsuperscript{15}

\begin{footnotesize}
\textsuperscript{11} Merger No. 08700.005719/2014-65, opinion.
\textsuperscript{12} Merger No. 08700.004185/2014-50, opinion.
\textsuperscript{15} Administrative Proceeding No. 08700.003018/2014-91, regarding the market of resins for coatings and composites; Administrative Proceeding No. 08012.005255/2010-11, related to an international cartel in the market of dynamic random access memory (DRAM); Administrative Proceeding No. 08012.001377/2006-52, related to a cartel in the
\end{footnotesize}
these Agreements, R$ 45.2 million (roughly US$ 15 million) will be collected for the Diffused Rights Fund.\textsuperscript{16}

In 2014, 22 Cease and Desist Agreements were signed in cartel investigations. Seven of them referred to bid-rigging cases. The collected pecuniary contributions in these settlements equals R$ 153.4 million (roughly US$ 51 million).

In the judgment session held on December 10, CADE convicted 2 bid rigging cartels in the markets of orthopedic orthotics and prosthesis\textsuperscript{17} and metal detector security doors.\textsuperscript{18}

\section*{D. ABUSE OF DOMINANCE}

On January 14, the General Superintendent recommended the condemnation of Telemar Norte Leste S/A\textsuperscript{19} for abuse of dominant position in the telecommunications market. According to the General Superintendent, the company had monitored its clients’ phone calls to the call center of a new entrant in the market beginning in 2000, when Telemar had roughly 90% of market share.

\section*{E. COURT DECISIONS}

Brazil’s antitrust regulator has appealed the decision issued by the Supreme Court allowing any federal court in the country to process challenges to decisions issued by CADE. According to CADE, challenges to its decisions should be filed before Brasilia’s Federal Court.\textsuperscript{20}

In June, the Supreme Court denied CADE’s extraordinary appeal in connection with the conflict of jurisdiction between CADE and the Brazilian Central Bank on merger control involving the banking sector. The decision of the Minister Dias Toffoli confirmed that the Central Bank has the exclusive jurisdiction over mergers involving banks.\textsuperscript{21}

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\textsuperscript{16} According to the agreements, the parties admitted their participation in the investigated conduct, committed to cease the practice and to collaborate with the agency to clarify the facts. The settlements were negotiated by CADE’s General Superintendent, and its effect is to suspend the proceedings against the signatory parties until their commitments are declared fulfilled.  


\textsuperscript{19} Telemar Norte Leste S/A. Administrative proceeding: 08012.003918/2005-04, opinion.  


PERU

By Alejandro Falla J. and Eduardo Quintana S. of Bullard Falla Ezcurra +

A. LEGISLATIVE DEVELOPMENTS

In Peru, the National Institute for the Defense of Competition and Intellectual Property – INDECOPI (hereinafter, "INDECOPI") is the administrative entity in charge of implementing competition law, consumer protection law and matters related to intellectual property, among others. INDECOPI’s Antitrust Commission is the administrative body in charge of implementing competition law and authorizing acts of concentration in the electricity sector under Law N° 26876. The Antitrust Commission’s Technical Secretariat is the investigative body, in charge of conducting dawn raids and initiating ex-officio investigations, among other functions. INDECOPI’s Tribunal is the second instance.

In 2014, the Antitrust Commission approved several acts of concentration in the power generation market, fined two price fixing cartels in the ground transportation market, further developed its leniency program and fined engineer associations for issuing recommendations to increase rates. The Tribunal withdrew the conditions imposed by the Antitrust Commission in 2006 as part of the authorization of a concentration in the power transmission market and approved a Precedent of Mandatory Compliance regarding the imposition and withdrawal of conditions for the authorization of acts of concentration. The Tribunal also approved a Precedent of Mandatory Compliance regarding legal exemption from competition law.

As per the development of INDECOPI’s Leniency Procedure, although the possibility of obtaining an exemption from sanctions deriving from anticompetitive conduct has been established in Peru since 1996 (Legislative Decree N° 701, former antitrust law) and is to date regulated by article 26 of Legislative Decree N° 1034 – Law for the repression of anticompetitive conducts – so far there is no public record of any case or evidence of anticompetitive practices brought to INDECOPI’s Antitrust Commission or its Technical Secretariat by an undertaking under this article. In June 2014, INDECOPI issued a communication emphasizing the work carried out by the Antitrust Commission’s Technical Secretariat in investigating markets in order to find evidence of the existence of cartel activity, particularly through dawn raids. In this context, INDECOPI reminded all undertakings and individuals that can be exempt from sanction if they cooperate with the Commission to identify other cartel members through the Leniency Program ("Programa de Clemencia").

1 Legislative Decree N° 701 published on November 7, 1991 in the Official Journal El Peruano.
3 Article 26.- Waiver of penalty.- “26.1. Without prejudice to what is set forth in the foregoing article, any person may request to the Technical Secretariat to be exempted from punishment in return for evidence to help identify and establish the existence of an illegal practice. Assuming that the evidence offered is crucial to punish those responsible, the Technical Secretariat may propose, and the Commission accepts, the approval of the made offer. For this purpose, the Technical Secretariat has all the powers of negotiation that may be necessary to establish the terms of the offer. (...)”
To this effect, INDECOPI communicated the steps needed to be granted an exemption from sanction: (i) Collaborator must contact the Technical Secretariat and file an application for Leniency, (ii) Collaborator must submit all information available regarding the anticompetitive practice mentioned in the application and in response the Technical Secretariat will issue an Exoneration Commitment under certain conditions, (iii) Collaborator will provide the Technical Secretariat with all the necessary information and cooperation in order to corroborate the infringement and sanction the cartel, and (iv) The Technical Secretariat will evaluate the cooperation provided and recommend the Antitrust Commission grant the definitive exoneration. It must be noted that for the first time since leniency was introduced in Peruvian legislation, INDECOPI has provided a special email address and a telephone number for those individuals who seek to apply for leniency. So far, INDECOPI has not published guidelines on this procedure, but these are soon expected to be considered and approved by the Commission.

B. MERGERS

In July 2014, INDECOPI’s Tribunal revoked the conditions imposed on the concentration between INTERCONEXIÓN ELÉCTRICA S.A (hereinafter, “ISA”) and CONSORCIO TRANSMANTARO S.A. According to the Tribunal decisions N° 081-2006-INDECOPI/CLC and 001-2007-INDECOPI/CLC, ISA had to abide by the following conditions: (i) do not exercise all of their options when it comes to decision making within any instance inside the Economic Operation Committee of the System (“COES”), allowing it to use only one vote; and (ii) do not participate in the second call for tenders for the construction and/or expansion of electric transmission infrastructure, which declared void because of lack of technical and/or financial offers.

By its Resolution No. 0623-2014/SC1-INDECOPI, the Tribunal decided to revoke those conditions because it was verified that the number of participants within the Subcommittee of Transmitters increased compared to the number of members belonging to ISA Group and because of the Transfer Regulation and Regulations of COES established measures to prevent an economic group to preponderantly control decisions. In addition, the possibility of ordering the organization of tenders to PROINVERSIÓN established by Law No. 28832 and the stability of remuneration to holders of new transmission lines contributed to generate revenue for more competitors. Finally, INDECOPI’s Tribunal set a binding precedent regarding the possibility of establishing conditions for the approval of concentration acts in the electricity market:

a) In case the approval of the concentration act is subject to certain conditions, it must be understood that such restrictions must be associated with a timeframe and that the authority can later review the market competitiveness and its characteristics, in order to determine whether it is necessary to keep the restriction.

b) This, notwithstanding the fact that, under the revocation procedure referred to in Law No. 27444, companies can request the revocation of the conditions imposed as they deem appropriate, identifying the circumstances that would have occurred in the electricity market and that would merit the removal of the once valid conditions.

In October 2013, KALLPA GENERACIÓN S.A. (hereinafter, "KALLPA") requested the Antitrust Commission a prior authorization to acquire a coal fired power station from DUKE ENERGY EGENOR (hereinafter, "DUKE") (since the acquisition of productive assets from a company that develops activities in the relevant sector is considered a concentration act, according to article 2 of Law N° 26876). KALLPA stated however that the operation should not be considered an act of concentration, since the power station was not being used by DUKE and therefore, its acquisition by KALLPA would not have any effect on competition. When allowing the request, the Antitrust Commission clarified that the degree of utilization of the asset was not relevant under Law N° 26876 and that the cost of acquisition in relation to KALLPA’s assets value (20%) surpassed the threshold needed to require prior authorization (5%) under the same legislation.

After requesting information from KALLPA and several administrative authorities involved in the power generation market, the Commission reached the following main conclusions:

a) The acquisition will not have any effect on the concentration levels of the regulated and free markets, since the power station is not a supplier of these markets;

b) Future effects that may rise in contracts with power distributors and free clients will be limited;

c) The variation of the concentration level in the spot market will not have anticompetitive effects;

d) The act of concentration will not have any effect in the decision making process of the board of operators of the interconnected national power system ("COES").

As a result, the Antitrust Commission determined that the acquisition of the power station by KALLPA will not facilitate the exercise of its market power or facilitate collusive behavior. Moreover, the Antitrust Commission concluded that with the current market conditions the operation will not have an effect that could possibly damage, restrict or hinder competition. By Decision N° 007-2014/CLC-INDECOPI issued February 25th 2014, the Antitrust Commission approved the unrestricted acquisition of the Las Flores Power Station by KALLPA.5

In August 2014, ENERSIS S.A. (hereinafter, ENERSIS) requested the Antitrust Commission's prior authorization to acquire 100% of shares of INKIA HOLDINGS LIMITED (hereinafter, "INKIA HOLDINGS"), according to the article 2 of the Law N° 26876 (since the acquisition of control of an undertaking is considered a concentration act). This concentration involves indirect control of companies such as GENERANDES S.A., EDEGEL S.A. and CHINANGO S.A.C. After requesting information from ENERSIS and administrative authorities involved in the electric market, the Commission reached the following conclusions:

a) The incentives that both parties will have, before and after the concentration act, in the decision to be taken for the development of their business will not have negative effects in the competition of the electricity market.

b) The concentration will not generate variations in the level of market concentration in the spot, free client or regulated client market.

c) The concentration will not modify ENERSIS’ market share and neither the

independence of the decision taken within the COES.

The Commission determined that the acquisition of control of INKIA HOLDINGS by ENERSIS will not have a negative impact that could possibly damage, restrict or hinder competition. Therefore, by Resolution N° 034-2014/CLC-INDECOPI, issued in August 2014, the Antitrust Commission approved the unrestricted acquisition of the control of INKIA HOLDINGS by ENERSIS.⁶

C. CARTELS AND ANTICOMPETITIVE PRACTICES

In April 2014, INDECOPI’s Tribunal sanctioned the Stevedore’s Union of the Salaverry Port, the Stevedore and Maneuver Men’s Union of the Salaverry Port, and the secretaries of those unions, for carrying out collusive practices through decisions and recommendations. The sanction results from the fact that the unions and his representatives would have hindered the training, the registry and contracting of certain workers with the purpose of avoiding their entry in the port market of Salaverry’s Maritime Terminal. By its Resolution No. 479-2014/SC1-INDECOPI,⁷ the Tribunal imposed a total fine of 33.88 UIT, which is equivalent to US$ 42,211. INDECOPI’s Tribunal approved a binding precedent for the interpretation of article 3 of the Law for the Repression of Anticompetitive Conduct, establishing the following criteria:

1. The reference to the acts that are a “consequence of a legal norm” included in the article 3 of the Law for the Repression of Anticompetitive Conducts must be understood as the need to possess legal authorization or even an obligation to execute the conduct under analysis.

2. For the application of article 3, it should be understood that the interpretation of "legal norm", on which the exemption is based, must be restrictive or literal, i.e. the rule should clearly authorize the conduct under analysis and should not apply extensively to other behaviors.

3. In the analysis of conduct that might be capable of being considered to be anticompetitive practices, but that simultaneously might be authorized by a legal norm, the following steps must be followed:

a. Analyze under a strict or literal interpretation, whether the "legal norm", i.e. a different norm of Law for the Repression of Anticompetitive Conduct, authorized a particular behavior or not.

b. If the "legal norm" authorizes the conduct, the competition authority will not be able to sanction it, regardless of its anticompetitive effects. In case the "legal norm" authorizes certain conduct but there are indications that the conduct is being engaged in "unreasonably", the competition authority will bring this to the attention of the authority competent to apply the "legal norm".

c. If the conduct under analysis is not expressly authorized by the legal norm, the competition authority must analyze the anticompetitive conduct based in the criteria of the Law for the Repression of Anticompetitive

Conducts and other applicable precedents.

In December 2014, the Antitrust Commission sanctioned the College of Engineers of Peru and the Peruvian Consulting Association for carrying out collusive practices in their recommendations. According to the Resolution No. 040-2014/CLC, both entities shared documents recommending rates for the work done by engineer consultants and the values of the general expenses, being that the rates established in those documents had been fixed on the basis of a market research. For this violation, the Antitrust Commission imposed a fine of 1000 UIT, which is equivalent to US$ 1.25 million. The sanction can be revised by the Tribunal through an appeal.

In July 2014, INDECOPI’s Antitrust Commission sanctioned the president of the Association of the Transportation Companies of the Urban Sector and the president of the Regional Federation of the Transportation Companies, drivers, and others for making public announcements that established an increase in the transport fare. The Antitrust Commission interpreted these public announcements as recommendations to increase the transport fare in the Juliaca-Puno route. By its Resolution No. 029-2014/CLC-INDECOPI, the Antitrust Commission fined six transportation companies for price fixing aimed to increase the price of the service of transport in the same route. Therefore, the Antitrust Commission imposed a total fine of 74 UIT, approximately US$ 92,196.00, to six transportation companies and 2 UIT to the presidents of the federations, which equals approximately US$ 2,491.00.

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