The views and opinions expressed herein are those of the authors of each respective contribution. The 2015 Antitrust Year in Review is not, and should not be relied upon, as legal advice.

Copyright © 2016 American Bar Association. All rights reserved.
Welcome to the 2015 Antitrust Year in Review, a compilation of the latest antitrust/competition law developments in 27 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 10th edition of the Year in Review, which debuted in 2006.

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 to improve private access, including the UK’s new class action regime; and analysis of mergers involving everything from beer, to biomedical life sciences businesses, to heavy machinery, to telecom, to hospitals, and everything in between.

The 2015 Year in Review is the culmination of a great deal of work on the part of our authors and our editorial team. A great deal of thanks is also due to 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

Co-Editors

Jonathan Tickner
Peters & Peters
London, United Kingdom

Adam S. Goodman
Dentons Canada LLP
Toronto, Canada

Bronwyn Roe
WeirFoulds LLP
Toronto, Canada
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 2015 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 2015 editors, Jonathan Tickner, 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 2016 edition. The 2015 Year in Review covers 27 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.

Lisl Dunlop
Manatt, Phelps & Phillips, LLP
ldunlop@manatt.com

Marcelo den Toom
M. & M. Bomchil
Marcelo.denToom@bomchil.com
CONTRIBUTORS

AFRICA AND THE MIDDLE EAST

ISRAEL | Fischer Behar Chen Well Orion & Co.
Tal Eyal-Boger, Ziv Schwartz and Shani Brown

SOUTH AFRICA | Norton Rose Fulbright
Heather Irvine and Lara Granville

ASIA AND OCEANIA

AUSTRALIA | Minter Ellison
Paul Schoff, Katrina Groshinski and Eric White

INDIA | Dhall Law Chambers
Vinod Dhall and Sonam Mathur

NEW ZEALAND | Russel McVeagh
Sarah Keene and Troy Pilkington

CHINA | Jones Day
Peter Wang and Yizhe Zhang

JAPAN | Anderson Mori & Tomotsune
Shigeyoshi Ezaki

SOUTH KOREA | Kim & Chang
Youngjin Jung and Gina Jeehyun Choi

EUROPE

AUSTRIA | Reidlinger Schatzmann Rechtsanwälte GmbH | DORDA BRUGGER JORDIS Rechtsanwälte GmbH
Dr. Axel Reidlinger and Dr. Heinrich Kühnert

FINLAND | Roschier Attorneys Ltd.
Ami Paanajärvi

GERMANY | Willkie Farr & Gallagher LLP
Susanne Zuehike

ITALY | Gianni, Origoni, Grippo, Cappelli & Partners
Alberto Pera and Michele Carpagnano

PORTUGAL | Garrigues LLP
João Paulo Teixeira de Matos

SPAIN | Garrigues LLP
Susana Cabrera, Konstantin Jöergens, José Luis Azofra Parronda, Carlos Bobillo Barbeito and César Borja Galán Santos

SWITZERLAND | CMS von Erlach Poncet Ltd.
Dr. Patrick Sommer and Marquard Christen

UNited KINGDOM | Peters & Peters Solicitors LLP
Jonathan Tickner

EUROPEAN UNION | Covington & Burling LLP
Laurie-Anne Grelier and Peter Camesasca

FRANCE | Aramis Société d’Avocats
Aurélien Condomines

HUNGARY | KNP LAW Nagy Koppany Varga and Partners
Dr. Kornelia Nagy-Koppany and Dr. Annamaria Klara

NORWAY | Kvale Advokatfirma
Kristin Hjelmaas Valla and Trygve Norum

RUSSIA | Alrud
Vassily Rudomino, Ksenia Tarkhova, Roman Vedernikov and Alla Azmukhanova

SWEDEN | Advokatfirman Vinge KB
John Karlsson and Helena Höök

UKRAINE | Arzinger
Timur Bondaryev

NORTH AND SOUTH AMERICA

ARGENTINA | M. & M. Bomchil
Marcelo den Toom and Mercedes de Artaza

MEXICO | Baker & McKenzie Abogados, SC
Gerardo Calderon-Villegas

CANADA | Dentons Canada LLP
Adam S. Goodman

UNITED STATES | Patterson Belknap Webb & Tyler LLP
Deirdre A. McEvoy and Stephen P. Younger
# INDEX

## AFRICA AND THE MIDDLE EAST

<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Israel</td>
<td>7</td>
</tr>
<tr>
<td>South Africa</td>
<td>11</td>
</tr>
</tbody>
</table>

## ASIA AND OCEANIA

<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>16</td>
</tr>
<tr>
<td>China</td>
<td>22</td>
</tr>
<tr>
<td>India</td>
<td>28</td>
</tr>
<tr>
<td>Japan</td>
<td>33</td>
</tr>
<tr>
<td>New Zealand</td>
<td>38</td>
</tr>
<tr>
<td>South Korea</td>
<td>43</td>
</tr>
</tbody>
</table>

## EUROPE

<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>47</td>
</tr>
<tr>
<td>European Union</td>
<td>52</td>
</tr>
<tr>
<td>Finland</td>
<td>56</td>
</tr>
<tr>
<td>France</td>
<td>60</td>
</tr>
<tr>
<td>Germany</td>
<td>64</td>
</tr>
<tr>
<td>Hungary</td>
<td>68</td>
</tr>
<tr>
<td>Italy</td>
<td>72</td>
</tr>
<tr>
<td>Norway</td>
<td>77</td>
</tr>
<tr>
<td>Portugal</td>
<td>81</td>
</tr>
<tr>
<td>Russia</td>
<td>84</td>
</tr>
<tr>
<td>Spain</td>
<td>88</td>
</tr>
<tr>
<td>Sweden</td>
<td>94</td>
</tr>
<tr>
<td>Switzerland</td>
<td>100</td>
</tr>
<tr>
<td>Ukraine</td>
<td>106</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>111</td>
</tr>
</tbody>
</table>

## NORTH AND SOUTH AMERICA

<table>
<thead>
<tr>
<th>Country</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>116</td>
</tr>
<tr>
<td>Canada</td>
<td>122</td>
</tr>
<tr>
<td>Mexico</td>
<td>126</td>
</tr>
<tr>
<td>United States</td>
<td>130</td>
</tr>
</tbody>
</table>
ISRAEL


1. PROPOSED LEGISLATIVE DEVELOPMENTS

In 2015, the Israeli Antitrust Authority (the "IAA") published two proposed amendments, regarding the Israeli Monopoly Regime and the Israeli Merger Control Regime.

On March 31, 2015, the IAA published its proposed amendments to the Restrictive Trade Practices Law, 5748–1988 (the "Law" or "Antitrust Law") with respect to the Israeli Merger Control Regime. The IAA proposes substantial changes, including: amending the definition of "Company" under the Law to include various types of foreign corporations and other entities; amending the definition of "Merger of Companies" to include mergers with an individual; amending the thresholds for filing a merger to include, inter alia, foreign corporations that have no sales in Israel under certain circumstances; prohibiting mergers that do not meet the filing thresholds but are anti–competitive; and extending the IAA's timeline for reviewing mergers to 150 days.

The IAA's memorandum has yet to be promoted or tabled before the Israeli parliament. It is expected that an updated version of the IAA's memorandum will be published, following comments from the public.¹

On July 8, 2015, the IAA published its proposed amendments to the Law concerning the Israeli Monopoly Regime. The proposal was tabled before the Israeli Parliament in October as a Private Member's Bill.

The proposed amendment would extend the Israeli Monopoly Regime's applicability to certain entities that do not meet the existing definition of a "Monopoly" under the Law, which refers to an entity which possesses a market share of more than half of the total supply or acquisition of an asset, or more than half of the total provision or acquisition of a service, and would subject such entities to the limitations and obligations applicable to a monopoly holder under the Law. The proposed reform would extend the applicability of the Monopoly Regime to entities that possess market power, as opposed to the current Monopoly Regime whose application is solely based on market share requirements. Also, according to the proposed amendment, the General Director of the IAA (the "General Director") will have the power to declare an entity with market share exceeding 50% as a monopoly. Such declaration will be constitutional.²

In addition, the IAA also proposed amendments concerning parallel imports this year in order to prevent harm to competition caused by the uncompetitive behavior of an official importer. The IAA proposed to impose limitations on official importers in Israel by, inter alia, prohibiting an official importer from abusing its position in the market, even if the importer is not considered a monopoly under the Law.³

In August 2015, Section 1 of Amendment Number 16 of the Law entered into force and repealed the statutory exclusion regarding reciprocal exclusivity arrangements between a purchaser of an asset or service and its supplier, under Section 3(6) to the Law. Prior to

¹ Israeli Antitrust Auth., Memorandum: Amendments to Merger Control Regime (Mar. 31, 2015):
http://www.antitrust.gov.il/files/33593/%D7%9E%D7%95%D7%99%D7%96%D7%95%D7%92%D7%99%D7%9D_032015.pdf

² Israeli Antitrust Auth., Memorandum: Defining Monopoly by Market Power (July 8, 2015).

Amendment Number 16, the Law stated that such arrangements, under certain circumstances, shall not be deemed restrictive arrangements. Upon the elimination of Section 3(6), such mutual exclusivity arrangements will be subject to an individual assessment process and may require approval from the IAA or the Antitrust Tribunal.4

On February 2015, the General Director announced his intention to amend the IAA's Policy Paper regarding Collaborations among Competitors in Activity vis-à-vis Government Authorities. In the IAA’s previous Policy Paper, which was published in 2000, the IAA recognized the legitimacy of co-operation between competitors when facing government agencies and undertook not to act against them under certain circumstances. In the context of this amendment, the General Director is considering clarifying that cooperation between competitors undertake vis-à-vis government agencies that is likely to harm competition will no longer be protected under the Policy Paper’s safe harbor.5

2. CARTEL AND OTHER ANTICOMPETITIVE PRACTICES

On August 10, 2015 the Israeli Supreme Court delivered its decision to the appeals filed against the District Court’s verdict and sentence regarding the criminal proceedings against Shufersal Ltd. ("Shufersal", the largest supermarket chain in Israel) and its former CEO and Deputy CEO. The Israeli Supreme Court held that the company's officers attempted to stop special offers being extended by its suppliers to a competing supermarket chain ("Mega"), on the Jewish holiday of Hanukkah.

According to the judgment, when this attempt did not succeed, Shufersal attempted "to punish" a number of suppliers by removing some of their products from its shelves. In its decision, the Israeli Supreme Court held that under the circumstances, such conduct was an attempt to establish a restrictive arrangement and was in fact a violation of the merger conditions stipulated by the General Director in his decision consenting to a merger between Shufersal and Clubmarket (another supermarket chain).

The Shufersal ruling indicates a strict approach towards anti-competitive conduct and sets two important precedents: first, the imposition of stricter penalties for antitrust violations, as for the first time in Israel, jail sentences were ordered for violating merger conditions and for attempting to set a vertical restrictive arrangement. Second, that as a rule, vertical arrangements will not be presumed to constitute a restrictive arrangement. From now on, such arrangements will be examined primarily on the basis of their likelihood to harm competition, under the definition of a "Restrictive Arrangement" in the Antitrust Law (a rule of reason analysis).6

On August 12, 2014, the Jerusalem District Court, in a precedential decision, sentenced an attorney, inter alia, to serve two months of community service for his assistance in conducting a restrictive arrangement, by drafting the relevant cartel agreement. The sentence handed down by the District Court was stricter than the sentence requested by the prosecutor. On March 30, 2015, the Israeli

---

5 Israeli Antitrust Auth., Draft Policy Paper: Trade Associations And Other Common Tables Among Competitors, (July 26, 2015): http://www.antitrust.gov.il/files/33706%D7%98%D7%99%D7%95%D7%98%D7%94%20%D7%92%D7%99%D7%9C%D7%95%D7%99_%D7%93%D7%9A%D7%95%D7%90%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%_%D7%A2%D7%AA_%D7%9A%D7%99%D7%9D_%D7%A2%D7%A1%D7%AA_%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92%D7%95%D7%99%D7%9D_%D7%95%D7%99%D7%92

Supreme Court reduced that sentence to a month and a half of community service, which as was originally sought by the prosecution.7

On August 31, 2015, the IAA filed an indictment in the Jerusalem District Court against six textbook distribution companies and their managers. The indictment involved a number of instances of alleged bid-rigging. Pursuant to the indictment, the collusion included six instances over a period of five years, in which the managers of the companies coordinated price bids on tenders. The tenders were published as a part of the "Lending Project" initiative by the Ministry of Education according to which textbooks were to be bought by the school and then lent to the pupils for each school year. The tenders were published for purchasing books to be lent out in the future. According to the indictment, the companies and their managers were involved in committing the offenses, and were therefore accused of being part of a cartel with aggravating circumstances.8

3. MONOPOLY & ABUSE OF DOMINANT POSITION

On June 17, 2015, the Antitrust Tribunal rejected two appeals filed against the declaration of the General Director, in which he determined that El Al Israeli Airlines Ltd. (Israel's national airline, "El Al") held a monopoly over the provision of aviation security services which it provides to itself and other airline companies under the State of Israel's guidelines. The declaration was handed down over on a concern that El Al would take advantage of its monopolistic position, inter alia, by refusing to provide services to other Israeli airline companies which compete with it. The Tribunal rejected El Al's claims that the service was 'public', and not commercial, in nature because it was forced to provide it. Instead, it held that the involvement of the State in the service does not eliminate concerns relating to the abuse of monopoly power.9

On December 21, 2015 the General Director declared that the Port of Ashdod (the "Port") abused its dominant position in the unloading of vehicles market. According to decision, the Port granted vehicle importers "tailor made" rebates, with personal targets for each importer, whereby it punished importers for not achieving the targets set for them. Using this kind of rebates method affected the Port of Haifa's, the only other competitor in that market, ability to compete with the Port. The General Director decided to impose administrative fines of approximately 2.25 million USD on the Port itself and personal administrative fines of approximately 5,000 USD on two former senior managers of the Port.10

On October 8, 2015, the Central District Court handed down its ruling in the case of Unipharm v. Sanofi regarding the alleged misconduct of Sanofi, one of the world’s biggest ethical drug companies, in prosecuting a second application for a patent. Unipharm accused Sanofi of defrauding the Israel Patents Registrar by providing inadequate disclosure in its patent application. Due to the Monopoly position granted to Sanofi by the Israeli patent laws, the Court held, inter alia, that this action was not only a breach of Israeli patent laws, but an abuse of Sanofi's dominant position. The Court stated that misleading the Patents Registrar, intentionally or due to gross negligence, may be considered to be an abuse of monopoly power, in certain circumstances such as providing misleading

9 AT 52563-09-12 EL AL Israel Airline Inc. v. General Dir. Of the IAA (2015).
10 Israeli Antitrust Auth., The General Director's Determination according to Sections 26(A) and 29A of the Israeli Restrictive Trade Practices Law 5748-1988 - The Ashdod Port Company Ltd. (Dec. 21, 2015).
information. It should be noted, that the Court decided to take a wide approach to the interpretation of the prohibition to abuse monopoly power with respect to patent extension proceedings. the Court relied on the European law approach taken in AstraZeneca v. Commission.¹¹

2015 was a busy year for the South African competition authorities with significant developments in abuse of dominance cases, cartel referrals and market enquiries. 2015 also saw stabilisation in the staffing of the competition authorities.¹

1. LEGISLATIVE DEVELOPMENTS

There were no legislative changes in 2015, but the Commission developed guidelines on administrative penalties;² issued draft guidelines on public interest issues in mergers;³ and is in the process of developing guidelines on information exchange by competitors.⁴

Comments from the Minister of Economic Development suggest that the long–awaited promulgation of amendments which introduce criminal sanctions for cartel conduct is likely in the coming year.

The Commission also updated its merger service standards, extending the expected timeline for decisions to be issued in complex large mergers from 60 days to 120 days.

2. MERGERS

As at 31 March 2015, the Commission had received 395 merger notifications in the financial year, an increase from the previous year’s 320. Of the 375 merger investigations finalised by the Commission, 321 were approved without conditions, 43 with conditions, and 5 were prohibited.⁵

Consolidation in the telecommunication sector was a major theme in 2015. Mergers between Telkom (the major fixed line operator in South Africa) and BCX (a prior attempt in 2007 was prohibited); MTN and Afrithost; and Dimension Data and MWeb were approved. These largely involved vertical arrangements in the internet service provider space. In the BCX transaction, the authorities found that Telkom is the largest provider of wholesale leased lines and has the ability to foreclose its downstream rivals from access to these wholesale leased lines which are essential inputs for the provision of downstream services including managed network services, value–added network services and others. It also found that Merged Entity has the ability and incentives to engage in bundling strategies that may result in anticompetitive effects. It therefore imposed conditions aimed at addressing these concerns.

The Commission recommended the prohibition of a RAN–sharing arrangement between mobile network operators, MTN and

---

Telkom Mobile, and the parties abandoned the transaction, rather than argue their position at the Tribunal.

The Commission recommended the approval of Vodacom’s acquisition of Neotel (a smaller South African fixed line operator) on the condition that Vodacom does not make use of Neotel’s spectrum for a two year period. The deal then faced significant opposition in the Competition Tribunal as well as a successful review in the High Court of the Independent Communications Authority of South Africa’s decision to transfer control of the spectrum. In the Tribunal, competitors argued Vodacom’s access to Neotel’s spectrum would strengthen an already dominant player. At first, the merging parties suggested they would amend the arrangement to deal with these concerns, but ultimately they decided to abandon the transaction. There are substantial difficulties being faced by operators in South Africa requiring access to spectrum and capacity in order to address the growing data requirements of consumers, with severe delays by the regulator taking steps to address these concerns.

Public interest issues in mergers continue to be a focus. Of the 43 mergers approved with conditions by the Commission, 39 had remedies aimed at addressing a public interest concerns, a significant increase from 10 cases in the previous financial year. The authorities imposed conditions including moratoria on retrenchments; requirements to invest and operate in South Africa; and to source from local suppliers as means to mitigate negative public interest impacts. Business and competition lawyers in South Africa have expressed concerns that the Commission’s approach expressed in its draft public interest guidelines might lead to prior implementation of a merger before clearance or to information sharing by competitors. However, in the Delatrade merger, the Tribunal suggested it would not consider such conduct to be a contravention of the law when aimed at providing information on employment effects.

Two high profile mergers involving global brewer SABMiller are facing hurdles at the time of writing, arising from public interest concerns. The Commission recommended the conditional

---

7 The matter was to be heard by the Tribunal from 23 November 2015 – 11 December 2015: http://www.comptrib.co.za/publications/case-documents/large-merger-vodacom-proprietary-limited-neotel-proprietary-limited/Vodacom /
11 Southern African Clothing and Textile Workers Union and Competition Commission and Newco One, Bagshaw Footwear (Pty) Ltd, Bolton Footwear (Pty) Ltd, Kap Manufacturing (Pty) Ltd, The Divisions, United Farm, Wayne Plastics, Moppow Western Leathers, Jordan Shoes Case Number IM161Dec14/020321; Clover SA (Pty) Ltd and Nkunzi Milkyway (Pty) Ltd Case Number IM175Dec14/020461; Fidelity Cash Solutions (Pty) Ltd, Fidelity Security Services (Pty) Ltd, Protea Coin Group (Pty) Ltd and Competition Commission & Protea Coin Group (Pty) Ltd Case Number IM183Jan15/020545.
14 http://www.compcom.co.za/stakeholders-comments-on-the-draft-guidelines/
15 Delatrade 83 (Pty) Ltd and The JHI Retail Division of JHI Properties (Pty) Ltd and LP Manco, The Property Management Business of Liberty Holdings Ltd Case Number 020404
The Commission prohibited, or recommended the prohibition of, a number of mergers in 2015. In the andalusite sector, the Commission prohibited a merger on the basis that the merging parties were close competitors and the proposed transaction would result in the removal of an effective competitor in the market for fine and medium grade andalusite. The merging parties have asked the Tribunal to consider the matter.

In the casino sector, the Commission recommended the prohibition of Sun International’s acquisition of Peermont on the basis that the merger was likely to give rise to significant competition concerns in the central Gauteng gambling market. The Commission found that the transaction would increase concentration levels in an already highly concentrated industry, leaving the central Gauteng gambling market with only two major competitors who could then coordinate their behaviour to the detriment of consumers. The matter was subsequently removed from the roll before the Tribunal, with the merging parties informing the Tribunal that there was uncertainty concerning the continued pursuit of the proposed merger.

In the construction sector, the Commission prohibited a small merger on the basis that the merged entity would have the ability and the incentive to raise the costs of its rivals in the downstream market for road surfacing and rehabilitation in the Kimberley area, substantially lessening or preventing competition in the market for the production and supply of aggregates used in the surfacing of national roads in the Kimberley area.

3. CARTELS AND OTHER ANTI–COMPETITIVE PRACTICES

The Commission has conducted more dawn raids in the last two years than in all of the years the Act has been in effect. Raids were conducted on the premises of the suppliers of liquid petroleum gas cylinders; furniture removal companies; recruitment advertising agencies; and fire protection system providers. This trend suggests we may see more dawn raids in 2016.

The Commission finally completed its fast track settlement process (which began in February 2011) in relation to bid rigging of projects in the construction sector. Parties have settled claims of collusion in relation to numerous projects, but the Commission has referred a complaint against Group Five, the leniency

---

17 Imerys South Africa (Pty) Ltd AND Andalusite Resources (Pty) Ltd Case Number IM013May15/CNF046Jun15
19 Raumix Aggregates (Pty) Ltd intended to acquire OMV Kimberley (Pty) Ltd and OMV Kimberley Mining (Pty) Ltd.
applicant in relation to the bulk of the projects.\textsuperscript{23} It seems likely that civil claims will be launched against construction companies, particularly by government agencies who commissioned projects such as roads\textsuperscript{24} and World Cup Stadia.\textsuperscript{25}

The Commission has also been conducting market inquiries: the private healthcare inquiry is now in full swing, although the Commission extended the date for conclusion of this process until 31 May 2016.\textsuperscript{26} Submissions have been called for in the LPG inquiry.\textsuperscript{27} The Commission has released final terms of reference for the retail grocery market inquiry. The Commission intends to look at, among other things, the impact of the expansion, diversification and consolidation of national supermarket chains on small and independent retailers in townships, peri-urban and rural areas and the informal economy; the impact of long term exclusive lease agreements entered into between property developers and national supermarket chains (and the role of banks in financing shopping centres); as well as the impact of buyer groups on small and independent retailers.\textsuperscript{28}

4. \textbf{ABUSES OF DOMINANCE}

The Commission experienced mixed outcomes on abuse of dominance matters. Its successful prosecution of Sasol Chemical Industries for excessive pricing was overturned by the Competition Appeal Court (CAC).\textsuperscript{29} The essence of the Commission’s complaint was that a SCI charged excessive prices for purified propylene and polypropylene between 2004 and 2007. These products are key inputs for manufacturers of industrial and household plastic products and accordingly, the prices of purified propylene and polypropylene have important knock-on implications for producers in a wide variety of industries. The feedstock for these products comes from another Sasol subsidiary, Synfuels, which produces that feedstock as a by-product in its fuel production process.

Although the CAC held that the determination of economic value must be predicated on the price at which Synfuels sold feedstock to SCI and not some hypothetical price, it upheld SCI’s arguments as regards the evaluation of capital assets, the appropriate rate of return on capital, the allocation of group costs and the allocation of common costs. On the basis of these revised cost assumptions, the CAC concluded that the price-cost mark-up was approximately 12% -- 14%, which it determined did not lead to excessive prices (even though this mark-up is in addition to the competitive return on capital).

The Commission asked the Constitutional Court for leave to appeal the CAC's judgment on the basis that the issue has substantial public interest impact, but that Court refused leave.\textsuperscript{30} In a press release, the Commission expressed disappointment at the Constitutional Court’s decision and stated that it remains concerned about the pricing behaviour of dominant firms.
operating upstream, and it resolved to go back to the drawing board to determine its next approach to handling excessive pricing complaints going forward.31

The Commission also lost its long-running case against SAB relating to its distribution arrangements and whether the appointment of exclusive distributors with exclusive territories and particular pricing arrangements amounted to market allocation, restrictive vertical practices and price discrimination. The CAC found that SAB and its appointed distributors had not engaged in any anti-competitive conduct in relation to these allegations.32

On the other hand, the Commission succeeded in the Tribunal, proving that Media24 had engaged in exclusionary conduct through low pricing in the local newspaper market.33 This is the first time in the sixteen years in which the Competition Act has been in operation that a firm has been found guilty of predatory pricing. The Tribunal determined that Media 24 engaging in a multi-pronged strategy which included using a Media 24 title, Forum, as a "fighting brand" to prevent a competitor from expanding in the market. This strategy entailed pricing its advertising rates below average total cost and operating Forum for a lengthy period even though it was making a loss. The competitor finally exited the market in 2009.

In light of this mixed bag, the Commission will be giving careful thought to the abuse cases that it chooses to litigate going forward, given the complexity and costs of such litigation.

5. COURT DECISIONS

The Supreme Court of Appeal found that civil actions could not be pursued against bread manufacturer Premier (which was granted leniency by the Commission) because the Commission had failed to cite it as a respondent in its referral of the cartel complaint.34 The Commission has however indicated that it will cite leniency applicants in cartel cases going forward, so the decision is not likely to impact on too many future cases.

The High Court dismissed an application by Allens Meshco to review the Commission's decision not to grant them leniency in relation to the wire products cartel.35

---

32 The Competition Commission and South African Breweries Limited and 14 others Case Number 129/CAC/Apr14.
33 The Competition Commission vs Media 24 Limited Case Number CR154Oct11/013938
34 Premier Foods (Pty) Ltd v. Manoim NO and Others (38235/2012) [2013] ZAGPPHC 236 (2 August 2013)
35 The Allens Meshco Group of Companies and Others v. the Competition Commission (31044/13)(not reported)
AUSTRALIA

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

There were no relevant amendments to the Competition and Consumer Act 2010 (Cth) ("CCA") in 2015. However, the Competition Policy Review released its final report in March 2015 ("Report"). The Report made 56 recommendations to overhaul Australia’s competition laws, policies and institutions. The Chairman of the Australian Competition and Consumer Commission ("ACCC"), Rod Sims, welcomed many of the recommendations, noting that their adoption "could significantly enhance economic productivity".1

In addition to the recommendations relating to competition policies and institutions, the Report recommends amendments to Australia’s competition laws consistent with those flagged in the draft report (released in September 2014). The key recommendations relate to the merger review process, cartels, misuse of market power (abuse of dominance), exclusive dealing and the introduction of a concept of ‘concerted practices’. The Report also contains model legislative provisions which give life to the Report’s recommendations by providing a tangible foundation for future reform.

The Australian Government responded to the Report in November 2015, announcing that it will implement 44 of the 56 recommendations in whole or in part. It is conducting consultation on the proposed amendments to the dominance prohibition (discussed further below).

2. MERGERS

2015 saw the ACCC deal with several complex merger assessments with only two mergers opposed and some significant mergers approved.2 Notable ongoing assessments include Iron Mountain Incorporated’s proposed acquisition of Recall Holdings Limited and the proposed acquisition of Asciano Limited ("Asciano") by competing bids from Brookfield Infrastructure Partners LP ("Brookfield") and a consortium led by Qube Holdings Limited ("Qube Consortium"). On 23 February 2016, the ACCC announced that it suspended the review timelines for consideration of both proposed acquisitions of Asciano,3 following an Australian Stock Exchange announcement that Brookfield and the Qube Consortium are in discussions regarding a joint bid to acquire Asciano.4

---


4 ASX Announcement, Qube Holdings Limited, Qube Consortium in discussions with Brookfield Infrastructure in
In July 2015 the ACCC announced its decision to oppose the acquisition of the Northern Territory and far north Queensland marine freight business of Toll Marine Logistics Australia ("Toll") by Sea Swift Pty Ltd ("Sea Swift"). Sea Swift and Toll are the only suppliers of scheduled freight services on particular routes in the region. The ACCC determined that the proposed acquisition would eliminate competition, strengthen Sea Swift's position and deny the opportunity for other freight suppliers to enter the market. Undertakings offered by Sea Swift were considered by the ACCC to be insufficient to dispel the ACCC's concerns. Sea Swift applied to the Australian Competition Tribunal in September 2015 seeking review of the ACCC's decision (which is an alternative to seeking clearance from the ACCC). This application was subsequently withdrawn.6

2015 also saw a large number of significant mergers approved. In October 2015 the ACCC approved cross-acquisitions between Foxtel Management Pty Ltd (a monopoly pay television company) and Ten Network Holdings Pty Ltd (a free–to–air network), on the basis of strong competition from other free–to–air networks and the introduction of streaming services (such as Netflix) into the Australian market earlier in the year.7 In November 2015 the ACCC approved the acquisitions of BG Group by Royal Dutch Shell, of Brisbane's AirportLink M7 by a consortium led by Transurban, and of TNT Express NV by FedEx Corporation.8

The ACCC also approved two major mergers in the Australian telecommunications industry. In August 2015 the ACCC announced it would not oppose TPG Telecom Limited's acquisition of iiNet Limited, which represented an amalgamation of two of the five largest suppliers of fixed broadband in Australia.9 This was closely followed by an announcement in November 2015 that the ACCC would not oppose the proposed acquisition of M2 Group Limited ("M2") (a household and small business focused telecommunications provider) by Vocus Communications Limited ("Vocus") (an enterprise and government focused telecommunications provider). The ACCC noted that the merged entity will be a strong fourth competitor to rival strongholds Optus, Telstra and TPG.10

---

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In February 2015, the ACCC identified its compliance and enforcement priorities for the coming year and announced its intention to combat cartel conduct impacting on government procurement.\(^{11}\)

Consistent with that priority, in May 2015, the ACCC commenced proceedings against eleven respondents involving serious allegations of cartel conduct affecting a state Government tender process. Two of the respondents are Cascade Coal Pty Ltd ("Cascade") and Loyal Coal Pty Ltd ("Loyal"). The ACCC alleges that the respondents engaged in bid rigging conduct during the tender process for a mining exploration licence which related to a mining tenement at Mt Penny in the State of New South Wales. The ACCC alleges, amongst other things, that Cascade entered into an arrangement with Loyal whereby Loyal would submit its bid and then withdraw from the tender. In return, Cascade would grant to an affiliate of Loyal a 25 per cent interest in Cascade's mining venture in respect of the Mount Penny coal release area. The case is listed for hearing in the Federal Court of Australia in April 2016.

In December 2014 the ACCC appealed against the Federal Court's decision to dismiss the ACCC's proceedings against Air New Zealand Ltd and PT Garuda Indonesia Ltd.\(^ {12}\) The ACCC alleged that the airlines had engaged in an air cargo cartel involving collusion by fixing surcharges and fees on carriage of air cargo from Hong Kong, Singapore and Indonesia to Australia. The appeal was heard by the Full Court of the Federal Court and judgment was reserved in August 2015. Judgment on the appeal is expected in 2016.

In July the Full Court of the Federal Court delivered judgment in two appeals relating to cartels between agents and principals: one by the ACCC against the decision in proceedings against Australia and New Zealand Banking Group Ltd ("ANZ"), and one by Flight Centre Travel Group Limited. The ACCC lost both appeals. These decisions confirm the application of Australia's cartel laws to firms which sell their goods and services both directly and through agents. The Flight Centre decision was granted special leave to appeal to the High Court of Australia in March 2016\(^ {13}\) and a hearing of the final appeal is expected in late 2016.

In the proceedings against ANZ the ACCC alleged that the bank had entered into a price-fixing agreement with a mortgage broker, whereby the broker was required to restrict rebates offered to customers taking out home loans with ANZ. The Federal Court dismissed the ACCC's claim, finding that the conduct did not amount to price fixing because ANZ and the mortgage broker were not competitors in the market for the supply of loan arrangement services.\(^ {14}\) The Full Federal Court upheld this finding on appeal, holding that the 'loan arrangement services' provided by ANZ in respect of its own loans were ancillary to the market for the supply of home loans, rather than a distinct service provided in a separate market. The Full Court criticised the ACCC's

\(^{11}\) 2015 ACCC Compliance and Enforcement Policy (February 2015).


characterisation of the service offered by ANZ in relation to loan products as "somewhat contrived and artificial", reiterating that the sale and distribution of ANZ's home loans was not a service akin to the advisory service offered by independent mortgage brokers.

In its claim against Flight Centre the ACCC alleged that the travel agency had attempted to enter into anti-competitive arrangements with Singapore Airlines, Malaysia Airlines and Emirates ("the airlines"). The ACCC alleged that Flight Centre had attempted to induce the airlines to offer all their fares online, and for those fares to be offered at a price no less than the net fare plus the commission Flight Centre would have received if it had sold the fare. At first instance the Federal Court found that Flight Centre was in competition with the airlines for the distribution and booking of services. On appeal the Full Court overturned the primary judge's findings, holding that there was no market for the supply of "distribution and booking of services", rather, that the relevant conduct occurred in the market for the supply of international passenger air travel. The Full Court found that Flight Centre acted in that market as agent for the airlines.

In both cases, the ACCC was unable to adduce evidence to support the existence of the particular market pleaded. The Full Court of the Federal Court held that the ACCC had failed to establish competition between the principals and agents in the particular markets as defined. In its ANZ judgment, the Full Court noted "the characterisation must be based on, amongst other things, a careful evaluation of the evidence concerning the nature and character of the relevant goods or services, the circumstances in which they were supplied or acquired, and the interactions between, and the perceptions of, the relevant suppliers and acquirers of the product".

In the Flight Centre case the Full Court left open the possibility that the existence of an agency relationship may not, in an appropriate case, mean that parties to that relationship cannot be in competition with each other.

In December 2014, the ACCC commenced proceedings against Little Company of Mary Health Care Limited and Calvary Health Care Riverina Ltd (together, "Calvary") for adopting by-laws to regulate the accreditation of medical practitioners to use Calvary medical facilities. The ACCC alleged that this conduct amounted to exclusive dealing, with the purpose of substantially lessening competition. The Federal Court declared that Calvary engaged in exclusive dealing likely to have the effect of substantially lessening competition in the day surgery market in Wagga Wagga and its surrounding areas. Calvary gave a court enforceable undertaking to remove the by-law the source of the ACCC's concern.

In September 2015, Visa Worldwide Pty Ltd ("Visa") was ordered by the Federal Court to pay a pecuniary penalty of $18 million, in addition to the ACCC's costs of $2 million. Visa was

21 Press Release, Austl. Competition and Consumer Comm'n, Visa ordered to pay $18 million penalty for anti-
found to have entered into unlawful exclusive arrangements preventing the further expansion of the supply of dynamic currency conversion services on point of sale transactions on its network by rival suppliers of currency conversion services.

In May 2014, the ACCC commenced proceedings against Australian Egg Corporation Limited ("AECL") (and its managing director and two directors) and two egg producing companies, alleging that the defendants attempted to induce egg producers who were members of AECL into an arrangement to cull hens or dispose of eggs for the purpose of restricting the supply of eggs to consumers and businesses in Australia. In February 2016, the Federal Court of Australia dismissed the ACCC's claims, finding that AECL and the egg producers did not attempt to induce a cartel arrangement. The ACCC has appealed the decision.

4. ABUSES OF A DOMINANT POSITION

In February 2015, the Federal Court dismissed the ACCC's proceedings against Pfizer Australia Pty Ltd for alleged misuse of market power and exclusive dealing in the supply of a generic cholesterol–lowering pharmaceutical to pharmacies. The case is the first time that the ACCC has challenged in court a distribution strategy embarked on by a pharmaceutical patent holder immediately prior to expiry of its exclusive rights. The Court found that Pfizer did not have the requisite substantial market power at the relevant time and at no time engaged in conduct for a prescribed prohibited purpose. The ACCC appealed the Federal Court's decision in March 2015, and the appeal is likely to be decided in 2016.

One of the key recommendations emerging from the Competition Policy Review was the proposed overhaul of section 46. The Review proposed that the prohibition be refocused to combat conduct that has the purpose or effect of substantially lessening competition.

In May 2015 the Chairman of the ACCC reflected on the debate regarding section 46, citing three main causes of contention. First, he described that there is a division between the wider public and competition law experts on the interpretation of the words of the provision – an undesirable situation from a public policy perspective. Second, he claimed that the provision is out of step with antitrust law in overseas jurisdictions, as the Australian prohibition requires proof of the nexus between market power and the offending conduct (i.e. 'taking advantage' of market power). Third, the Chairman suggested that the 'taking advantage' limb of the prohibition attempts to filter pro–competitive and anti–competitive conduct by a firm with substantial market power. The Chairman considers that this filter is ineffective, illogical and unpredictable.

The shape of the misuse of market power prohibition has attracted extensive debate in the

---

Australian business community and media in the wake of the Australian Government’s announcement that it will not adopt the Review’s recommendation for reform. Instead, the Government has released a further discussion paper on the issue and engaged in community consultation, with a final position on reform due to be announced in 2016.

Minter Ellison
www.minterellison.com
Governor Macquarie Tower
1 Farrer Place, Sydney
New South Wales, 2000
Australia

(T) +61 2 9921 8888
(F) +61 2 9921 8123
CHINA

By Peter Wang and Yizhe Zhang of Jones Day

1. LEGISLATIVE DEVELOPMENTS

In 2015, the State Administration for Industry and Commerce ("SAIC"), the agency responsible for non-price non-merger antitrust enforcement in China, published its Regulation on the Prohibition of Abuse of Intellectual Property Rights That Eliminates and Restricts Competition ("SAIC Antitrust and IPR Regulation") 1. The SAIC Antitrust and IPR Regulation is the first set of comprehensive rules dedicated to the intersection of antitrust and IP laws in China. The SAIC Antitrust and IPR Regulation provides some safe harbors, a rule of reason analysis and more details on the application of the Anti-Monopoly Law ("AML") in IP-related issues such as tying, refusal to deal (including the controversial essential facilities doctrine), patent pools and standard-essential patents ("SEPs"). However, the SAIC Antitrust and IPR Regulation is legally binding only on SAIC, and not on courts or other enforcement agencies.

2. MERGERS

In 2015, MOFCOM unconditionally cleared 312 merger cases,4 including 238 cases

1 Guanyu Jinzhi Lanyong Zhishi Chanquan Paichu, Xianzhi Jingzheng Xingwei de Guiding (关于禁止滥用知识产权排除、限制竞争行为的规定) [Regulation on the Prohibition of Abuse of Intellectual Property Rights That Eliminates and Restricts Competition] (Announcement by the State Administration for Industry and Commerce, April 7, effective August 1, 2015):

2 Jingyingzhe Jizhong Shenbao Banfa (经营者集中申报办法) [Rules for the Notification of Concentration of Undertakings] (Promulgated by the Anti-monopoly Bureau of the Ministry of Commerce, November 21, 2009, effective January 1, 2010):
http://fljd.mofcom.gov.cn/article/c/200911/20091106639149.shtml

3 NDRC Press Release: Working on Drafting Six Anti-Monopoly Guidelines:

4 List of Unconditional Clearance of Concentrations of Undertakings:
http://fljd.mofcom.gov.cn/article/zcfb/201504/20150400932418.shtml (first quarter),
http://fljd.mofcom.gov.cn/article/zcfb/201507/20150701034930.shtml (second quarter),
http://fljd.mofcom.gov.cn/article/zcfb/201510/20151001128985.shtml (third quarter), and
under its simple case procedure, which provides expedited review for transactions unlikely to raise competition concerns. Most cases under the simplified procedure have been cleared within phase I (30 days) or shortly thereafter.

During 2015, MOFCOM imposed new conditions in two merger cases while adjusting conditions previously imposed in three other cases. In Nokia/Alcatel–Lucent, MOFCOM required that Nokia continue to observe its FRAND commitments for both its own and Alcatel–Lucent’s SEPs, and not seek injunction or exclusion orders based on its SEPs that would jeopardize the application of FRAND commitments. It also required that Nokia notify licensees in China of any future transfers of SEPs to third parties. These conditions were similar to ones previously imposed by MOFCOM upon Microsoft and Nokia in connection with the Microsoft/Nokia transaction in 2014. In NXP/Freescale, a post–transaction combined market share of 51.1% in the global radio–frequency (RF) power transistors market gave rise to MOFCOM’s concerns that the transaction might eliminate competition between the No.1 and No.2 players in the market, limit clients’ choice of suppliers, reduce incentives for R&D, and raise barriers to entry. Consequently, MOFCOM required NXP to sell its RF power transistors business to a Chinese company, JAC Capital.

In addition, MOFCOM agreed to modify conditions previously imposed in some earlier conditional approval decisions:

(1) Google/Motorola: MOFCOM approved Google’s application for relief from one of its previous commitments that Google comply with FRAND in dealing with mobile handset original equipment manufacturers (“OEMs”) in relation to the Android platform. The commitment was imposed on Google as one of the conditions of its acquisition of Motorola Mobility in 2012, but now has been removed in light of Lenovo’s acquisition of 100% interest in Motorola Mobility from Google.

(2) Western Digital/Hitachi: MOFCOM revisited the market conditions for traditional hard disk drives (“HDDs”) and found that increasing competitive constraint has been exercised by portable solid state drives (“SSDs”) and excess capacity in the traditional HDD sector. As a result, MOFCOM released Western Digital from its obligation to hold separate the manufacturing and R&D activities of Western Digital and Hitachi, although it continued the requirement that Western Digital must hold separate their sales and brands.

(3) Seagate/Samsung: for similar reasons, as well as taking into account Samsung’s relatively weak market position, MOFCOM also removed some of the conditions originally imposed on Seagate in 2011, specifically: (i) removing Seagate’s hold–separate obligation in relation to Samsung in all aspects including manufacture, pricing, sales and R&D; and (ii) releasing Seagate from the

7 ABA Section of International Law, 2014 Antitrust Year in Review, p. 18.
8 MOFCOM’s Notice of Releasing Part of Obligations Imposed on Google’s Acquisition of Motorola: http://fldj.mofcom.gov.cn/article/ztxx/201501/2015010086631.shtml
9 MOFCOM’s Notice of Releasing Part of Conditions Imposed on the Concentration of Undertakings of Western Digital’s Acquisition of Hitachi: http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139040.shtml
obligation to expand Samsung’s capacity and to determine capacity based on market demands.\textsuperscript{10}

Finally, MOFCOM published four penalty decisions in 2015 for transactions not properly notified for merger review. The four cases involved two joint ventures and two multi-step acquisitions:

(1) \textit{Microsoft/BesTV}: the two companies established a joint venture in China but failed to file a notification to MOFCOM. The investigation seems to have been triggered by a whistleblower.\textsuperscript{11}

(2) \textit{Bombardier/CSR Nanjing Puzhen}: another joint venture not filed with MOFCOM. The parties discovered the failure to file on their own and notified MOFCOM.\textsuperscript{12}

(3) \textit{Shanghai Fosun/Suzhou Erye}: this case involved a two-step acquisition by Shanghai Fosun, where 35\% of the target was to be acquired by Shanghai Fosun, and 30\% was to be acquired by one of its subsidiaries. Shanghai Fosun completed the initial 35\% acquisition without notifying MOFCOM, but later filed a notification for the overall transaction. MOFCOM considered this to be “gun–jumping” and fined Shanghai Fosun.\textsuperscript{13}

(4) \textit{Fujian Electronics/Shenzhen CHINO–E}: this was a similar two-step acquisition where Fujian Electronics initially acquired 35\% shares in Shenzhen CHINO–E without notifying MOFCOM. Later, one of Fujian Electronics’ subsidiaries acquired the remainder of the outstanding shares in Shenzhen CHINO–E and filed the transaction with MOFCOM. However, an investigation was initiated as a result of a whistleblower complaint and MOFCOM determined that Fujian Electronics should have notified the first 35\% acquisition at the time.\textsuperscript{14}

MOFCOM decided in all four cases that the transactions did not give rise to competition concerns, and thus only imposed fines on each of between RMB 150,000 and RMB 200,000 (statutory maximum RMB 500,000 ($77,120)) without requiring that the transactions be reversed.

3. \textbf{CARTELS AND OTHER ANTICOMPETITIVE PRACTICES}

Enforcement action against conduct violations has increased sharply since 2013. NDRC and SAIC investigated and issued large fines in several high-profile cases in 2015, including:

(1) fining Qualcomm RMB 6 billion ($962 million) for setting unfairly high royalties for wireless SEPs, tying sales of non-wireless SEPs, and imposing unfair conditions on sales of baseband chips. This is the highest fine imposed to date by any Chinese AML enforcement agency,

\textsuperscript{10} MOFCOM’s Notice of Changing the Restrictive Conditions Imposed on the Concentration of Undertakings of Seagate’s Acquisition of Samsung’s Hard Drive Business: http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001144105.shtml

\textsuperscript{11} MOFCOM’s Penalty Decisions (Microsoft/BesTV): http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124903.shtml

\textsuperscript{12} MOFCOM’s Penalty Decisions (Bombardier/CSR Nanjing Puzhen): http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124899.shtml

\textsuperscript{13} MOFCOM’s Penalty Decisions (Shanghai Fosun/Suzhou Erye): http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124896.shtml

\textsuperscript{14} MOFCOM’s Penalty Decisions (Fujian Electronics/Shenzhen CHINO–E): http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124887.shtml
representing 8% of Qualcomm’s sales in China during 2013;\(^\text{15}\)

(2) fining Mercedes-Benz RMB 350 million ($56 million) for setting minimum resale prices for its dealers in Jiangsu Province on certain cars and car parts, and fining some of its dealers RMB 7.8 million ($1.3 million) in total for price-fixing;\(^\text{16}\)

(3) fining Nissan RMB 120 million ($19 million) for fixing resale price for dealers of its cars in Guangdong Province, and fining some of its dealers RMB 19 million ($3 million) in total for price-fixing;\(^\text{17}\)

(4) fining 8 international shipping companies a total of RMB 407 million ($65 million) for price-fixing, but exempting NYK from penalty for being the first to self-report, providing key evidence and cooperating with the agency during the investigation;\(^\text{18}\)

(5) investigating Chinese telecommunication giants including CMCC, China Telecom, China Unicom, and China Tietong in Ningxia Province and Inner Mongolia for potential abuses of dominance by tying broadband services with mobile services and the sale of handsets, and forfeiting unused data volume purchases; this was later suspended based on commitments proposed by the companies.\(^\text{19}\)

(6) fining Sunyard System Engineering RMB 200,000 ($32,080) for refusing to provide requested documents to SAIC Anhui branch for the purpose of an investigation into its alleged anticompetitive conduct, which is the first published penalty for failure to cooperate with an anti-monopoly investigation;\(^\text{20}\)

(7) imposing a fine of RMB 100,000 ($16,040) on Guangzhou Fanyu Animation and Game Association ("the Association") for organizing an anticompetitive agreement among its member companies to only participate in conventions and fairs organized by the Association;\(^\text{21}\)

(8) fining Chongqing Qingyang Pharmaceuticals RMB 439,308.53 ($70,465) for abuse of dominance for stopping the supply of allopurinol ingredients in order to increase price and market share.\(^\text{22}\)

Moreover, Chinese antitrust regulators are increasingly cracking down administrative monopolies (i.e. administrative agencies abusing their powers to restrict or eliminate competition). The six administrative monopoly cases during 2015 included local governmental authorities (1) requiring exclusive dealing with designated companies; (2) discriminating against non-local

\(^{15}\) NDRC’s administrative penalty decision against Qualcomm: [http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html](http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html)


\(^{18}\) NDRC’s administrative penalty decisions against the shipping companies: [http://jjs.ndrc.gov.cn/fjgld/](http://jjs.ndrc.gov.cn/fjgld/)


companies; and (3) restricting participation in local bidding by non-local companies. Notably, the AML enforcement agencies do not have authority under the AML to directly order changes to administrative monopoly conduct by other governmental agencies. Instead, they have only a "right of recommendation," by which they can make rectification proposals to the supervising agencies of the violating administrative agencies. However, the few reported cases to date appear to indicate that violating agencies usually will follow the recommendations made by antitrust authorities.  

4. COURT DECISIONS  

Antitrust civil litigation has been increasing steadily since the AML came into force in 2008. Through 2015, courts nationwide had tried and closed 1802 unfair competition and antitrust cases, including 141 first instance antitrust actions under the AML.

On 2 February 2015, The Intermediate People's Court of Guangdong Province issued a first instance judgment on an administrative monopoly litigation between Shenzhen Tsinghua Sware Software Hi-Tech Co., Ltd. ("Thsware") and the Department of Education of Guangdong Province ("the Department"). This was the first such case addressing the merits of an alleged administrative monopoly. The Department had restricted the software to be used in a National Vocational Students Skills Competition hosted by the Department to software developed by a company called Glodon. Thsware alleged that this exclusive software requirement eliminated and restricted competition among software developers. The Court held that the Department's requirement constituted abuse of administrative power. The Department and Glodon appealed the first instance judgment, and the appeal is still pending.

On 18 June 2015, the Beijing High People's Court affirmed the jurisdiction of the Beijing Intellectual Property Court over antitrust civil litigation between an individual, Tian Junwei, as plaintiff, and Carrefour and Abbott as defendants. This appears to be the first reported follow-on antitrust civil litigation after a finding of violation by the AML enforcement agencies. The plaintiff purchased Abbott's baby formula in Carrefour. Thereafter, Abbott cut the price of its baby formula in light of the NDRC investigation into baby formula companies for resale price maintenance in 2013. As a result, the plaintiff sued the defendants in court for damages allegedly suffered as a result of the violations. The case has yet to be tried on the merits.

On 30 April 2015, the Beijing High People's Court entered final judgment on eMiage v. Qihoo 360, affirming a first instance judgment in favor of Qihoo 360. eMiage is a provider of mobile applications, and Qihoo 360 is a provider of security software. In this case, eMiage alleged that Qihoo's mobile security app had replaced the caller identification feature of eMiage's mobile app, as well as blacked its e-business cards sent via SMS, which constituted illegal restriction of

27 Full court judgment: http://wenshu.court.gov.cn/content/content?DocID=eb0ba701-ec03-4408-90c3-954c5e5b45f3
dealing. eMiage also alleged that Qihoo had tied its security app with its caller identification function. The first instance court refused to find dominance by Qihoo. In addition, the court held that Qihoo’s behavior did not constitute abuse because the filter of its product did not target any specific competitor.²⁹

Another case that received much public attention was the appeal in the case of Yingding v. Sinopec. The case was first heard in 2014, where Yingding, a bioenergy company, alleged that Sinopec, an oil and gas company, had abused its dominant position by refusing to trade with Yingding. The first instance court found abuse of dominance. However, on appeal, the High People's Court of Yunnan Province held that the first instance court had failed to identify the correct relevant market, and that Yingding failed to prove Sinopec's dominance. The case was finally revoked and remanded.³⁰

²⁹ Full court judgment: http://wenshu.court.gov.cn/content/content?DocID=8940842e-cc95-4e1a-be4f-c6e501fe70fd
³⁰ Full court judgment: http://wenshu.court.gov.cn/content/content?DocID=9e71db51-6ff6-4d2c-8af6-8eacf023ebde
INDIA

By Vinod Dhall and Sonam Mathur of Dhall Law Chambers

There have been significant developments in competition law over the last year. The developments have arisen from orders passed by the Competition Commission of India ("CCI"), on both anti-trust and merger control issues. The Competition Appellate Tribunal ("COMPAT") and the judiciary have also played a significant role in impacting the competition law jurisprudence.

1. LEGISLATIVE DEVELOPMENTS

Recently, the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 ("Merger Regulations") were amended twice, in July 2015 and in January 2016.

The amendments have made substantial changes to the filing and merger review process. For instance, the timeline within which the CCI is required to take a prima facie decision on a transaction, Phase I, has been extended from 30 calendar days to 30 working days; the CCI can further extend the review period by 15 working days to seek comments from third parties. The result of these changes is that the Phase I review process has been extended to almost 63 calendar days, excluding the time taken by parties to furnish additional information. The CCI is also now empowered to invalidate a notice at any time if it is 'incomplete or not in conformity with the Merger Regulations'. The CCI has issued guidance notes to provide greater clarity to parties about the information required to be incorporated in the short filing form, Form I. Parties may also be given an opportunity to be heard before the invalidation of a form. The procedural requirements for authenticating a form have also been simplified.

The CCI has also clarified the exemption available for acquisitions made 'solely as an investment' in Schedule I of the Merger Regulations to apply to any acquisition of and aggregating to less than 10% of the total shares or voting rights without any board representation and so long as the acquirer has the rights only of an ordinary shareholder. Similarly, the CCI has clarified that the trigger for commencing the filing obligation, referred to as the 'other document' in sub-section (2) of Section 6 of the Competition Act ("Act"), would only be a public announcement made in terms of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.1

In a much awaited move, the Government of India2 has extended the validity of the small target exemption3 for another five years until 4 March 2021 ("De Minimis Exemption"). The notification has also increased the value of the De Minimis Exemption from INR 2.5 billion of assets and INR 7.5 billion of turnover in India to INR 3.5 billion and INR 10 billion respectively. The Government of India, through a separate notification,4 has increased by 100% the financial thresholds for the combined entity and group to which the combined entity will belong.5

The cumulative effect of the Government notifications and the amendments to the Merger

---

2 Notification S.O. 674(E) dated 4 March 2016.
3 Notification S.O. 482(E) dated 4 March 2011.
4 Notification S.O. 675(E) dated 4 March 2016.
5 § 5 of the Act.
Regulations are to liberalize the Indian merger regime.

2. MERGERS

The CCI has had a busy year in regulating combinations with a total of approximately 127 filings in 2015—the highest number received in a calendar year.

In its second divestment order, the CCI approved the global merger of cement companies, Lafarge and Holcim, subject to the divestment of two cement plants with a total capacity of 5.15 million tons per annum by Lafarge in Eastern India. The CCI defined the geographic market on a regional basis and found horizontal overlaps between the parties in the Northern and Eastern regions in India in the grey cement product market. Specifically, in the Eastern region the CCI concluded that there would be adverse effect on competition due to the high concentration levels, limited constraints exercised by competitors, limited countervailing buyer power, high entry barriers and closeness of competition between the parties pre–merger; and therefore, ordered the divestment. The CCI order, however, could not be implemented given the legal uncertainty regarding transfer of mining leases. Through a supplementary order, the CCI approved an alternative proposal of the parties consisting of the sale of 100% of Lafarge India’s share capital.  

The CCI has also been pro–active in penalizing parties for ‘gun–jumping’. In two separate orders, the CCI imposed penalties of INR 3 crore (approx. USD 0.45 million) on the Zuari group and INR 2 crore (approx. USD 0.30 million) on Deepak Fertilizers for not notifying CCI of their respective purchases of shares in Mangalore Chemicals and Fertilizers Limited (“MCFL”) which the CCI regarded as ‘strategic’ (and not ‘passive’) investments and therefore ineligible for exemptions. The Zuari group failed to inform the CCI about its 16.43% acquisition of shares in MCFL, which it purchased between April to July 2013 in four tranches. Similarly, Deepak Fertilizers failed to notify the CCI about its acquisition of 24.46% shares in MCFL in July 2013.

The CCI also took serious note of companies that did not provide a full and complete disclosure of information for merger review. For instance, Sumitomo Mitsui Trust Bank/Reliance Capital while seeking CCI approval for its deal, did not provide complete details regarding horizontal overlaps in the parties’ business activities. Although no penalty was imposed, the CCI concluded the order with a strict message to the industry that any effort to conceal material information could invite a penalty.

3. ANTI–COMPETITIVE AGREEMENTS

The CCI continued to come down heavily on cartels, particularly for bid–rigging. It penalized a number of enterprises for rigging Government tenders.

The CCI imposed a penalty of INR 671 crore (approx. USD 105.7 million) on four Government owned insurance companies for bid–rigging in a tender floated by the State

---

7 § 43A of the Act.
Government of Kerala.\textsuperscript{10} In another case, the CCI also imposed a cumulative penalty of INR 3 crore (approx. USD 0.45 million) on thirteen manufacturers/suppliers for colluding in tenders issued by ordnance factories.\textsuperscript{11}

Many trade bodies came under heavy scrutiny; the CCI imposed a maximum penalty of 10\% of the average turnover on the All India Motor Transport Congress ("\textit{AIMTC}\textsuperscript{12}")\textsuperscript{13}, the apex trade association for road transport service providers (both cargo and passenger) in India for a coordinated increase in charges pursuant to increase in diesel prices.\textsuperscript{12} Penalties were also imposed on a cooperative union of truck operators for price-fixing and limiting the supply of their services by not allowing non-members to operate in the area.\textsuperscript{13} Further, the CCI also imposed a heavy penalty on the Kerala Film Exhibitors Federation, an association of theatre owners, for restricting the distribution of newly released films.\textsuperscript{14}

The CCI continued its record of penalizing the associations of chemists and druggists and their members for restrictions/agreements that had the effect of determining the sale prices of drugs, and controlling/limiting the supply of drugs.\textsuperscript{15} Significantly, the CCI also punished a pharmaceutical company for its restrictive agreements with defaulting associations by observing that agreements between pharmaceutical companies and the defaulting association did not fall within the ambit of a horizontal or vertical agreement.\textsuperscript{16} However, the CCI observed that the agreement was in contravention, on a standalone basis, of the over-arching provision that 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.\textsuperscript{17}

The CCI also imposed penalties of INR 258 crore (approx. USD 38.6 million) on three airlines for fixing fuel surcharges on the carriage of cargo.\textsuperscript{18} Notably, the CCI relied merely on price parallelism as evidence of the cartel. Prior to this, the CCI had observed that mere price parallelism was insufficient evidence to establish a cartel and that certain 'plus factors' were needed to corroborate price parallelism.

There is also an increasing propensity to penalize the individuals responsible for a violation or infringement.\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{10} Suo Moto Case No. 02/2014, In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna. vs National Insurance Co. Ltd. and Others: http://cci.gov.in/sites/default/files/022014S.pdf
  \item \textsuperscript{11} Suo Moto Case No. 04/2013, In Re: M/s Sheth & Co & others: http://cci.gov.in/sites/default/files/04201327_0.pdf
  \item \textsuperscript{12} Case No. 61/2012, Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh, President and Ors: http://cci.gov.in/sites/default/files/61-2012_0.pdf
  \item \textsuperscript{13} Case No. 43/2013, M/s Shivam Enterprises v. Kiratpur Sahib Truck Operators Co-operative Transport Society Limited & Ors: http://www.cci.gov.in/sites/default/files/432013_0.pdf
  \item \textsuperscript{14} Case No. 16/2014, In Re:M/s. Crown Theatre v. Kerala Film Exhibitors Federation (KCEF): http://www.cci.gov.in/sites/default/files/61-2012_0.pdf
  \item \textsuperscript{15} Case No. 28/2014, Mr. P. K. Krishnan Proprietor, Vinayaka Pharma v. Mr. Paul Madavana, Divisional Sales Manager, M/s Alkem Laboratories Limited & Others: http://cci.gov.in/sites/default/files/282014.pdf
  \item \textsuperscript{16} § 3(3) which deals with horizontal agreements and § 3(4) which deals with vertical relationships under the Act.
  \item \textsuperscript{17} § 3(1) of the Act.
  \item \textsuperscript{18} Case No. 30/2013, Industry Council of India v. Jet Airways (India) Ltd. & Others: http://cci.gov.in/sites/default/files/302013.pdf
\end{itemize}
4. **ABUSE OF DOMINANCE**

The CCI has not imposed any significant penalties for abuse of dominance in 2015, though a few cases are in progress in the CCI. According to media reports, following a detailed investigation by the investigative branch of the CCI, the Director General ("DG") has concluded that the internet giant Google Inc. abused its dominant position in relation to its search and Ad–Word services. Google would have an opportunity to challenge the DG’s report before the CCI passes its final order.\(^{20}\)

5. **COURT DECISIONS**

The past year has witnessed a number of 'conflicts' between the CCI and the COMPAT, where the COMPAT has either set aside or remanded several decisions of the CCI on procedural grounds.

The COMPAT’s much anticipated decision in the cement cartel appeal against the CCI's order imposing heavy penalties on eleven cement manufacturers was finally released.\(^{21}\) However, the COMPAT remitted the case to the CCI for fresh adjudication of issues, on the ground that the principles of natural justice were not duly observed during the hearing before the CCI. The COMPAT noted that although the Chairman of the CCI was not present during the hearings in which the arguments were presented, the final order imposing penalty was authored and signed by the Chairman (along with the other members of the CCI). The COMPAT order also noted that the CCI should implement comprehensive guidelines to conduct its proceedings in accordance with the principles of natural justice to ensure that a just and fair procedure is followed.

Similarly, in the chemists’ and druggists appeal, the COMPAT set aside the order of the CCI on grounds that it violated the principles of natural justice, including the failure to provide the appellant an opportunity to cross examine. A notable feature of this case is that the COMPAT issued directions to the DG to investigate the allegations, which is contrary to general process as only the CCI is empowered to direct the DG to investigate a matter.\(^{22}\)

The COMPAT also set aside the penalty imposed by CCI on Thomas Cook for 'gun–jumping' by observing that the mere fact that several transactions were entered into at or around the same time between an acquirer and the target and were approved by the board of the acquiror on the same date is insufficient to establish that these transactions were interconnected. Accordingly, it was held that Thomas Cook was not required to notify the CCI of its open market purchases on a standalone basis, as they fell below the *De Minimis* Exemption thresholds and hence, there was no gun–jumping by Thomas Cook.\(^{23}\)

In relation to penalties, the COMPAT in its earlier decisions had reduced the penalty for conglomerate companies on the ground that it should be limited to only the turnover derived from the relevant product or service. A recent decision of the COMPAT has extended this principle further, to limit the penalty to the


turnover derived from the sub-service offered by a company in which the violation occurred.24

Apart from the COMPAT, the judiciary has also passed orders relating to procedures that impact the competition jurisprudence. In a landmark ruling, the Delhi High Court held that the CCI possesses inherent power to review and recall its prima facie orders directing investigations to be undertaken by the DG passed under Section 26(1) of the Act; the court directed the CCI to re-consider any application for review and recall of a prima facie order.25 In another case, the Madras High Court clarified that the DG cannot initiate an investigation suo moto and must seek the CCI’s permission before widening the scope of the investigation. Further, it held that the CCI is not required to form a prima facie opinion de novo regarding such cases when an initial opinion has already been formed before directing the DG to investigate.26 Currently, the Delhi High Court is also considering a challenge to the procedure of an investigation conducted by the DG.27

6. CONCLUSION

Overall, in 2015 and early 2016 India witnessed a substantial relaxation of its merger regime. In case of anti-trust matters, however, the CCI has faced significant challenges to its orders and procedures at the hand of the COMPAT as well as the judiciary. It is anticipated that issues related to procedural fairness and DG investigations will be clarified over the next few years.

JAPAN

By Shigeyoshi Ezaki of Anderson Mori & Tomotsune

1. LEGISLATIVE DEVELOPMENTS

The revised Antimonopoly Act (“AMA”) in effect as of April 1, 2015 abolished the Japan Fair Trade Commission’s (“JFTC”) hearing procedure and introduced a system in which any appeal of a JFTC order shall be heard by the Tokyo District Court. Furthermore, a new procedure for hearings prior to issuing orders has been put in place to enhance due process (described below in the Hokuriku Shinkansen case). The JFTC issued its "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act" in December 2015.¹ In the guidelines, the JFTC did not change its long-standing position that the concept of attorney-client privilege is not recognized in Japan. The guidelines recognize the right for outside counsel to be present during JFTC interviews under very limited circumstances, such as during interviews with foreign nationals.

In March 2015, the JFTC amended the "Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act".² The amendments include policies regarding the criteria for judgment of the legality or illegality of vertical restraints, including the legality of selective distribution and views on the "justifiable grounds" set out in the regulations on resale price maintenance (RPM). One example of justifiable RPM is the encouragement of inter-brand competition by new entry into the market, where investment for sales promotion of the new product can be protected through intra–brand RPM which avoids the so–called "free rider problem”.

The JFTC recently made a partial amendment to the "Guidelines for the Use of Intellectual Property under the Antimonopoly Act" on matters related to FRAND–encumbered SEPs, such as a claim for an injunction by a FRAND–encumbered SEP holder.³

Finally, in 2015, Japan entered into an agreement in principle on the Trans Pacific Partnership (“TPP”). The JFTC is in the process of making the necessary amendments to the AMA to ensure that the TPP agreement will transition smoothly in Japan. This includes the introduction of a "commitment" system to be used in relation to abuse of dominance cases and mergers. Furthermore, the JFTC has started to consider the introduction of a discretionary surcharge system to enhance the JFTC’s investigative capabilities as described above in relation to private monopolization.

2. MERGERS

In the last fiscal year, the JFTC received 289 merger filings and completed Phase II reviews in two cases. The decrease in the number of Phase II cases is due, in part, to the widely adopted practice of "pull and refile" to avoid a full Phase II review. Conditional clearance decisions or decisions to block, which allow for judicial review of such decision, 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 informal


ASIA AND OCEANIA
consultation with the JFTC. Such “voluntarily” agreed conditions may not be disclosed to the public without the consent of the parties and therefore the parties prefer to try and limit the JFTC's review to a Phase I investigation. Experience shows that even after the abolition of the prior consultation procedure in 2010, informal consultation with the JFTC is still critical to a smooth review, especially in complicated cases. The two cases which went to a Phase II review in the last fiscal year are (1) the merger of Zimmer and Biomet, and (2) the acquisition of shares of Chuetu Pulp & Paper by Oji Holdings Corporation. In both cases, the parties voluntarily submitted remedies with the JFTC.

Regarding the merger of Zimmer, Inc. and Biomet, Inc., both US companies, the JFTC found that after the transaction, the market share of the parties would become approximately 90% on the artificial knee market, and 60–70% on the artificial elbow joints market, which would create a significant gap from competing enterprises and previous competition between the parties would be lost. The JFTC concluded that because competitive pressure (entry pressure, competitive pressure from users, competitive pressure from adjacent markets) in the artificial knee market and the artificial elbow joints market is limited, the transaction would substantially restrain competition.

After consultation with the JFTC, the parties voluntarily submitted the following proposed remedies: (1) tangible assets (e.g. inventory, design history, experimental and clinical data) and intellectual property rights (e.g. patents, trademarks, know-how) pertaining to the parties’ leading brands corresponding to approximately 50% of the artificial knee market and approximately 20% of the artificial elbow joints market in fiscal year 2012 are to be divested; (2) buyers of the divested assets are to be enterprises which have adequate experience and capability in the orthopedics and artificial joints business and be independent of and financially unrelated to the parties, and are to be selected in light of criteria such as possessing the funds, specialty and incentive to maintain and develop the business subject to the divestitures. The possible buyers are to be notified to and obtain clearance from the JFTC after concluding contracts with the buyers; (3) if the parties do not conclude contracts with buyers within a certain period of time, an independent third party (divestiture trustee) shall carry out disposal of the business listed in (1) above after obtaining an approval from the JFTC; and (4) the time limit to execute the divestitures is within three months of the date of the clearance from the JFTC regarding possible buyers.

If the remedies above were enforced, the parties’ combined market share after the transaction would be approximately 40% in both the artificial knee market and the artificial elbow joints market. In both cases, the parties’ market share after the transaction would be lower than the market share of the parties before the transaction. It is assumed that buyers who satisfy the requirements described in (2) above would become independent competitors that would be influential in the artificial knee and artificial elbow joints markets. Therefore, on the premise that the remedy would be enforced, the JFTC concluded that the transaction would not substantially restrain competition in the artificial knee and artificial elbow joints markets. The JFTC exchanged information and cooperated with the United States Federal Trade Commission (“US

---

FTC”) and the European Commission (“EC”) which also investigated the same transaction.

3. CARTELS AND BID RIGGING

The level of enforcement of cartels and bid rigging has slowed down, at least in terms of the pure number of orders issued by the JFTC, and is the lowest for the past five fiscal years. However, the leniency program continues to function well. The JFTC received 61 leniency applications between April 2014 and March 2015 (an increase from 50 applications from the previous year), which brings the total to 836 applications since the introduction of the leniency program in 2006.6

Hokuriku Shinkansen Bid Rigging Case7

In October 2015, the JFTC issued cease-and-desist and surcharge payment orders to 11 companies that had participated in bidding for snow-melting equipment works ordered by the Japan Railway Construction, Transportation and Technology Agency. The JFTC found that the 11 companies substantially restrained competition by designating successful bidders and managing to have the designated successful bidders win the bidding. The total amount of the surcharge was approximately 1.03 billion JPY (approximately 8.6 million USD). This is the first case in which the new procedure for hearings prior to the issuing of the JFTC’s order was used, following the abolishment of the JFTC’s hearing procedure for administrative appeals (which came into force in April 2015).

Under the new hearing procedure, the JFTC notified the 11 companies of the contents of the proposed orders in writing and provided them with opportunities to view the evidence and to submit their own opinions and evidence to the JFTC. A recipient dissatisfied with an order may appeal within six months from such knowledge or within a year from the date of the order, to the Tokyo District Court, instead of the JFTC’s hearing department (as it was under the former appeals procedure). For this case, the JFTC also 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 that were engaged in the equipment engineering business in 2014.

CRT Cartel Case8

In May 2015, the JFTC hearing department issued its long–awaited decision on the appeal of the cathode–ray tubes (“CRT”) cartel case (CRTs are the main component of traditional television sets). In 2009 and 2010, the JFTC had sanctioned wholly extraterritorial price–fixing cartel practices for the first time and ordered foreign companies who do not have subsidiaries or branches in Japan to pay a surcharge.

The 11 CRT manufactures involved in the JFTC decision, which included MT Picture Display Indonesia, MT Picture Display Malaysia, MT Picture Display Thailand, as well as Samsung SDI Malaysia, did not sell directly to purchasers in Japan; rather, they sold CRTs to subsidiaries of Japanese companies located in South–East Asia ("local TV manufacturers"), following price negotiations held with the Japanese parent companies, such as Sharp, JVC, Sanyo, Funai and Orion ("TV manufacturers in Japan"). The total surcharges amounted to approximately 3.2 billion JPY.

6 Ibid.
(approximately 27 million USD). While the JFTC amended some of its original orders in respect of procedural matters such as cease–and–desist orders that became unnecessary due to cessation of the conduct, it re–affirmed its view that it has jurisdiction to apply the AMA to extraterritorial conduct where there is a substantial restriction of competition affecting consumers in Japan.

The JFTC acknowledged that there were no direct sales or deliveries of CRTs in Japan, but considered that competition in Japan was affected by the cartel's practices because TV manufacturers in Japan had negotiated with CRT manufacturers. Through the negotiations, they decided important transactional conditions such as the purchase price directed local TV subsidiaries to purchase CRTs based on their decision. Considering the role played by TV manufacturers in Japan, the JFTC found that they were "consumers" in the relevant market. The JFTC also concluded that the amount of surcharges should be calculated based on the total amount of CRTs sold under the cartel to local TV subsidiaries outside Japan because CRTs supplied to local TV subsidiaries were targeted by the cartel and were under certain restrictions imposed by the cartel. The JFTC did not consider whether CRTs purchased by local TV subsidiaries were supplied inside or outside Japan, contrary to the prior predominant theory that the surcharge amount should be calculated based on the sales amounts in Japan.

4. ABUSE OF DOMINANCE (PRIVATE MONOPOLIZATION AND UNFAIR TRADE PRACTICES)

Recently, the JFTC has not been very active in the area of the enforcement of private monopolization. Since the cease–and–desist order against JASRAC in 2009 (as described below), the JFTC has not started any formal investigations for private monopolization cases. A rare exception is the 2015 JA Fukui Keizairen case9. In this case, JA Fukui Keizairen (JA Fukui Prefectural Economic Federation of Agricultural Cooperatives) controlled the business activities of bid participants by taking advantage of its position as the agent for ordering facilities for drying, husking and storing grains. It designated successful bidders and managed to have the designated successful bidders win the biddings. The JFTC issued a cease–and–desist order but did not impose financial surcharges because it seemed that the agricultural cooperatives themselves did not receive any revenue for sales of the relevant products. This is not a typical abuse of dominance case because the conduct is a control–type private monopolization that is similar to bid rigging, and the JFTC did not have to impose a surcharge due to the lack of revenue.

Due to amendments to the AMA in 2009, an automatic, obligatory imposition of a surcharge against private monopolization was introduced. Pursuant to this amendment, the JFTC must not only issue a cease–and–desist order, but also must impose financial surcharges provided by the statute for abuse of dominance cases if the relevant revenues exist. Lack of flexibility and discretion mean that the JFTC lacks the right tools for negotiating to induce the alleged violators to cooperate with JFTC investigations. This might discourage the JFTC from using the private monopolization prohibition in complicated cases and, instead, seems to result in more active enforcement of unfair trade practices where the surcharge is imposed in limited cases such as repeated offences and abuse of superior bargaining positions.

The JFTC has been actively enforcing unfair trade practice rules on large retailers, such

as supermarkets, based upon abuse of superior bargaining positions. 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 market dominant player. Rather, such enforcement is aimed at protecting smaller suppliers by prohibiting the exploitation of weak companies.

In March 2015, the JFTC issued the decision in the Toys”R”Us–Japan case. In this decision, the JFTC confirmed that Toys “R” Us (a large toy retailer) engaged in abuse of a superior bargaining position because it forced suppliers of toys to accept price reductions for the goods that it had sold at discounted prices, although it reduced the surcharge amount from 369 million JPY (approximately 3 million USD) to 222 million JPY (approximately 1.9 million USD). The discounted goods were unsaleable inventory, unsold seasonal goods, etc. and the reduction was made against the originally agreed payable price. The JFTC noted that the fact that the suppliers accepted the retailer’s unreasonable request which did not result in any direct advantage to the suppliers would suggest that the retailer had a superior bargaining position. Such a broad interpretation of "superior bargaining position" could encourage the JFTC to take an aggressive stance and might result in more active enforcement in this area.

5. Court Decisions (JASRAC case)

In April 2015, the Supreme Court rejected an appeal by the JFTC that had found that there was no violation of the AMA by JASRAC, upholding the November 2013 decision by the Tokyo High Court. In February 2009, the JFTC alleged that JASRAC’s method of collecting royalties was in violation of the AMA and ordered that it be stopped. JASRAC requested the order be reviewed, and in June 2012, the JFTC hearing department released a ruling that nullified its earlier order to stop the contracts. Music copyright management company, e–License, contested the JFTC’s ruling and filed a lawsuit. In November 2013, the Tokyo High Court annulled the JFTC’s ruling, which has now been confirmed by the Supreme Court.

The main issue in this case was over JASRAC’s “blanket collection contract”, under which broadcasters pay a fixed percentage of their broadcast income as a usage fee in return for the ability to make an unlimited number of broadcasts of music whose copyright is managed by JASRAC. Under this system, JASRAC had a virtual monopoly on the copyright management of music intended for broadcast. The other music copyright management companies argue that they are unable to make market headway because JASRAC’s all–encompassing contracts discourage broadcasters from paying them for each individual song the broadcasters use.

---

11 The Supreme Court decision of April 28, 2015, supra note 2.
NEW ZEALAND

By Sarah Keene and Troy Pilkington of Russel McVeagh

1. LEGISLATIVE DEVELOPMENTS

The Commerce (Cartels and Other matters) Amendment Bill ("Cartels Bill"),¹ which proposes the most significant reforms to the Commerce Act 1986 since its inception, had been expected to be enacted during 2015 given it had passed its second reading in November 2014 and was said to be high on the Government’s legislative agenda for 2015. However, the Cartels Bill continues to await its final reading.

The key changes proposed in the Cartels Bill include:

- Expansion of the existing price fixing prohibition to also prohibit output restriction and market allocation agreements between competitors (to be known as the prohibition on "cartel provisions"); and
- Introduction of new exemptions to the cartel prohibition, including a "collaborative activities" exemption to replace the current joint venture exemption.

The key rationale for the Cartels Bill, when it was first introduced to Parliament in 2011, was to introduce criminal sanctions for individuals engaged in cartel conduct, namely 7 year jail sentences, on the basis that the existing fines were "seen by some as just a cost of doing business" and, therefore, criminal sanctions were needed to achieve adequate deterrence.²

However, in December 2015 the Government announced that it would remove criminal sanctions from the Cartels Bill on the basis that criminalisation had "remained an issue of major contention" and that there was a "significant risk that cartel criminalisation would have a chilling effect on pro–competitive behaviour between companies."³

Once a Supplementary Order Paper is introduced to Parliament to give effect to these changes, the Cartels Bill is expected to be enacted during 2016.

In May 2014, the Productivity Commission recommended a review of New Zealand's misuse of market power provision on the basis that "a better balance is needed to achieve an effective monopolisation law for the small, competition–challenged New Zealand economy". ⁴ This recommendation was motivated by the New Zealand Commerce Commission’s ("NZCC") long–held, and publicly expressed, dissatisfaction with New Zealand’s existing prohibition on misuse of market power. Following the Productivity Commission’s recommendation, in June 2014 the Government announced that the Ministry of Business Innovation & Employment ("MBIE") would be asked to review New Zealand’s market power prohibition. The Government then delayed that review process as it wanted to wait for the Australian Government's

---


response to the Harper Review, given regulatory alignment between the two countries is an overarching goal. However, delays in Australia saw MBIE proceed to release, in November 2015, an issues paper seeking submissions on three areas of potential Commerce Act reform:

- New Zealand’s misuse of market power prohibition. The review raised several potential reform options, including removing the current “taking advantage requirement” or moving to an “effects based” test (broadly aligned with the recommendation of the Harper Review in Australia).
- The NZCC’s enforcement powers, including whether it should have powers to impose penalties or enforce settlements without going through the courts.
- Whether the NZCC (or some other body) should have the power to conduct general market competition studies (at present the NZCC can only investigate potential breaches of the Commerce Act, it cannot undertake a general market study to determine whether a market is sufficiently competitive).

MBIE will consider the submissions received during the first few months of 2016 and then make a recommendation to the Government on whether or not MBIE should proceed to the next stage. The next stage would be the release of an Options Paper that weighs the advantages and disadvantages of a number of different reform options. The Australian Government’s March 2016 announcement that it intends to adopt the Harper Review’s recommendations on the Australian market power prohibition will inevitably impact on MBIE’s recommendations to the Government.

2. MERGERS

2015 was another active year for New Zealand merger control. The NZCC received a total of 12 clearance applications in 2015, two fewer than it received in 2014 (which was the busiest year since 2008), with the NZCC reaching decisions in respect of 9 applications (including 2 that had been filed in 2014). Of those 9 decisions, 7 were cleared outright, one was cleared subject to a divestment undertaking, and one was declined. Five other applications remained outstanding as of 31 December 2015.

The NZCC has noted that it continues to struggle to meet its 40 working day target for decisions on clearance applications, with the reasons for that said to include the complexity of the applications received, liaising with overseas regulators, and waiting for information from stakeholders. The NZCC’s average decision timeframe during its 2015 financial year was 64 working days.

A number of complex and high profile merger clearance applications were considered by the NZCC in 2015:

- The NZCC granted clearance in respect of three high profile global mergers. In June, Staples, Inc gained clearance from the NZCC for its acquisition of Office Depot, Inc, which trades in New Zealand as OfficeMax. The NZCC also cleared Pfizer Inc’s acquisition of Hospira Inc in

---

July, one of the larger transactions in a global wave of activity occurring in the pharmaceutical industry. And in October the NZCC cleared FedEx Corporation’s acquisition of TNT Express N.V. – both key global operators active in the provision of express international delivery services.

- In April, the NZCC declined Reckitt Benckiser’s, owners of Durex, application to purchase Johnson & Johnson’s K–Y brand and product assets. This was the NZCC’s only declined clearance in 2015. Although this merger has been approved in other countries, albeit often with remedies (as was the case in the United Kingdom), the NZCC declined to grant clearance on account of New Zealand having a limited number of personal lubricant suppliers, with Durex and K–Y being the two leading brands.

- In July, Z Energy applied to acquire Chevron New Zealand, the owner of the Caltex Brand in New Zealand. The NZCC’s market enquiries span many aspects of the fuel supply chain, ranging from fuel storage to the retail supply of diesel and petrol. The process is proving to be lengthy, with the NZCC having extended its deadline for a decision to the end of April 2016.

In February 2016 the NZCC also declined the October 2015 application of Tennex Capital Ltd, owners of International Waste, to acquire the medical and quarantine waste business of San–i–pak Ltd. The NZCC found that the two parties were the only providers in the South Island of medical and quarantine waste treatment/disposal services and that the merger would reduce the market to a monopoly.

The only merger authorisation considered during 2015 was Cavalier Wool Holding’s (“CWH”) October 2014 application to acquire New Zealand Wool Services International’s wool scouring business, which would result in CWH being the only wool scouring business in New Zealand. The NZCC had previously authorised this transaction in 2011, but the parties had not completed the transaction within the 12 month statutory timeframe. On 13 November 2015 the NZCC authorised the transaction, on the basis that there were public benefits to New Zealand from the acquisition, including lower administration and production costs, the freeing up of industrial sites, and lower ongoing capital expenditure. On 12 November, 2015, downstream competitor Godfrey Hirst asked the High Court to issue an order staying the effect of the NZCC’s final determination if authorisation was granted, so that it could file a formal appeal against the determination. This order was granted, and Godfrey Hirst has appealed on the basis that the NZCC made material errors in reaching its decision. Godfrey Hirst’s appeal is yet to be heard.

---

On the enforcement front, in March 2015 the NZCC finally concluded its almost 2-year investigation into Wilson Parking’s completed and un-notified acquisition of car parking assets from Tournament Parking. The NZCC commenced that investigation in June 2013 on the basis that the parties were the two largest car parking providers in New Zealand, leading to concerns that the acquisition may have removed Wilson Parking’s closest competitor in certain localised areas. Ultimately, however, the NZCC concluded that while existing and potential competition in the relevant localised areas would be unlikely to constrain Wilson Parking post-acquisition, the NZCC’s customer surveys indicated that public transport may be a sufficient constraint on Wilson Parking’s ability to raise prices in those areas. Curiously, the NZCC noted that “this outcome is inconsistent with international literature and views expressed by other market participants,” but that it may nevertheless “be explicable on the basis that [the relevant areas] have good public transport and are close to tertiary education institutions.”

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In April 2015 the NZCC authorised members of the Infant Nutrition Council (“INC”) to agree to follow their Code of Practice that restricts advertising and marketing of infant formula for children under six months of age. The NZCC was satisfied that the public benefits arising from higher breastfeeding rates would outweigh any lessening of competition from the arrangement, and that the prices of infant formula were unlikely to be affected.

In October the NZCC issued a formal warning to Consolidated Alloys (N.Z.) Limited (“CAL”) over the inclusion of an anti-competitive clause in a negotiated settlement with a competitor, Edging Systems (NZ) Limited (“ESL”). CAL and ESL had entered into the settlement agreement following a dispute about a patented softedge roof flashing product. In that settlement agreement CAL sought to prohibit ESL from selling its own flashing products, which CAL claimed infringed the patent of its patented softedge flashing product, and ESL was required to pay CAL royalties and not sell any other softedge flashing product until 2023. However, CAL’s patent expired in August 2015, meaning the restriction in the settlement agreement was eight years longer than its patent right. The NZCC said that “a restraint that is eight years beyond the expiry of the patent is likely to have the effect of substantially lessening competition in the market.”

4. ABUSES OF DOMINANCE

The NZCC did not take any enforcement action, or conduct any investigations, relating to the misuse of market power prohibition in 2015. As noted above, the NZCC has expressed public dissatisfaction for a number of years with New Zealand’s existing market power prohibition. That dissatisfaction appears to be reflected in the NZCC’s enforcement/investigation decisions.

In the Commerce Select Committee’s annual review of the performance and operations

---


17 Ibid at [12].


of the NZCC, the NZCC was asked whether its apparent focus on consumer complaints in 2015 represented a shift of emphasis away from investigation of structural competition issues such as potential misuse of market power issues. The NZCC replied that its activities were guided by the complaints it receives.\(^{20}\)

5. **COURT DECISIONS**

On 13 November 2015 the High Court fined waste oil firm Enviro Waste Services Limited ("EWS") NZ$425,000 for attempted anti-competitive conduct in relation to the collection of waste oil in the upper South Island. The NZCC alleged that the branch manager of Bens Oil, a division of EWS, attempted to agree with a competitor (Transpacific Industries Group ("TPI")) to compete less aggressively for each other’s customers. The branch manager allegedly threatened to enter Bens Oil into a separate market for waste tallow collection in competition with TPI unless TPI consented to the customer allocation agreement. The agreement was never actually entered into, and no commercial gain was made.

In December 2015 the NZCC filed proceedings in the High Court for alleged price fixing and anti-competitive behaviour by a number of competing real estate agencies and individuals within those agencies. The NZCC alleges that the agencies coordinated a national, industry-wide response to the change by online trading platform Trade Me from a monthly subscription fee to a per-listing fee for properties advertised for sale on its website, namely that the agencies would:

- require vendors to pay the listing fee; and
- not commit to any discounted listing fees with Trade Me.\(^{21}\)

As of 17 December 2015, the NZCC had agreed in principle to settlements, involving admissions and agreed penalties, with two of the agencies and had issued warnings to an additional 8 agencies for their role in the conduct. Proceedings against the other defendants are ongoing.

Also in December 2015, livestock companies PGG Wrightson and Rural Livestock were fined NZ$2.7 million and NZ$475,000 respectively by the High Court for price fixing in connection with the introduction of the National Animal Identification Tracing Act 2012 ("NAIT Act"). The NAIT Act imposed various livestock tagging and monitoring obligations upon the livestock companies. The NZCC’s investigation found that in anticipation of the NAIT Act, the competing livestock companies entered into agreements to charge certain minimum fees for the tagging and registering of animals.\(^{22}\)

---


SOUTH KOREA

By Youngjin Jung, Gina Jeehyun Choi of Kim & Chang

1. LEGISLATIVE DEVELOPMENTS

On December 3, 2015, the Fairness in Distributorship Transactions Act ("FDTA") was passed, in an effort to prevent unfair trade practices and foster fairness in supplier–distributor relationships. The FDTA will not, however, apply to transactions involving small and medium-sized suppliers, to cases where the distributor is not a small or medium-sized enterprise or to situations where the supplier is not deemed to hold a superior bargaining position over the distributor. Violations of the FDTA can result in administrative and criminal sanctions for suppliers, as well as the imposition of liability on the supplier for any damages suffered by the distributor, which, in certain cases, may include treble damages. The FDTA will come into effect on December 23, 2016 and will apply to the first distribution agreement executed or renewed after the statute’s enforcement.

On December 31, 2015, the Korea Fair Trade Commission ("KFTC") amended its Review Guidelines on Unfair Trade Practices ("Amended Guidelines"). Unfair trade practices refer to a unique concept that is a significant pillar of Korean competition law, regulate practices similar to those regulated as abuse of market dominance, although, for unfair trade practices, the entity engaging in the allegedly unlawful conduct need not have market dominance. In assessing the illegality of such practices, fairness as well as anticompetitive effects are taken into consideration. The Amended Guidelines are aimed at aligning the KFTC’s review criteria with global standards, and, in particular, adding details to the standards for assessing anticompetitive effects and clarifying that the focus of the anticompetitive effect review should be on protecting competition, not protecting competitors. In this regard, violations may include market price increases and reductions in production volume.

On December 16, 2015, the KFTC announced proposed amendments to its Guidelines on Unfair Exercise of Intellectual Property Rights ("IPR Guidelines"). The purpose of these revisions is to provide greater clarity and predictability around when the KFTC will consider the exercise of intellectual property rights problematic and include proposed changes to narrow the definition of Standard Essential Patents ("SEP") and to remove the previous reference to de-facto SEPs. An amendment is also proposed to the definition of SEPs to include the requirement that a patent holder commit to license on "fair, reasonable, and non-discriminatory" ("FRAND") terms.

The KFTC also announced draft amendments to its Guidelines on Committee Operation and Handling Procedure, intended to strengthen internal and external controls on the

---

1 Fairness in Distributorship Transactions Act (Dec. 23, 2016):
http://www.law.go.kr/lsSc.do?menuId=0&p1=&subMenu=1&nwYn=1&section=&tabNo=&query=%EB%8C%80%EB%A6%AC%EC%A0%90%EA%B1%B0%EB%9E%98%EC%9D%98%20%EA%B3%B5%EC%A0%95%ED%99%94%EC%97%90%20%EA%B4%80%ED%95%9C%20%EB%B2%89%EB%A5%90&undefined
http://www.ftc.go.kr/laws/laws/popRegulation.jsp?lawDivCd=01&firstFtcRelLawNo=759
3 Guidelines on Unfair Exercise of Intellectual Property Rights, Korea Fair Trade Commission:
4 Guidelines on Committee Operation and Handling Procedure, Korea Fair Trade Commission (Feb. 4, 2016):
http://www.ftc.go.kr/laws/laws/popRegulation.jsp?lawDivCd=01&firstFtcRelLawNo=244
KFTC’s investigation process. This is also in line with the KFTC’s Guidelines on Investigation Procedure,\(^5\) which aim to protect the rights of the respondents and to ensure transparent investigation processes.

2. **MERGERS**

In 2015, the KFTC remained active and continued to strengthen its review of global mergers and acquisitions that may have a significant impact on the Korean market. The KFTC reviewed a total of 669 business combination filings, amounting to KRW 38.1 trillion in value during 2015, of which 135 combinations (aggregate value of KRW 32.5 trillion) involved an overseas entity.\(^6\)

In August 2015, two years after the transaction was originally reported, the KFTC concluded the consent decree proceedings against Microsoft for its proposed acquisition of Nokia. This was the first time that the KFTC utilized the consent decree proceedings for a merger review. The consent decree accepted Microsoft’s proposed commitments to continue licensing its SEPs for mobile devices on FRAND terms and from "unfairly commencing patent infringement lawsuits."\(^7\) Microsoft also agreed that it would not transfer such patents to a third party without agreeing to maintain such FRAND commitments. Notably, such commitments were not required for Nokia’s patents.

In March 2015, the KFTC imposed a corrective order in a transfer of the over-the-counter drug business between Bayer and Merck.\(^8\) Based on the combined market shares of the two companies (82%) in the over-the-counter Korean contraceptive drug market, the KFTC ordered Bayer Korea to divest its assets and rights related to oral contraceptive pills acquired from MSD Korea (Merck’s Korean subsidiary) to a third party, excluding its existing distributor, to prevent the market from turning monopolistic.

In November 2015, the KFTC cooperated with competition authorities in the US, the EU, Japan and other jurisdictions to conditionally approve NXP Semiconductors’ acquisition of Freescale Semiconductor, subject to the divestment of NXP’s RF power transistor business.\(^9\) In reaching the conditional approval, the KFTC, as well as the competition authorities in other jurisdictions, took into account the merging companies’ combined market share of 61.7%, as well as possible effects on competition in the RF power transistor market after the merger.

3. **CARTELS**

In May 2015, the KFTC fined 22 construction companies, including Hyundai, Samsung, Hanyang Construction, SK and Sambo Construction, for bid rigging in multiple large-scale government projects.\(^10\) The total fines amounted to KRW 182.6 billion, with

---

Hyundai receiving the largest individual fine of KRW 36.2 billion, followed by Hanyang and Samsung.\textsuperscript{11} This is the latest in a series of bid rigging investigations by the KFTC involving large government projects, which inflict harm on major government construction projects and which involve schemes that ultimately cost taxpayers. Recently, the KFTC has been focused on eliminating entrenched bid rigging and collusion in the construction industry. The case represents continued efforts by the KFTC in this regard and the fines are among the highest imposed on the construction industry, based on a calculation of total project costs.

Also in May 2015, the KFTC fined 6 butane gas cylinder manufacturers KRW 30.8 billion for price fixing and referred the case to the Prosecutor's Office for criminal prosecution.\textsuperscript{12} The KFTC found that from 2007 to 2012, the six portable butane gas manufacturers agreed to prices of butane gas in an attempt to avoid price competition. Specifically, the manufacturers agreed to price increase amounts and the partial lowering of prices when changes to the price of raw materials occur. According to the KFTC, such agreements were reached during meetings of sales executives at a restaurant in Seoul. The KFTC also brought individual charges against the executives of the manufacturers for price fixing, as well as made criminal referrals for the individuals based on their active role in the price fixing, which remains relatively rare.

In September 2015, as part of the enforcement against the bearing cartel case, the Prosecutor's Office announced that it indicted (without detention) a Japanese bearing manufacturer and its Korean subsidiary on charges of price fixing. The case had been referred to the Prosecutor's Office after the KFTC had found that the companies engaged in a cartel to fix prices on bearing. After conducting a \textit{de novo} investigation, the Prosecutor's Office decided to indict both companies for a full criminal trial, instead of utilizing a summary procedure for fixing the prices of bearings supplied to Korean customers. This was the first time that a foreign company was indicted in Korea for engaging in an international cartel and marks a continued criminal prosecution trend for violations of the FTL.

4. ABUSE OF DOMINANCE AND UNFAIR TRADE PRACTICES

In March 2015, the KFTC fined Nongshim, the largest instant noodle manufacturer in Korea with an approximate 60% market share in the domestic Korean market, KRW 500 million for abusing its superior bargaining power over wholesalers.\textsuperscript{13} In particular, the KFTC found that Nongshim had forcefully imposed difficult sales targets and incentives for wholesalers. Despite the fact that the company had imposed such targets for years, the KFTC found that Nongshim had failed to revise such targets after acquiring the power to abuse its position in the market. The KFTC characterized such activities as a "passive violation," conceding that external forces could be attributed to setting the sales targets, namely that competition in the instant noodle market had been rapidly increasing causing a steady and continued decrease in prices. This appears to have been taken into consideration when setting the fine amounts, which fell far below the maximum administrative fines under the FTL.

\begin{itemize}
  \item \textsuperscript{11} Two of the companies were not required to pay fines as they were on the brink of collapse or were already in receivership.
\end{itemize}
Under the FTL, the KFTC has the discretion to impose fines of up to 3% of the relevant turnover.

In February 2015, the KFTC investigation against the international credit card company Visa was dropped after an investigation that lasted more than three years. The investigation was triggered by a formal complaint filed by BC Card, a Korean credit card company, alleging that Visa had abused its market dominant position by requiring credit card companies who signed a contract with Visa to use Visa’s global payment network through its international operation rules. There was insufficient evidence to substantiate the allegation and BC Card eventually withdrew its complaint.

5. COURT DECISIONS

On 24 December 2015, the Supreme Court overturned the KFTC’s corrective order and fines (amounting to over KRW 100 billion (approx. US$100 million)) against four instant noodle manufacturers for price fixing. The Supreme Court held that the evidence, which included statements from the leniency applicant and evidence of an information exchange, without more, was insufficient to support the existence of a price-fixing agreement. In particular, the Supreme Court reaffirmed the KFTC’s burden of proof in cartel cases by requiring the KFTC to produce concrete evidence that proved a mutual "meeting of the minds" to fix prices (e.g., appearance of a concerted act and history and background of information exchange).

In February 2015, the Supreme Court upheld the Seoul High Court decision revoking the KFTC’s corrective order and administrative fines (amounting to over KRW 100 billion) against five oil refining companies. The orders and fines related to allegations of unfair collusive acts and mandated that the companies refrain from soliciting gas stations that operated (or had previously operated) under competitors’ brands, unless the competitor had provided its prior consent. After the Seoul High Court found in favor of the company and vacated the KFTC's decision, the Supreme Court affirmed the Seoul High Court’s ruling. The Supreme Court held that there was insufficient evidence to prove the collusive act. The Supreme Court also found that a consensus between the companies may have, as a matter of course, formed based on the normal operation of the industry, without the companies’ active engagement in unfair agreements between competitors to refrain from engaging in excessive competition in soliciting gas stations.

---


15 Supreme Court [S. Ct.], 2012Du21840, Jan. 29, 2015.
AUSTRIA

By Dr. Axel Reidlinger of Reidlinger Schatzmann Rechtsanwälte GmbH and Dr. Heinrich Kühnert of DORDA BRUGGER JORDIS Rechtsanwälte GmbH

1. LEGISLATIVE DEVELOPMENTS

Current legislative efforts focus, in particular, on the transposition of EU Directive 2014/104 on antitrust damages actions into Austrian law. The deadline for implementation is 27 December 2016. The Directive will bring about a number of changes aimed at facilitating follow-on damages claims, while safeguarding the effectiveness of the EU and Austrian cartel leniency programs. In particular, courts will have the power to order the disclosure of evidence based on a reasoned request. Certain categories of evidence will enjoy limited or total protection from disclosure. In particular, corporate leniency statements and settlement submissions (but not the pre-existing evidence attached to such submissions) will enjoy total protection due to their self-incriminating nature. In addition to the discovery process, the Directive will also bring about a number of other changes to Austrian law, such as an extension of the limitation period, exceptions to the principle of joint and several liability of cartelists for small and medium enterprises, and rules for partial settlements between the claimant and some of the defendants.

2. MERGERS

Merger review activity increased in 2015, with 365 merger notifications received by the Federal Competition Authority ("FCA"), up from 322 in 2014. Five cases were referred to the Cartel Court for investigation in phase two.

Two of the cases examined in phase two concern the healthcare sector. By international standards, the Austrian healthcare sector has received relatively little attention in terms of competition law enforcement, likely a consequence of the large coverage given to public services. The first case, which is still pending, involves the acquisition of Goldenes Kreuz, a private hospital and maternity clinic in Vienna which had become insolvent in 2014, by PremiqaMed, a subsidiary of Austria's second largest insurance group, and which already operates two of five private hospitals in Vienna.

The second case concerned the acquisition by the Vienna Red Cross of another provider of ambulance services. While the main overlap between the parties was in Vienna, where they faced significant competition, the FCA and the Federal Cartel Prosecutor ("FCP") were concerned about the effect in other provinces, where the Red Cross organizations held very high market shares. After examination in phase two, the transaction received conditional clearance. In particular, the acquirer committed not to acquire the business of the target in two provinces (Lower Austria and Styria).

Also in the healthcare sector, the Austrian Supreme Court confirmed the imposition of a

---


3 FCA, BWB/Z-2736 – Rotes Kreuz - Grünes Kreuz; summary (in German); http://www.bwb.gv.at/Aktuell/archiv2015/Seiten/Z-2736-Rotes-Kreuz---Gr%C3%BCnes-Kreuz-.aspx
€155,000 fine on a clinics operator for gun-jumping. The case concerned a Public Private Partnership project in 2013, in the course of which the acquirer had been awarded the management of, and had purchased a 49% share in, a public rehabilitation clinic. The remaining 51% was retained by the previous 100% shareholder, a public health insurance carrier. In merger control proceedings concerning a later acquisition, the FCA discovered that the 2013 transaction had not been notified, and brought proceedings for infringement of the standstill obligation. In the proceedings, the acquirer argued that the clinic did not qualify as an "undertaking" under competition law, and that the merger control rules were therefore inapplicable. The argument turned, in particular, on the fact that clinic mainly treated patients who had been assigned to it by public health insurance carriers. The Austrian Supreme Court rejected this argument, holding that the clinic did not meet the criteria of the antitrust exemption, which applies to public health insurance carriers themselves. It also disagreed with the acquirer as regards the facts of the case, noting that the clinic also provided services to a small number of private patients.  

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The most important case in this field was the Supreme Court decision of 8 October 2015 against various companies of Spar, one of the leading Austrian fast moving consumer goods retail groups ("FMCG"). The FCA started litigation at the Cartel Court against Spar for alleged retail price maintenance and hub–and–spoke practices regarding dairy products. In 2014, the court imposed a €3 million fine against Spar for infringing the prohibition under Art 101 TFEU and sec 1 Austrian Cartel Act. This is a landmark case in Austrian antitrust enforcement not only because of the amount of the fine eventually imposed (€30 million), the second highest ever in Austrian enforcement, but also because the defendant had, unlike most other defendants in similar cases (see below), not concluded a settlement with the FCA but instead insisted on a Cartel Court decision. This was mostly because of a number of open legal questions on which the defendant did not share the FCA's assessment, especially regarding communication between retailers and their suppliers regarding promotional prices.

Both Spar and the FCA (as well as the FCP, who supported the FCA in this case) appealed against this decision to the Supreme Court, with Spar requesting the decision to be annulled or at least the fine to be substantially reduced, and the FCA and FCP asking for a higher fine. The Supreme Court clarified a few legal issues on the gravity of the infringements (which it held qualified as substantial), and also elaborated on the criteria for setting the amount of the fine, stressing that fines imposed in settlement cases, albeit for comparable infringements, could not be used as guidance for the appropriate amount of a fine without a settlement, as this would interfere with the full discretion of the courts under Austrian competition law. The Supreme Court thus increased the fine from €3 million to €30 million. This was also the first Austrian case where full liability of the 100% shareholder was assumed for infringements of its operational subsidiary (as

---

4 Austrian Supreme Court, judgment of 8 October 2015, Case No 16 Ok 3/15z (in German): http://www.ris.bka.gv.at/Dokument.xwe?Abfrage=Justiz&Dokumentnummer=JJT_20151008_OGH0002_0160OK0003_15Z0000_000  

has been established on EU level for many years).

The *Spar* case was also a test case for the FCA’s investigation tools, especially the screening of the defendant’s IT systems during and after dawn raids, which the defendant alleged to be excessive, but which was found by the Supreme Administrative Court to be in compliance with the applicable standards and the rights of defense.\(^6\)

The other cases in this area (infringements of the prohibitions under Art 101 TFEU and sec 1 Austrian Cartel Act) concerned, like in previous years, mostly vertical restraints in the FMCG and consumer electronics sectors, especially for retail price maintenance and hub–and–spoke practices. The FCA continued to conclude settlements with defendants before the Cartel Court, leading to reduced fines (mostly in the €500k to €1.5 million range, depending on turnovers affected and individual cooperation levels) imposed in fast–track court proceedings\(^7\). There was a similar fine for RPM in the bicycle retail market.\(^8\)

However, in 2015 there were also a handful of horizontal price fixing cartel cases in which the Cartel Court imposed fines upon the request of the FCA (partly after settlements by the defendants with the FCA), e.g. in the steel wholesale market\(^9\) and in the rail cargo transport sector, and – curiously – in the case of a local cartel between sports shops in the ski equipment rental market in St. Anton / Arlberg, one of Austria’s most famous ski resorts.\(^10\)

4. **ABUSES OF A DOMINANT POSITION**

There was one noteworthy decision in this area by the Supreme Court adopted on 8 October 2015 in a predatory pricing case.\(^11\) The Supreme Court confirmed a Cartel Court decision of 22 December 2014, finding that *Altstoff Recycling Austria AG* (*"ARA"*), the leading Austrian provider of packaging waste collection and recycling services, had engaged in predatory pricing (Art 102 TFEU) for certain types of packaging waste, and ordering ARA to stop offering its services at or below a certain price. The case had been started by two of ARA’s competitors, and the FCA supported their allegations and legal arguments before the court.

The legal substance of the case was about the correct cost test for predatory pricing. The economic expert appointed by the Cartel Court had considered "long run average incremental cost" ("LRAIC") to be the correct benchmark. The Supreme Court merely stated that this did not raise any methodological concerns, which would have been necessary for the Supreme Court to quash the decision – if the Cartel Court follows findings made by its appointed expert, those findings typically (unless they exhibit major methodological errors) may not

---


\(^7\) For example Cartel Court, judgment of 9 September 2015, Case No 24 Kt 35/15, Samsung Electronics Austria GmbH; Cartel Court, judgment of 1 December 2015, Case No 29 Kt 34/15, Hewlett Packard Gesellschaft mbH; Cartel Court, judgment of 2 July 2015, Case No 26 Kt 9/15, Pfeiffer HandelsgmbH und Zielpunkt GmbH; Cartel Court, judgment of 8 July 2015, Case No 29 Kt 12/15, Pago International GmbH (in German): http://www.edikt.justiz.gv.at/edikt/ek/ekedi17.nsf/suche

\(^8\) For example Cartel Court, judgment of 9 September 2015, Case No 29 Kt 6/15, KTM Fahrrad GmbH (in German): http://www.edikt.justiz.gv.at/edikt/ek/ekedi17.nsf/suche

\(^9\) Cartel Court, judgment of 9 September 2015, Case No 24 Kt 35/15, Frankstahl Rohr- und Stahlhandelsgesellschaft mbH: http://www.edikte.justiz.gv.at/edikt/ek/ekedi17.nsf/suche


\(^11\) Supreme Court, judgment of 8 October 2015, case No 16 Ok 9/15g (in German): http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20151008_OGH0002_0160OK00009_15G0000_000
be challenged in Austria, as the Supreme Court's review is limited to questions of law.

In addition, the Cartel Court had considered that ARA had acted with the intention to eliminate competition. In this regard, the Supreme Court found the Cartel Court's assessment was consistent with the laws of logic, but did not engage in a more detailed analysis as this would have amounted to a review of the facts.

Finally, the Supreme Court also rejected ARA's claim that the relatively small gap between the prices and the cost benchmark would not be "appreciable" and thus not abusive. In this regard, the court clarified that there is no appreciability criterion for assessing predatory pricing under competition law.

5. COURT DECISIONS

In an important case, the Austrian Supreme Court clarified the extent to which arbitral awards are subject to review by the ordinary courts, based on alleged misapplication of competition law. Pursuant to the European Court of Justice’s judgment in the Eco Swiss judgment, Member States which provide for annulment of arbitral awards on grounds of public policy, must treat European competition law as part of the ordre public. The Supreme Court’s judgment examines, in particular, the scope of the review to be carried out by the ordinary courts in their review of arbitral awards which allegedly misapply the competition rules.

The case concerned an international long–term "take–or–pay" gas supply contract between a major international supplier and a Czech national distributor. The contract was subject to Austrian law, and contained an arbitration clause. The dispute revolved around the customer’s refusal to take off contracted quantities with reference to a quantity reduction clause. This clause allowed the customer to reduce the annual contract quantity which it was required to take, in the case of direct sales by the supplier to its customers in the Czech Republic. The supplier brought arbitral proceedings for payment of the contracted quantities, arguing that the reduction clause violated EU competition law. In 2012, an International Chamber of Commerce arbitral tribunal confirmed the validity of the reduction clause and dismissed the supplier’s claim.

The supplier brought proceedings in the ordinary courts, arguing that the arbitral tribunal had misapplied the EU competition rules, and that the decision should be set aside. After its challenge had been unsuccessful in the courts of first and second instance, it brought an extraordinary appeal to the Austrian Supreme Court. The Supreme Court rejected the appeal. While it acknowledged that EU competition law was part of the ordre public, the court noted that under Austrian law, arbitral awards could not be challenged merely based on a wrong application of law or incorrect findings of fact. Even an ordre public examination could not give rise to a révision au fond (review on the substance). Rather, an award could only be set aside if its effects infringed the basic values of the Austrian legal order in an unbearable way.

In this regard, the Supreme Court remarked that even under the hypothetical assumption that the reduction clause infringed the competition rules, its interdependence with the minimum take–off obligation would lead to

---

12 Austrian Supreme Court, judgment of 18 February 2015, Case No 2 Ob 22/14w (in German): http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20150218_OGH0002_0020OB00022_14W0000_000/JJT_20150218_OGH0002_0020OB00022_14W0000_000.pdf
the latter also becoming null and void. Thus, the supplier would not be able to claim payment even in the counterfactual. Based on this analysis, the Supreme Court concluded that the award passed the order public test, and affirmed the judgment at second instance.
EUROPEAN UNION

By Laurie–Anne Grelier and Peter Camesasca of Covington & Burling LLP

1. LEGISLATIVE DEVELOPMENTS

One year after taking office as the European Commission’s (“EC’s”) new Competition Commissioner, and consistent with her orders of mission, Margrethe Vestager’s agenda has been busy with state aid/tax evasion and high profile matters in the energy and digital industries, *inter alia*, including the ongoing and wider policy strategy to achieve a borderless, Europe-wide, digital market (the “Digital Single Market” strategy). She also launched a public reflection on boosting EU national competition authorities’ powers, about 10 years after the modernization of the EU enforcement regime. In contrast, pausing a project initiated by her predecessor, she decided to take a fresh look at proposals to extend the merger notification system to acquisitions of minority shareholdings.

In the field of private enforcement, a number of EU Member–States have taken first steps to implement 2014 EU framework legislation destined to facilitate antitrust damage claims.

---

2. MERGERS

A wave of telecom transactions have come under close scrutiny as the EC opened in–depth investigations into Hutchinson’s planned acquisition of Telefonica UK and Liberty Global’s proposed takeover of BASE Belgium. The EC cleared Orange’s acquisition of Spain–focused Jazztel upon securing remedies to allow market entry. In contrast, Telenor and TeliaSonera abandoned their Danish merger plans after failed discussions with the EC over a remedy package. The deals also triggered a broader political debate on pan–European telecom integration.

The EC also examined a series of deals in the semiconductor industry, clearing Intel's planned acquisition of Altera upon initial review. It likewise approved Avago's proposed acquisition of Broadcom after Avago up–front entered into commercial agreements to make its technology available to switch chips manufacturers; as well as NXP's proposed acquisition of Freescale upon NXP’s undertaking

---


---

3 For an updated overview of the implementation process, EC's dedicated webpage: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html
to divest its radio frequency power transistor business.\textsuperscript{10}

Separately, after an in–depth examination and with remedies, the EC cleared General Electric’s acquisition of Alstom’s energy business—a deal that attracted a lot of political attention.\textsuperscript{11} In another mediated review, Ball obtained clearance to acquire rival can maker Rexam, after the EC conducted an extended in–depth investigation and required Ball to divest a total of 12 can plants in the EU.\textsuperscript{12} After another in–depth investigation, the EC unconditionally approved FedEx’s proposed acquisition of rival TNT, almost exactly 3 years after opposing a similar attempt by UPS.\textsuperscript{13} The EC’s green light to IAG’s acquisition of Aer Lingus relatedly saw Irish rival Ryanair end the court battles that have been opposing it to the EU regulators over its failed attempts to acquire Aer Lingus.\textsuperscript{14}

Finally, in one of the rare appeals concerning mergers, the EU’s lower court upheld the EC’s 2012 decision to block a proposed merger between NYSE Euronext and Deutsche Börse.\textsuperscript{15}

3. ANTI–COMPETITIVE PRACTICES

The EC issued five cartel decisions in 2015 (optical disc drives, cargo train, retail packaging, parking heaters, and Yen Interest Rate Derivatives), imposing fines totaling €365 million (approximately US$407 million), an amount significantly lower than the over–€1 billion annual totals reached in the past three years.\textsuperscript{16} The EC further launched or continued investigations in the ethanol benchmark,\textsuperscript{17} capacitor,\textsuperscript{18} car battery recycling,\textsuperscript{19} canned mushroom,\textsuperscript{20} and bioethanol\textsuperscript{21} sectors.

In addition to its cartel enforcement activities, the EC considered other types of competitor interaction. In particular, the EC continued its first investigation into alleged price signaling, confirming its focus on horizontal activities that go beyond “traditional” cartels.\textsuperscript{22} Also continuing a long–running series of probes into interchange fees, the EC issued formal charges against MasterCard over concerns that its rules on EU cross–border acquiring prevent banks in low–fee Member States from offering

\textsuperscript{15} Case T-175/12 Deutsche Börse: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-175/12&td=ALL
\textsuperscript{16} EC’s cartel webpage: http://ec.europa.eu/competition/cartels/cases/cases.html
such lower interchange fees to retailers located in higher-fee Member States. The EC has also voiced concerns over MasterCard’s rules concerning international interchange fees. In the transport sector, the EC made binding commitments offered by SkyTeam members Air France/KLM, Alitalia and Delta to alleviate concerns that their transatlantic JV involving profit sharing, joint pricing and capacity management and joint scheduling may adversely impact competition on certain O&D pairs.

In the digital space, the EC issued formal charges against Sky and six film studios, alleging that they respectively entered into anti-competitive arrangements preventing Sky from supplying pay-TV content to viewers located outside the UK/Ireland. The EC also started a formal investigation into Amazon’s e-book distribution arrangements with publishers, two years after settling a somewhat resembling case concerning Apple’s eBooks. Relatively, as part of the broader Digital Single Market strategy (see A. above), the EC commenced a sector-wide inquiry into e-commerce, sending questionnaires to multiple companies to identify potential anti-competitive barriers to online trade and supply of digital content across the EU.

4. ABUSES OF A DOMINANT POSITION

Pursuing an investigation commenced in 2010, the EC adopted formal charges against Google for abusively favoring its internet comparison shopping products. Concurrently, it also started investigating Google’s practices relating to its Android mobile operating system, to determine if the company unduly impeded development of rival mobile applications by favoring its own services. The EC also issued formal charges in both of the investigations it had been running against Qualcomm, concerned that the company made exclusivity payments to customer(s) and sold chipsets below costs to drive a rival out of the market.

Outside the technology sector, the EC sent charges to Gazprom in a “political-heavy” investigation involving territorial restrictions in supply agreements. It also commenced a formal investigation into rules of the International Skating Union (“ISU”) that purportedly restrict skaters’ ability to take part in non-ISU sponsored events.

---

5. COURT DECISIONS

The EU’s top court (the Court of Justice, “CJEU”) confirmed in Bananas that the pure exchange (i.e., without any agreement) of forward-looking strategic information among rivals equates a cartel.33 It also confirmed in Innolux that the EC may impose fines based on foreign sales of cartelized components that were transformed, within the same corporate group, into finished products in turn sold in the EU.34 In sum, two momentous precedents in that they confirm the EU’s enforcement reach when it comes to looser forms of competitor interaction, as well as the EU’s territorial reach when it comes to exercising its fining powers.

In a line of important rulings, the EU’s lower court annulled fines totaling €790 million (approx. US$880 million) imposed on 13 airlines allegedly involved in the Air Cargo cartel, finding contradictions between the reasoning and the operative parts of the EC’s infringement decisions.35 These rulings have furthered impacted the dynamics of ongoing damage litigation in the UK, as the claimants can no longer piggy back their claim on the (now annulled) EC’s decisions against the 13 airlines.

On single–firm conduct, in Huawei, the CJEU provided guidance for the first time on a standard–essential–patent–holder’s ability to seek an injunction against an infringer without running afoul of EU antitrust law. In doing so, the CJEU took a more balanced approach between licensor’s and licensee’s interests that now supersedes the EC’s relatively pro–licensee standard per the Motorola decision and Samsung commitments.36

Covington & Burling LLP
www.cov.com
Foreign Legal Consultant Office
22nd Floor, Meritz Tower
382, Gangnam–daero,
Gangnam–gu, Seoul 135–934,
Korea
(T) +82 2 6281 0005

Kunstlaan 44 Avenue des Arts
B–1040 Brussels
Belgium
(T) +32 2 549 52 38
(F) +32 2 549 10 38

33 Case C-286/13P:
34 Case C-231/14P:
35 General Court Press Release, December 16, 2015:

36 Case C-170/13:
FINLAND

By Ami Paanajärvi of Roschier Attorneys Ltd.

1. LEGISLATIVE DEVELOPMENTS

The Competition Act (“Act”)¹ was subject to one amendment in 2015, which was made on February 8, 2015 and came into force on March 1, 2015. The amendment legislatively codified commonplace practices regarding the surprise inspection powers (so-called dawn raids) of the Finnish Competition and Consumer Authority (“FCCA”). Under the amended Act, the FCCA’s inspection power was expanded to include third party service providers to whom an inspection target company has outsourced its document management and/or retention.

With respect to future reforms, the Finnish Ministry of Employment and Economy (“MEE”) appointed a working group in September 2015 to address the potential reform of the Act with respect to procedural rules, fines, investigative powers and food production. The working group’s mandate runs until February 2017, and, as such, no amendments are expected before the second half of 2017.

The MEE also published a working group report on the national implementation of the antitrust damages directive (Directive 2014/104/EU) for open consultation. The report proposes that the directive be implemented through a special Act on Antitrust Damages instead of amending several of the existing laws concerning competition and procedural rules. The goal of the proposed act is to clarify the rules applicable to antitrust damages actions, to facilitate bringing and handling such actions, and to ensure that parties who suffer losses as a result of competition rule infringements are able to obtain full compensation. The new act is proposed to apply to damages actions based on infringements of both Articles 101 and 102 of the Treaty on the Functioning of the European Union and of Sections 5 and 7 of the Act, regardless of whether the infringement has an effect on trade between Member States. Thus, the proposed act would not apply to infringements of Act provisions that concern the neutrality of competition between public and private sector undertakings. The working group also proposes that the new act apply to antitrust damages actions both in general courts and before arbitration tribunals. The public consultation period has ended and implementation of the finalized act is expected to occur in 2016.

2. MERGERS

The flow of notified transactions has been steady, with the FCCA receiving 30 notifications in the course of 2015. True to its reputation and history, the FCCA only took two cases to Phase II: Elisa/Anvia² which focused on the provision of telecommunication services, and EQT/Animagi³ which focused on the provision of small animal veterinary services. Although this is a 100% increase compared to 2014, in both cases an in-depth investigation was likely seen as probable, if not inevitable, due to the clear horizontal overlap in the parties’ activities in geographic areas where resulting market shares were considerably high.

In both cases, the FCCA’s review focused on relatively narrow municipal geographic markets and the notified transactions’ effects on the provision of services to final consumers. Moreover, the influence of market commentary was clearly one of the main reasons the FCCA believed it was necessary to take the investigations to Phase II. Interestingly, however, only one of the two – Elisa/Anvia – lead to the FCCA imposing commitments,\(^4\) while the other – EQT/Animagi – was granted unconditional clearance.\(^5\) This is a clear and welcome indication from the FCCA that unconditional clearances are possible even after Phase II investigations.

Requests to amend or remove commitments imposed in past conditional approval decisions were also common in 2015. The FCCA received three such requests – relating to commitments applicable in the milk sector,\(^6\) the broadcasting sector\(^7\) and the healthcare services sector\(^8\) – two of which were wholly successful due to significant changes in market conditions and one of which was only marginally successful. These decisions by the FCCA provide some very welcome analysis of the current state of competition in the relevant markets and serve as good guidance for all market operators.

3. **CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

As reported last year, the FCCA broke several years of silence in cartel enforcement by proposing in October 2014 to fine Eltel Oy and Eltel Networks Oy EUR 35 million for their alleged participation in a cartel in the power transmission line building business, in breach of the Finnish and EU competition rules.\(^9\) The written phase of the Market Court proceedings continued until the summer of 2015 and culminated in oral proceedings in September 2015. The case is still pending before the Market Court, with judgment expected before Summer 2016.

In 2015, the FCCA also continued its chain of decisions condemning prices and other recommendations given by trade associations. The FCCA had previously found the Hairdresser’s Association and the Association of Home Appliance Maintenance Providers guilty of illegal price recommendations. In 2015, the Finnish Bakery Association received a reprimand and a proposed fine of EUR 55 000.\(^10\) The Market Court quickly decided the case and handed down its judgement on February 29, 2016.\(^11\) While the Market Court sided with the

---


FCCA on the substantive issues, the fine was significantly reduced to EUR 15,000.

4. ABUSE OF A DOMINANT POSITION

The FCCA continued to focus on abuse of dominance investigations in 2015. Even though no major decisions were made, several high profile investigations are understood to have been opened. Moreover, two longstanding investigations were closed without a finding of abuse. On October 5, 2015 the FCCA closed an abuse of dominance investigation into the activities of thermal insulation materials producer, Finnfoam Oy ("Finnfoam"), in the Finnish market for insulation boards. In particular, the FCCA investigated whether Finnfoam engaged in predatory pricing and locking customers into exclusivity agreements. The FCCA made no definitive decision on whether Finnfoam had a dominant market position but concluded that no anti-competitive intention had been established and that Finnfoam had not sold the relevant products below average variable costs. Accordingly, no finding of predatory pricing could be made. Concerning the exclusivity clauses, the FCCA concluded that neither Finnfoam, nor the customers, actually enforced exclusivity in practice. Further, during the investigation, Finnfoam had informed the FCCA of its intention to remove the contested clauses from its agreements.

On December 3, 2015 the FCCA closed its investigation into the alleged abuse of dominance of state-owned railway company VR Group Ltd ("VR"). The FCCA initiated the investigations in October 2012, following a request for action by Fenniarail Ltd ("Fenniarail"). Fenniarail alleged that VR had abused its dominant position in the freight transport sector by refusing to allow Fenniarail access to a service providing locomotives and drivers needed for the operation of freight wagons. Fenniarail withdrew its request for action during the first half of 2015 and, according to the FCCA, there are no grounds to continue the investigation.

5. COURT DECISIONS

Court decisions in the antitrust sphere during 2015 mainly concerned the ever-increasing area of private enforcement. Even though not yet at a level comparable to the UK, Germany or the Netherlands, Finland has a significant amount of ongoing private enforcement cases at various different levels of the court system.

On May 22, 2015, the Finnish Supreme Court ("Supreme Court") granted leave to appeal to three Finnish forestry companies, Metsäliitto Cooperative ("Metsäliitto"), Stora Enso Oyj ("Stora Enso") and UPM–Kymmene Oyj ("UPM–Kymmene"), in a raw wood cartel damages case. In 2009, the Market Court imposed fines totaling EUR 51 million on Metsäliitto and Stora Enso for illegal price cooperation and information exchange in the market for purchase of raw wood between 1997 and 2004. UPM–Kymmene received full immunity from fines for its cooperation with the FCCA under the Finnish leniency program.


14 The Supreme Court's press release (in Finnish): http://korkeinoikeus.fi/fi/index/ajankohtaista/tiedotteet/2015/05/5.10.2015-puukartelliasiassavalituslupakolmellemetsayhtiolle.html
Following the Market Court judgment, a total of 656 corporations and private forest owners brought actions for damages before the Helsinki District Court ("District Court") against the three referenced forestry companies. The District Court dismissed the first 13 actions by finding that the cartel victims’ right to compensation had expired under the applicable statute of limitations. The corporations and forest owners brought actions before the Helsinki Court of Appeal ("Court of Appeal") which referred all 13 cases back to the District Court for review on the merits in November 2014. According to the Court of Appeal, the District Court had wrongly dismissed the actions for damages instituted in December 2011 and May 2012 on the grounds that the cartel victims’ right to compensation had expired.

UPM–Kymmene, Stora Enso and Metsäliitto applied to the Supreme Court for leave to appeal all 13 Court of Appeal judgments. According to the three forestry companies, the judgment of the Court of Appeal had been unclear regarding when the limitation periods under the applicable laws commenced. The Supreme Court granted leave to appeal one of the Court of Appeal's judgments but decided to stay the proceedings concerning the other applications until it handed down its judgment in the case concerned.

On February 29, 2016 the Supreme Court handed down its judgment, finding that all relevant limitation periods (of five and three years) under the applicable laws had started on December 21, 2006, when the FCCA issued its decision, submitted the fine proposal to the Market Court and published its press release. This ruling was in stark contrast to both the view taken by the District Court (which considered the operative moment to be the date when the FCCA issued its press release on commencement of the investigation of the alleged cartel) and the Court of Appeal (which had considered the operative moment to be the date when the Market Court's judgment on the cartel became binding).

The Supreme Court also found that the Act on Restraints of Competition applied only to damages which had occurred after the entry into force of that Act (i.e. 1.10.1998). Damages occurring before the entry into force of the Act on Restraints of Competition are to be dealt with under the Act on Statute of Limitations. Accordingly, the individual cartel victims' right to compensation had not expired for the portion of the claim to be dealt with under the Act on Restraints of Competition but had expired for the portion of the claim to be dealt with under the Act on Statute of Limitations. With respect to the ten–year limitation period under the Act on Statute of Limitations, the Supreme Court stated that the limitation period in the Act on Restraints of Competition overrides the general ten–year limitation as lex specialis. Therefore, the ten–year limitation period did not apply. Accordingly, the Supreme Court referred the case back to the District Court, which will continue to deal with the cases stayed pending the Supreme Court's judgment. It is understood that several hundred individual claims will be considered time–barred in light of the Supreme Court's ruling.

---

15 The Supreme Court's judgement (in Finnish): http://www.korkeainoikeus.fi/fi/index/ennakkopaatokset/precedent/1456488007006.html

16 The predecessor of the currently applicable Competition Act.
1. LEGISLATIVE DEVELOPMENTS

The "Macron" bill, which was adopted on 10 July 2015, has modified the French settlement procedure. When a company suspected of an infringement decides not to challenge the existence of the infringement, the general reporter of the French Competition Authority ("FCA") can submit a proposal for settling the case, announcing the maximum amount of the contemplated fine. Companies will thus have visibility on the final amount of the fine in order to appreciate whether the settlement is acceptable. This should facilitate settlements because the parties previously had to rely on a proposed percentage of reduction based on a fine that had not been imposed before the final decision was rendered. The new bill also introduces a "stop the clock" mechanism in Phase 1 of merger control proceedings, which allows the FCA to extend proceedings by up to 60 business days when it requires further information. This is helpful, as in the previous system, notifying parties involved in complex matters had to withdraw their notification to avoid Phase 2 and then resubmit their notification. Finally, in Phase 2 of merger control proceedings, the FCA may now extend the duration of proceedings if commitments are proposed in extremis or if requested information has not been provided in due time.

2. MERGERS

The FCA reviewed more than 150 merger control filings in 2015. Most of them were approved, with or without conditions.

In May 2015, while clearing the acquisition of Totalgaz by UGI France, the parent company of Antargaz, the FCA applied the "fix it first" principle for the first time. The FCA guidelines on merger control contemplate that, in this context, the notifying party identifies an acquiror who will take on the asset that it has committed to divest before the issue is decided.

In December 2015, the FCA authorized, subject to commitments, one notable operation in the fast-food sector. The FCA cleared the acquisition of sole control of the Quick group (four hundred and five fast food outlets in France) by Burger King, which operates a network of thirty restaurants. The FCA distinguished between low-cost fast-food and sophisticated catering, including table service in particular. After a substantive consultation of the operators in the sector, supplemented by the results of a consumer survey conducted by Burger King France, the FCA found that there was a strong competitive proximity between the main brands specialized in so-called "Anglo-Saxon style" fast food, namely McDonalds, KFC, Quick, Burger King and Subway. The FCA considered that the transaction was unlikely to harm competition, given the presence of sufficient competitors. In some limited areas, where the deal was likely to lead to the creation of a virtual monopoly (no restaurant of the fast-food chains Mc Donald's, KFC or Subway) Burger King committed to terminate the franchise agreement with the operator of the relevant Quick restaurant.

2 Decision n°15-DCC-170 of December 15, 2015 (not published yet).
3. CARTELS AND OTHER ANTI–COMPETITIVE PRACTICES

In March 2015, the FCA imposed a total fine of 192.7 million euros on several competing manufacturers of dairy products for cartel behavior during the period 2006–2012. The case was initiated by a leniency application by General Mills – Yoplait, who benefited from a full exemption from fines. After the FCA conducted an on-site investigation at the premises of the companies concerned, a second leniency applicant provided further information and was rewarded with a 35% fine reduction. The anticompetitive behavior involved price-fixing and volume allocation in the context of tender offers organized by the main retailers who purchased the dairy products. The investigation found evidence of secret meetings and meetings at the private home of one of the cartel participants as well as the use of dedicated mobile phones. As all but one participant agreed not to challenge the facts, the arguments before the FCA concerned mainly the calculation of fines. Interestingly, the fine for one participant was increased by 25% because it belonged to an important group of companies, while the fine of another participant was reduced because it had adopted competitive behavior during the cartel period, thus disrupting its operations.

In May 2015, the FCA imposed relatively moderate fines for a total of 15 million euros to a long list of companies in the poultry sector that were accused of having exchanged information on prices for several years. This amount is relatively low as compared to recent decisions by the FCA in horizontal/cartel–type cases. Exceptionally, the FCA departed from its usual method of calculating fines, which is based on the value of sales during the infringement period and would probably have resulted in much higher fines. It found that the sector had been impacted by significant crisis periods and that structural aspects of this industry made it difficult for the poultry sector to survive. Interestingly, the FCA accepted and appreciated a collective commitment submitted by almost all participants aimed at the creating an inter–branch organization, in accordance with EU agricultural law, which could create a legally acceptable framework for cooperation. While this is not an express recognition of an "agricultural exception" in competition law matters, it certainly creates a precedent and opens opportunities for companies in the agricultural sector to explore the possibilities of inter–branch organizations as an acceptable way of cooperating on certain market factors.

4. ABUSES OF A DOMINANT POSITION

The FCA ended the year 2015 with a decision rendered in December involving the delivery service industry where it imposed fines of 672.3 million euros. Again, the case had been brought to its attention through a leniency application. Twenty delivery service companies were fined for coordinating on annual price increases. According to the FCA, this information sharing process occurred between September 2004 and September 2010, primarily through meetings facilitated by a professional trade union body, which has also been fined. The FCA found that round table discussions were regularly organized before and after the price increases, enabling the companies to harmonize their pricing demands and secure business negotiations. Approximately half of the participants challenged the FCA’s findings and the decision is likely to be vigorously argued on appeal.

---

3 Decision n°15-D-03 of March 11, 2015.
4 Decision n°15-D-08 of May 15, 2015.
In coordination with the European Commission and the Italian and Swedish authorities, the FCA accepted, on April 2015, a commitment of Booking.com to renounce MFN clauses that it imposed on hotels, for a period of 5 years as from July 1, 2015. This MFN clause required, hotels to offer Booking.com the same prices as those offered to other distribution platforms and to their own clients. The FCA concluded that the network of contracts containing the clause could have anti-competitive effects which could result in Booking.com securing a dominant position in the French market.

In September 2015, the FCA rejected a request for interim measures relating to Google’s suspension of a weather forecasting editor’s Adwords. However, the FCA decided to continue proceedings on the merits of the underlying allegation because it was possible that Google, who likely holds a dominant market position in online advertising related to website searches, had suspended the account in a non-transparent manner and in a context of potentially unclear and abusive terms of use.

In December 2015, The FCA issued a decision against Orange, the main French telephone operator, for having implemented anti-competitive practices in the markets for fixed and mobile services to business customers involving abusive loyalty discounts, exclusivity discounts and discrimination for accessing to information. In this context, the FCA identified a relevant market of "mobile electronic communications services to non–residential customers", as distinct from services offered to residential customers. The FCA fined Orange 350 million euros, which is the highest fine ever imposed by the FCA on an individual company.

5. COURT DECISIONS

The Tribunal des Conflits, a special court in charge of resolving conflicts of jurisdiction between general courts and administrative courts, held, in November 2015, that French administrative courts have jurisdiction to rule on damage claims related to cartel behavior in the context of public tenders when the anti-competitive behavior is likely to have altered the terms of the contracts that were awarded. This decision reverses a previous Court of Appeal decision which held that such damage claims are based on tort law rather than on violations of contractual obligations.

6 Decision n°15-D-06 of April 21, 2015.
7 Decision n°15-D-13 of September 9, 2015.
8 Decision n°15-D-20 of December 17, 2015.
9 Tribunal des conflits, decision n°4035 of November 16, 2015.
In December 2015, the French Supreme Court decided to stay the appeal of a Court of Appeal decision involving to the application of competition law to the agriculture sector and referred a question on this issue to the Court of Justice of the European Union.\textsuperscript{10} The Paris Court of Appeals\textsuperscript{11} had overturned a decision of the FCA, in which the latter had imposed a fine of €3.6 million to endive growers for a price-fixing cartel.\textsuperscript{12} The Court of Appeals essentially held that competition law only applies to the agricultural sector if it does not interfere with the objectives of the EU’s Common Agricultural Policy (e.g. increased productivity, fair standard of life for farmers, stable markets, secure availability of supplies, supplying of food at reasonable prices for consumers).

\textbf{Aramis Société d’Avocats}

\url{www.aramis-law.com}

9 Rue Scribe, 75009
Paris, France
(T) +33 1 53 30 77 00
(F) +33 1 53 30 77 01

\textsuperscript{10} French Supreme Court December 8, 2015, n°14-19.589.
\textsuperscript{11} Judgment of the Paris Court of Appeals of May 15, 2014 n°2018/06494.
\textsuperscript{12} Decision n°12-D-08 of March 6, 2012.
GERMANY

By Susanne Zuehlke of Willkie Farr & Gallagher LLP

1. LEGISLATIVE DEVELOPMENTS

There have been no new legislative amendments in 2015. The German Act against Restraints of Competition ("ARC") was most recently revised in 2013. The transposition of the EU directive on antitrust damages by December 2016 will require changes to some of the German rules applicable to private damages claims, including the statutes of limitation, joint and several liability and passing on defence.

A number of topics have accumulated over time and will likely be subject to discussion as the next (the then ninth) amendment of the ARC will come up for review, amongst them, potentially, the introduction of a size of transaction threshold to capture high value combinations of start ups with limited revenue stream and an alignment of group liability for antitrust offences with the EU rules.

2. MERGERS

The FCO reviewed more than 1,000 transactions, eleven were investigated in Phase 2 investigations. One of those cases was prohibited, another was withdrawn (furniture retailing), one was cleared subject to conditions and obligations (car parts), two remain pending and the rest was cleared without conditions or obligations. The FCO’s sole prohibition decision in 2015, so far, concerned the proposed supermarket merger between Edeka and Tengelmann (phase 2 was opened in 2014). This matter has been submitted to the German Minister for the Economy for the granting of a permission to close ("Ministererlaubnis"). The German Minister for the Economy has indicated that he considers the request favorably, provided the parties agree to certain conditions which are mainly focused on preserving a significant number of jobs.

Of most interest perhaps to the global reader is the very detailed analysis of the proposed merger between two online dating platforms, where the FCO went into significant detail to analyze the competitive dynamics between online dating platforms. The text of the decision will provide useful guidance to parties in the sector considering a merger with a competitor and subject to German merger review.

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Antitrust enforcement continued to be top of the agenda of the FCO. Besides the classical cartel enforcement, it would seem that the FCO is now particularly focused on vertical restraints as well as vertical and other restrictions on internet trading and the use of most-favored

---

1 Consolidated version: http://www.bmwi.de/DE/Service/gesetze,did=22072.html (in German).
nation clauses on internet platforms. The FCO imposed fines in 11 cases totaling more than EUR 208 million on 45 companies and 24 individuals in a wide range of sectors, including various product categories in the food retail sector, including sweets, coffee, beer, personal car and pet food for resale price maintenance. The FCO found significant two-way communications between manufacturers (including threats and the exercise of pressure) and retailers (requesting that manufacturers ensure that other retailers also adhere to the recommended resale price). Other fining decisions include: certain car parts (total of EUR 75 million), resale price maintenance by mattress suppliers and suppliers of portable navigation devices.

Further, the FCO has focused on restrictions on internet sales. In ASICS, the FCO concluded that a prohibition to resell ASICS products on price comparison tools or internet platforms was illegal. ASICS has since changed its business practices. This follows an earlier, similar decision that concerned adidas. In HRS

4. ABUSES OF DOMINANCE

The FCO also pursued a limited number of abuse of dominance cases. In a very detailed decision, the FCO found that Deutsche Post AG had exposed suppliers of wholesale mailing service to a margin squeeze and engaged in exclusive dealing. Since Deutsche Post AG had already amended its business practices, the FCO refrained from imposing a fine. SodaStream was fined for suggesting that its machines would only work with authorized/ original CO2 cylinders.

5. JUDGMENTS

With judgment dated 22 December 2015, the Higher Regional Court of Frankfurt concluded

---

11 Case B3 - 137/12, FCO case report (in German only) of August 19, 2014: http://www.bundeskartellamt.de/SharedDocs/Entscheidungen/DE/Fallberichte/Kartellverbot/2014/B3-137-12.pdf?__blob=publicationFile&v=2
that a supplier of branded products (here Deuter backpacks) who sells its products in a selective distribution system can exclude the sale of its products on a platform, such as Amazon, if the platform itself does not meet the requirements of the selective distribution system. This judgment is subject to an appeal to the Federal Supreme Court and may lead the Federal Supreme Court to submit a request for a preliminary ruling to the European Court of Justice. It is established practice that a manufacturer cannot exclude online sales. However, there exists some disagreement between German courts on whether platforms or price comparison tools can be excluded, because, e.g. they do not meet the requirements for a proper display of the particular products (e.g. logo of the supplier, etc.).

With judgment of 18 November 2015, the Higher Regional Court Duesseldorf annulled a decision by the FCO with which the FCO imposed fines on food retailer EDEKA. EDEKA had acquired 2,300 outlets from Tengelmann. After the acquisition, EDEKA compared its sourcing conditions and requested price negotiations (and reductions referred to as a "Wedding Rebate") from suppliers. The FCO had considered that this constitutes an abuse of a relatively strong market position. The Duesseldorf Court disagreed and considered that the relevant suppliers were not relatively weaker and thus dependent on EDKEKA and thus annulled the prohibition.

In judgments dated 20 January 2015 and 27 November 2015, the Regional Labor Court of Duesseldorf decided that a managing director and a sales director, respectively, are not liable to their employer (ThyssenKrupp) for damages for antitrust fines imposed on the company or resulting damages, if their own actions are only a small contributing factor in the company's antitrust violation and the illegal agreements were developed and managed by the management and board of the company.

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. The judgment is final and was a fairly unceremonious end to a trailblazing case that has been pending since 2002. In the meantime, CDC has announced that it has re-launched an action concerning at least some damages claims.

17 Higher Regional Court of Frankfurt, Judgment of 22 December 2015 (11 U 84/14).
18 See above, the FCO against Asics and adidas, references in Fn. 8 and 9.
19 This legal test goes somewhat beyond the EU abuse of dominance provisions and applies where relatively smaller suppliers are dependent on one or more relatively stronger suppliers. See Higher Regional Court Duesseldorf, decision of 18 November 2015 (VI-Kart 6/14).
20 Regional Court Duesseldorf, Decision of 20 January 2015 (16 Sa 458-460/14) and Judgment of 27 November 2015 (14 Sa 800/15).
21 Higher Regional Court Düsseldorf, Judgment of February 18, 2015, Case VI-U (Kart) 3/14; also: Regional Court Düsseldorf, Judgment of December 17, 2013, 37 O 200/09 (Kart) U.
In a judgment dated December 16, 2014, and published in the course of 2015, the Federal Supreme Court re–confirmed its findings in an earlier case, stating that antitrust liability has to be assessed based on the acts of individuals and attributed to specific entities for which these individuals acted and that following, e.g. a merger, the new entity is not automatically liable for antitrust fines, except in specific circumstances. This has led to amendments of the applicable legal provisions, which now clarify that the legal successor does inherit the liability.

Willkie Farr & Gallagher LLP
www.willkie.com
An der Welle 4
D–60322 Frankfurt am Main
(T) +32 2 290 18 32
(M) +49 69 79302 0

HUNGARY

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

Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, a.k.a the competition act (“Competition Act”) ¹ was comprehensively modified in 2013. These modifications took effect on July 1, 2014. Therefore, there was no need for substantial changes to the Competition Act in 2015. With the experience gathered during the practical implementation of the 2013 amendments it has become clear that some fine tuning of the Competition Act was still necessary. Noting the shortcomings, in 2015 the Hungarian Parliament amended the Competition Act three times. The three most important amendments became effective on June 19, 2015.

The first amendment granted the Competition Authority the right to exercise leniency and close the procedure without the issuance of a fine for first time offences by small or medium size enterprises. According to the newly introduced Sections 78(8)–(9) of the Competition Act, first time offenders shall receive a warning instead of a fine, provided that the violation of the law: (i) did not infringe the laws of the European Union; (ii) did not involve an agreement on the coordinating of prices or dividing of the market in public procurement procedures; and, (iii) did not qualify as a violation of the laws against a clearly identifiable group of consumers who are particularly vulnerable because of their age, dependence, or their mental or physical vulnerability.

The second amendment dealt with restrictive access to the documents of the competition supervision procedure. The filing of commitment statements and their content, the investigated entity's petition for exemption or reduction of the assessed fine, and any evidence submitted together with these petitions must be treated as restricted-access data until the conclusion of the investigation phase. More specifically, this restrictive treatment must continue until the preliminary position of the Competition Authority or the closing report of the procedure has been delivered to the investigated entities (Sections 73/A(7) and 78/D(2) of the Competition Act). Following this deadline, only those who qualify as clients, defined in Section 52 of the Competition Act², shall be granted limited access to these documents, meaning they can review and take notes but are not allowed to make copies. Third persons shall not be granted any access to these documents.

Lastly, the third amendment granted the Competition Authority the right to allow the acquiring company – which submitted an application for merger approval with the potential to become the holder of the controlling interest – to exercise its control rights prior to the formal merger authorization if and when it was deemed necessary for the protection of its projected investment. This option was first introduced as part of the comprehensive modification of the Competition Act in July 2014, but the detailed implementation provisions were missing.

¹ (In Hungarian): http://njt.hu/cgi_bin/njt_doc.cgi?docid=26902.294660.

² According to Section 52 of the Competition Act: In competition control proceedings, ‘client’ means:
   a) regarding the mergers referred to in Subsection (1) of Section 24,
      aa) in proceedings opened upon request, the applicant, the party participating in the merger directly, and  
         - in the case of merger by acquisition under Paragraph a) of Subsection (1) of Section 23 - the company from which the business unit was acquired,
      ab) in ex officio proceedings, the companies referred to in Paragraph a), and  
         - in the case of merger under Paragraph c) of Subsection (1) of Section 23 - the joint company created by the merger;
   b) in proceedings not covered by Paragraph a), any person against whom proceedings were instituted ex officio.
Adopting provisions that specify the submission deadline and the information to be included in the application have assisted merger candidates to better understand how to benefit from this pre-merger provision aimed at investment protection (Sections 29/A (1a)–(1b) of the Competition Act).

1. MERGERS

Notable mergers of 2015 in Hungary involved the financial sector, the print and broadcasting media, as well as the construction industry.

On March 24, 2015, the Competition Authority authorized the direct, joint control of Mediaworks Kiadó és Nyomda Kft ("Mediaworks") and Népszabadság Kiadó és Nyomdaipari Zrt ("Népszabadság") over Magyar Előfizetői Vagyonkezelői Kft ("MEV") with certain commitments to be undertaken by Népszabadság and Mediaworks. All three companies provide print media services. The Competition Authority imposed a fine of HUF 81,250,000 (approximately USD 282,118) on Mediaworks and Népszabadság for not filing the merger approval petition with the Competition Authority. The Competition Authority ordered Népszabadság and Mediaworks to ensure that, for a period of two years, MEV provides non-discriminatory distribution of periodicals and any business secrets obtained by these companies shall not be made accessible to others.³

The Competition Authority authorized two transactions in which Körösaszfalt Mélyépítő Zrt ("Körösaszfalt") acquired direct, sole and direct, joint control, respectively. In its April 23, 2015 decision the Competition Authority allowed Körösaszfalt to acquire direct, sole control over Magyar Építő Zrt by purchasing the majority of their shares. The Authority established that Körösaszfalt conducts civil engineering activities while Magyar Építő Zrt's primary activity is structural engineering, meaning that they affect two different markets. As a result of the transaction, the joint market share did not exceed the 20% threshold.⁴ In the second decision dated June 1, 2015, the Competition Authority authorized Körösaszfalt to acquire direct, joint control over AEROPRODUKT Zrt, CLH Hűtés-és Klimatechnika Kft and CLH Klímaszervíz Kft. The Competition Authority concluded that these companies are not engaged in the same activities, are not active in the same market, and their joint market share shall be within the 20% market limit. Although the activities of the first group of companies and the activities of the target companies are complementary, the resulting joint market share was less than 30%.⁵

On October 30, 2015, the Competition Authority authorized the direct, sole control of Magyar Broadcasting Co. Kft over TV2 Média Csoport Kft ("TV2") and CEE Broadcasting Limited ("CEE"). The Competition Authority stated that there are no identical activities between the TV2–CEE group (television production services) and the "Vajna–Group" led by Andrew G. Vajna, which, in addition to film production and distribution, operates casinos and organizes online gambling activities.⁶

On December 2, 2015, the Competition Authority authorized the direct, sole control of Magyar Nemzeti Bank (Hungarian National Bank or "MNB") over Budapesti Értéktőzsde Zrt (Budapest Stock Exchange "BÉT"). As a result, MNB became the indirect, sole controller of the KELER-group. KELER Ltd. is the only central

---

securities depository entity and, as such, a specialized bank in Hungary.\textsuperscript{7}

2. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In its March 20, 2015 decision, the Competition Authority concluded that Auchan Magyarország Kft ("Auchan"), the largest supermarket operator in Hungary had abused its dominant market position and imposed a total fine of HUF 1,061,300,000 (approximately USD 3,685,069) on the company. According to the decision, Auchan violated Section 7(2) f) of Act CLXIV of 2005 on Trade that prohibits an entity with dominant market position to abuse its significant market power against suppliers by imposing various charges as a precondition for being admitted to the list of suppliers. Auchan asked for a post–price reference contribution from its suppliers without any compensation, making it a pure surcharge fee.\textsuperscript{8}

On August 6, 2015, the Competition Authority issued a decision against the Hungarian Branch Office of Alcon Services AG (former CIBA Services AG or "CIBA/ALCON") and against Alcon Hungária Gyógyszerkereskedelmi Kft ("Alcon Hungária"), claiming that the companies restricted the competition by a disadvantageous preference system established for online traders of CIBA contact lenses and related eye care products. The Competition Authority imposed a fine of HUF 51,356,000 (approximately USD 178,319) on CIBA/Alcon and a fine of HUF 52,343,000 (approximately USD 181,746) on Alcon Hungária. In its decision, the Competition Authority concluded that CIBA/Alcon provided different terms and conditions for online merchants than for traditional brick and mortar store operators. The preference system for online merchants was stricter and harder to meet than the system designed for store operations.\textsuperscript{9}

On July 22, 2015, the Competition Authority terminated its proceeding against Heineken Hungária Sörgyárák Zrt ("Heineken"), Dreher Sörgyárák Zrt ("Dreher") and Borsodi Sörgyárák Zrt ("Borsodi") due to the companies’ assumed commitments. Heineken, Dreher and Borsodi – the three biggest beer producers in Hungary – undertook an operation to lower the traffic of exclusively marketed beers and with that open the previously closed market for other participants and new entrants. The Competition Authority compelled the companies to lower the quantity of exclusively sold beer with 20% to each catering contractor until the end of 2017. The commitment shall decrease the size of the otherwise closed market sector from 43–44% to 30% and enhance the possibility for other beer producers to enter the Hungarian market.\textsuperscript{10}

On September 14, 2015, the Competition Authority rendered a decision in the case of Euromedic–Pharma Zrt ("Euromedic"), Hungaropharma Zrt ("Hungaropharma") and TEVA Zrt ("TEVA"), three of the largest Hungarian pharmaceutical wholesalers. Together with business advisory firms Mezadin Kft and Pharmaudit Kft, they coordinated their retail prices in a public procurement procedure (engaged in bid rigging) and violated the prohibition on concluding competition restricting agreements. In its decision, the Competition Authority imposed a fine of HUF 792,200,000 (approximately USD 2,750,694) on each of Euromedic, Hungaropharma and TEVA, HUF 66,595,000 (approximately USD 23,125) on

Mezadin and HUF 12,400 (approximately USD 400) on PharmAudit Kft. The Competition Authority established that the companies manipulated the tender invitation of Budapesti Egészségközpont Zrt ("Budapest Health Centre Zrt") and, prior to the submission of their bids, they coordinated their respective price proposals in anticipation of each other’s roles and gains in the tender, with the objective to divide, share and control the relevant market.11

In its October 21, 2015 decision, the Competition Authority concluded that participants in the mosquito nuisance market made agreements restricting competition affecting manufacturing, distribution and mosquito nuisance services. The Competition Authority imposed a total fine of HUF 79,000,000 (approximately USD 274,305) on Bayer Hungária Kft, Bayer CropScience Limited, Bayer Sp. z.o.o., Corax–Bioner Környezetvédelmi Zrt, Farmmix Kft, Gergely Air Kft, and Szemp Air Kft.12

3. COURT DECISIONS

In its April 15, 2015 judgment, the Metropolitan Court upheld judgment No. 3.K.28.763/2013/48. of the Metropolitan Administration and Labor Court, delivered on September 18, 2014, in which the court rejected the appeals of Magyar Államvasutak Zrt ("Államvasutak"), Győr–Sopron–Ebenfurti Vasút Zrt ("Vasút") and Rail Cargo Hungária Zrt ("Rail Cargo") challenging decision No. VJ–003/2008/363 of the Competition Authority rendered on April 27, 2012. The Competition Authority imposed a fine of HUF 100,000,000 (approximately USD 347,222) on Államvasutak, HUF 300,000,000 (approximately USD 1,041.666) on Vasút, and HUF 850,000,000 (approximately USD 2,951,388) on Rail Cargo. The Competition Authority concluded that Államvasutak and Vasút established and applied a uniform rail transport fee between May 1, 2004 and December 31, 2005. Vasút and Rail Cargo divided the rail transport market between January 1, 2006 and May 25, 2009, and applied a uniform rail transport tariff between January 1, 2006 and July 17, 2007. The companies petitioned for judicial review of the decision of the Competition Authority, arguing that Államvasutak and Vasút do not qualify as independent undertakings. Additionally, the companies argued that the uniformity of the tariffs was not based on the companies’ agreement but on the legislative decision of the Hungarian State, the owner of the railway. In the first instance review, the court rejected the claim of the companies. In its appeal, Államvasutak argued that the Competition Authority significantly exceeded the procedural time–limit and was barred from reviewing the case. Vasút and Real Cargo argued that the evidentiary proceedings conducted by the defendant Competition Authority were flawed and most of the ‘facts’ were unsubstantiated assumptions.

At the end, the Metropolitan Court upheld the judgment of the first instance court and ordered each company to pay HUF 2,500,000 (approximately USD 8.680) in court fees.

ITALY

By Alberto Pera and Michele Carpagnano of Gianni, Origoni, Grippo, Cappelli & Partners*

1. LEGISLATIVE DEVELOPMENTS

Annual fee to the Italian Competition Authority ("ICA") – On February 24, 2016, the ICA set the annual contribution rate due 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 2016 at 0,06 per thousand of the turnover resulting from the last approved budget¹. This financing mechanism was introduced by the Decree Law No. 1/2012² (the so-called "Cresci Italia" Decree), which entrusted the Authority with the power of determining every year the amount and the criteria of the contribution (within the maximum limit of 0,5 per thousand of the relevant turnover).

2. MERGERS

Merger Thresholds – On March 14, 2016, the ICA updated the thresholds that trigger pre–merger filing obligations. Currently the combined turnover in Italy of all the undertakings concerned must exceed €495 million, while the aggregate turnover in Italy of the target in the last financial year must exceed €50 million (formerly €49 million).³ It is worth noting that the two thresholds that trigger pre–merger filing obligations are cumulative.⁴

In 2015, fifty–one mergers were reported to the ICA, eleven cases were cleared unconditionally and in seven cases the ICA opened an investigation. Moreover, the ICA authorized four transactions subject to commitments.⁵ The number of cases reported to the ICA in 2015 increased as compared to 2014 when forty–six cases were reported.

During 2015, four transactions, related to the large scale retail distribution, utilities and childhood products sectors, were cleared subject to conditions. In all these cases the ICA recognized that the competition market analysis was local rather than national and accepted the commitments offered from the undertakings involved.

On November 11, 2015, the ICA authorized with conditions the acquisition of SEAT–Pagine Gialle by Libero. The ICA found that the transaction would have significantly impeded competition in the market of directory assistance service, on–line advertisement, direct marketing service and web service. In particular, the commitments accepted by ICA prevented an anticompetitive effect in the market of directory assistance services⁶.

On July 9, 2015 the ICA approved with conditions the JV between several Italian

---

¹ Italian Competition Authority, Decision n. 25876, Contributo all'onere derivante dal funzionamento dell'Autorità garante della concorrenza e del mercato per l'anno 2016, (in Italian): www.agcm.it.
² The Decree was subsequently converted by the Italian Parliament into ordinary law No. 27 of March 24, 2012.
³ Italian Competition Authority, Rivalutazione soglie fatturato ex art.16, comma 1, della legge n.287/90 (in Italian): www.agcm.it.
⁴ See Decree Law No. 1/2012, converted by the Italian Parliament into ordinary law No. 27 of March 24, 2012.
⁵ Italian Competition Authority Case C11982, Enrico Preziosi–ARTSANA/NEWCO_Bimbo Store; Case C12001, Libero acquisition/SEAT Pagine Gialle; Case C12005, Onorato Partecipazione–Newco/Moby-Compagnia Italiana di Navigazione; Case C11990, SEL–Società Elettrica Altoatesina/Azienda Energetica (in Italian): www.agcm.it
⁶ Italian Competition Authority Case C12001, Libero acquisition/SEAT Pagine Gialle (in Italian): www.agcm.it
companies in the childhood products distribution sector. The ICA raised concerns that the JV might affect both actual and potential competition in retail distribution, thus requiring the divestiture of several shops.\(^7\)

On July 15, 2015, the ICA authorized, with conditions, the merger between two companies, SEL and EAW, active in the electricity sector. According to the ICA, the merger would affect competition in the electricity, hydroelectricity and gas distribution sectors in the province of Bolzano. The ICA accepted binding commitments from SEL that aim to improve competition in the energy distribution market in the area of Bolzano\(^8\).

On December 10, 2015, the ICA cleared, with conditions, the acquisition of Moby S.p.A. e di Compagnia Italiana di Navigazione S.p.A by Onorato Partecipazioni S.r.l.. The ICA expressed concern that the acquisition may cause a deterioration in the market for maritime transportation for passengers (with or without vehicles) and goods. The ICA identified a substantial lessening of competition and required capacity commitments and pricing contracts for certain routes.\(^9\)

In addition, in one case the ICA, in light of new competitive contexts, revised commitments that had previously been conditions upon which the merger, between two banking service companies, had been authorized. The modification of the conditions was authorized on February 11, 2015.\(^10\)

In one case the ICA fined a company for not having notified two concentrations regarding the distribution of pharmaceutical products.\(^11\)

3. **CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

In 2015, the ICA closed seventeen proceedings, of which four were examined under Article 2 of the *Italian Competition Law*\(^12\) and nine under Article 101 of the *Treaty on the Functioning of the European Union* (the "TFEU")\(^13\)

On March 29, 2015, the ICA imposed, under Article 101 of the TFEU, a fine of over € 28 million on Generali and Unipol–Fonsai for an anticompetitive agreement related to automobile liability insurance coverage. According to the ICA, in order to reduce competition and maintain the clients, the two insurance companies were not participating in tenders issued by the Local

---

\(^7\) Italian Competition Authority Case C11982, Enrico Preziosi-ARTSANA/NEWCO_Bimbo Store (in Italian): [www.agcm.it](http://www.agcm.it)

\(^8\) Italian Competition Authority Case C11990, SEL-Società Elettrica Altoatesina/Azienda Energetica (in Italian): [www.agcm.it](http://www.agcm.it)

\(^9\) Italian Competition Authority Case C12005, Onorato Partecipazione-Newco/Moby-Compagnia Italiana di Navigazione (in Italian): [www.agcm.it](http://www.agcm.it)

\(^10\) Italian Competition Authority Case C8190B, Società per servizi bancari-SSB/Società inetbancaria per l'automazione (in Italian): [www.agcm.it](http://www.agcm.it)

\(^11\) Italian Competition Authority Case C11961, Cooperativa Esercenti Farmacia/AL-Pharma; Case C11960, Cooperativa Esercenti Farmacia/FARFIN-Scorefarma (in Italian): [www.agcm.it](http://www.agcm.it)

\(^12\) Italian Competition Authority Case I780, Mercato del Calcestruzzo in Veneto; Case I784 Ecoambiente-Bando di gara per lo smaltimento di rifiuti da raccolta differenziata; Case I771, Servizi di post-produzione di programmi televisivi RAI; Case I765, Gare gestione funghi in Lombardia e Piemonte (in Italian): [www.agcm.it](http://www.agcm.it)

\(^13\) Italian Competition Authority Case I785, Gara CONSIp servizio di pulizia nelle scuole; Case I761, Mercato dei servizi tecnici accessori; Case I776, Mecato della produzione di poliuretano espanso flessibile; Case I759, Forniture Trenitalia; Case I772, Mercato del Calcestruzzo in Friuli Venezia Giulia; Case I775, procedure di affidamento dei servizi ristoro su rete autostradale ASPI; Case I744, Gare RCA per trasporto pubblico locale; Case I689C, Organizzazione servizi marittimi nel Golfo di Napoli; Case I782, Gare per servizi di bonifica e smaltimento di materiali inquinanti e/o pericolosi presso gli arsenali di Taranto, La Spezia ed Augusta (in Italian): [www.agcm.it](http://www.agcm.it)
Public Transport. The decision was subsequently overturned by the Tar Lazio (First Instance Administrative Court) issued on December 18, 2015 (decision No. 14281) (described below).

In 2015 the ICA completed two investigations under art 101 of the TFEU and Italian Competition Law regarding the market for the production and sale of ready–mix concrete in Veneto and Friuli Venezia Giulia regions. In particular, more than 10 ready–mix concrete companies through their consultancy company, Intermodale S.r.l, put in place a horizontal concerted practice that, according to the ICA, resulted in the absence of price competition between the companies. The companies were fined a combined total of over €15 million.

Moreover, during 2015, the ICA completed several investigations under EU and national competition law regarding several calls for tenders. In all these cases, the ICA identified anticompetitive horizontal concerted practices and artificial coordination. In particular:

- On December 16, 2015, the ICA imposed a fine of over €28 million on the incumbent TLC operator (Telecom Italia S.p.a.) and six companies that provide technical services for telecommunication operators. According to the ICA, the companies had entered into an anticompetitive agreement in the market for maintenance services for telecommunication operators.
- On May 27, 2015, the ICA imposed a fine of over €1 million on twelve companies in the market for electro–mechanical services for railways. According to the ICA, the parties put in place horizontal concerted practices which resulted in increased prices of for procurements by Trenitalia SpA (an Italian railway company).
- On June 4, 2015, the ICA adopted a commitment decision that closed the investigation against Novartis Farma e Italfarmaco regarding regional tenders for the procurement of cancer drugs.
- On January 28, 2015 the ICA opened two investigations against several maritime transport companies in the Gulf of Naples in order to verify whether the companies continue to coordinate passenger transportation between Eolie and Pontine Islands.

4. ABUSES OF A DOMINANT POSITION

In 2015, the ICA concluded one case with a finding of infringement and concluded two more cases on the basis of commitments from the parties.

On March 25, 2015 the ICA fined SEA (Società esercizi aeroportuali di Milano) over €3

---

14 Italian Competition Authority Case I744, Gare RCA per trasposto pubblico local (in Italian): www.agcm.it
15 Italian Competition Authority Case I772, Mercato del Calcestruzzo in Friuli Venezia Giulia; Case I780, Mercato del Calcestruzzo in Veneto (in Italian): www.agcm.it
16 Italian Competition Authority Case I765, Gare gestione funghi in Lombardia e Piemonte; Case I784 Ecoambiente-Bando di gara per lo smaltimento di rifiuti da raccolta differenziata: Case I782, Gare per servizi di bonifica e smaltimento di materiali inquinanti e/o pericolosi presso gli arsenali di Taranto, La Spezia ed Augusta (in Italian): www.agcm.it
17 Italian Competition Authority Case I761, Mercato dei servizi tecnici accessori (in Italian): www.agcm.it
18 Italian Competition Authority Case I759, Forniture Trenitalia (in Italian): www.agcm.it
19 Italian Competition Authority Case I770, ARCA/NOVARTIS-ITALFARMACO (in Italian): www.agcm.it
20 Italian Competition Authority Case I689C, Organizzazione Servizi Marittimi nel Golfo di Napoli (in Italian): www.agcm.it
21 Italian Competition Authority Case A474, SEA/convezione ATA (in Italian): www.agcm.it
22 Italian Competition Authority Case A476, CONAI – Gestione rifiuti imballaggio in plastica; Case A473, Fornitura acido colico (in Italian): www.agcm.it
million. The Company manages the infrastructure of the Milanese airport of Linate. According to the ICA, SEA abused its monopoly and near-monopoly position in the market to restrict competitors' participation at tenders.23

On September 3, 2015 the ICA closed a proceeding opened under the Article 102 TFUE against CONAI and COREPLA regarding the waste management of plastic packaging. The ICA accepted the commitment offered by the companies to put in place measures which would facilitate and encourage the entry of new competitors in.24

On July 15, 2015, the ICA accepted binding commitments offered by I.C.E. (Industria Chimica Emiliana S.p.A) and Prodotti Chimici e Alimentari S.p.A. – undertakings purchasing chloric acid mainly for use by pharmaceutical companies – closing the Article 102 TFEU investigation concerning the abuse of dominant position in the market for chloric acid. The undertakings agreed to reduce the price of the raw material and to reconsider the resale of the raw material at third party operators.25

5. COURT DECISIONS

On September 9, 2015, the Council of State confirmed the First Instance Administrative Court ("Tar Lazio") judgment,27 which had annulled the ICA's decision to fine €8 million against ferry operators Moby, Grandi Navi Veloci, Marinvest and SNAV for engaging in anticompetitive conduct aimed at increasing ticket prices. Following an in–depth analysis of the market of maritime transport service for passengers, the Council of State affirmed that the stakeholders pursued economic objectives which did not infringe Article 101 TFEU. Therefore, the Council of State concluded that there was no infringement of Article 101 TFEU and annulled the ICA's decision.

On December 18, 2015, the Tar Lazio overturned the ICA's decision which sanctioned the insurers Generali Italia S.p.A. and Unipolsai Assicurazioni S.p.A. for agreeing not to participate in public tenders relating to the provision of motor insurance for companies responsible for public transport facilities (see above). The Tar Lazio found that the decision was not supported by adequate evidence and considered that the ICA based its decision on a single element of proof that was ambiguous and of unsuitable evidentiary value. The Tar Lazio considered that the non–participation of other companies active in the sector or almost all the tenders at issue was potentially irrelevant in assessing the conduct of the insurers. The non–participation in bidding by competitors who were not alleged cartel members was further relied on by the Tar Lazio, which stated in this regard that "or it is admitted that the non–participation of other companies, often invited to individual private negotiation procedures, but not excluded under the call for tenders, was determined by reasons of non–attractiveness of the offer (and then it is not clear why a similar assessment could not have been put lawfully at the ground of the choices made by Generali and Unipol), or it should be considered that the other traders in turn took part into the concerted practice, because an agreement between undertakings which do represent, either by themselves or even

23 Italian Competition Authority Case A474, SEA/convezione ATA (in Italian): www.agcm.it
24 Italian Competition Authority Case A476, CONAI–Gestione rifiuti da imballaggio di plastica (in Italian): www.agcm.it
25 Italian Competition Authority Case A473, Fornitura acido colico (in Italian): www.agcm.it
together, a significant part of an economic sector, is structurally unable of producing, even theoretically and therefore as a mere object, a distorting effect on competition*. Based on the above, the Tar Lazio held that the ICA's interpretation could not be considered the only reasonable explanation of the insures' conduct and therefore the Tar Lazio stated that Generali's behavior could be interpreted as unilateral decision, rationally adopted by the company.

Gianni, Origoni, Grippo, Cappelli & Partners

www.gop.it

Via delle Quattro Fontane
Rome, Italy 2000184
(T) +39 06 478751
(F) +39 06 4871101
NORWAY

By Kristin Hjelmaas Valla and Trygve Norum of Kvale Advokatfirma

1. LEGISLATIVE DEVELOPMENTS

No amendments to the Norwegian Competition Act were adopted in 2015. However, there are several legislative amendments in the pipeline that are expected to be adopted in 2016.

The most important future change is the proposed change to the system of appeal of the Norwegian Competition Authority’s ("NCA's") decisions and the establishment of a new independent administrative competition appeal body that will be the sole venue for first instance review of the NCA's decisions. The decisions of the new appeal entity will be subject to judicial review directly before the Court of Appeal with Gulating, in Bergen, serving as the legal venue. The NCA's decisions today are subject to administrative appeal before the Ministry, except decisions where the NCA also imposes sanctions (which must currently be challenged before the ordinary courts). The aim of the reform is to ensure no political considerations influence on decisions under the Competition Act.

Other proposed amendments will bring the Norwegian competition regime further in line with the EU. First, the standard of intervention under merger control will change from a substantial lessening of competition ("SLC") test to a "significant impediment of effective competition ("SIEC") test. This change is not likely to have any major impact on enforcement. In addition, a settlement procedure for cartel participants resulting in a 10% reduction in their fine will also be introduced, modelled on the EU–system.

Moreover, there is an ongoing legislative process to incorporate required amendments to incorporate the EU Directive on Antitrust Damage Actions in order to facilitate private enforcement.

2. MERGERS

2015 was an active year for the NCA concerning merger control. The NCA intervened against five concentrations in 2015. All were cleared after the parties offered commitments.

On February, 5, 2015 the NCA cleared the acquisition of Tele2 by TeliaSonera within the market for mobile telephony after remedies were proposed by TeliaSonera. The acquisition involved the merger of two of the three largest mobile players in Norway (the number two and the number three players), and came about after a spectrum auction in December 2013 where Tele2 lost most of its spectrum to a new market entrant, ICE. The concentration raised concerns in both the wholesale and retail market for mobile services. The parties offered a commitment package which included, an obligation to divest infrastructure to ICA, an obligation to enter into a roaming and service provider agreement with ICE, divestment of a corporate customer base to ICE, divestment of three retail stores to ICE, and an obligation for TeliaSonera to offer MVNO access to Norwegian mobile operators. The NCA found that the final commitments offered by TeliaSonera provided the basis for the

---

1 Lov om konkurranse mellom foretak og kontroll med foretaksammenslutninger (konkurranseloven), March 5, 2004, as amended by law June 14, 2013 no. 35 (in Norwegian):
http://lovdata.no/dokument/NL/lov/2004-03-05-12

2 Decision V2015-1 (in Norwegian):
development of a third mobile network in Norway and cleared the case.

On March, 4, 2015 the NCA approved Coop’s acquisition of Ica Norge in the retail grocery market subject to remedies. The Norwegian grocery retail market was already highly concentrated with four vertically integrated retail chains and a smaller fifth retail chain having nearly 100% of the market. The NCA found that the merger could lead to a significant restriction of competition in 90 local markets. To avoid the anti–competitive effects, Coop offered to sell a total of 93 stores.

On July, 30, 2015 the NCA approved St1 Nordic OY’s acquisition of Smart Fuel subject to remedies. The NCA found that the concentration would increase an already significant restriction of competition within the fuel market, basing its concern on coordinated effects. There were only four national fuel retail chains of significance, market share had been stable and pricing was transparent. The NCA found that a weekly price pattern had been observed over several years, with all players increasing prices in the same day during the week. St1 (the acquirer) was conceived as a Maverick player in the market, and loss of its competitive force would lead to a more stable coordination in the market. After St1 committed itself to divest its current Norwegian business to a new market player, i.e. not to any of the existing large national players, the NCA cleared the transaction.

On August 27, 2015, the NCA cleared Orkla ASA’s acquisition of Cederroth Interessenter AB, subject to remedies. The NCA found that the concentration would lead to a significant restriction of competition in a rather narrowly defined market for soap for intimate parts of the body sold in grocery shops (as opposed to sales in other sales channels such as pharmacies). Orkla proposed to divest one of the brands in the market and the NCA cleared the transaction subject to such conditions.

On August, 31, 2015, the NCA cleared Aleris’ acquisition of Teres Medical Group with remedies. The NCA found that the merger between Aleris and Teres could lead to a significant restriction of competition in the supply of plastic surgery and orthopaedics, to public hospitals, insurance companies, and to patients who finance their own purchases of services, in the central and northern part of Norway. To eliminate the anti–competitive effects of the merger, Aleris offered to sell a clinic in Trondheim (in central Norway) and a clinic in Tromsø (northern Norway).

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2015 the NCA adopted two decisions related to cartel/anticompetitive practices. The NCA is also still investigating several other cases that are not yet public. The NCA has informed it carried out dawn raids at two locations in 2015 (in one investigation/case).

In April 2015, the NCA adopted a decision where three undertakings were fined for unlawful bid–rigging within electrical services.

---

to a health enterprise. The NCA imposed fines on the three undertakings, Arro, Caverion and Ingeniør Ivar Pettersen, for breaches of the Competition Act. The fined undertakings had a three year framework agreement with a regional health care company/hospital. Through the framework agreement, the three undertakings concerned were the only permitted bidders in limited tenders for electrical services. One of the companies, Caverion, was given a reduction in the fine. The company had applied for immunity, but was only granted partial leniency due to the fact that the leniency application was only put forward after the Authority had executed a dawn raid. The Competition Authority reduced Caverion's fine from Norwegian Krone ("NOK") 2.4 million (approximately Euros ("EUR") 253,366) to NOK 1.44 million. (approximately EUR 152,000). Pettersen and Arro were imposed fines of NOK 2.88 million (approximately EUR 304,039) and NOK 1.87 million (approximately EUR 197,414), respectively.

On March, 13, 2015, the NCA adopted a decision whereby a national association of electrical repairers of white goods, ES–kjeden, was given a fine of NOK 11.7 million (approximately EUR 123,516) for giving recommended prices to its members. Due to the financial situation of ES–kjeden, the fine was substantially reduced to NOK 250,000 (approximately EUR 26,392).

4. ABUSES OF DOMINANCE

The NCA did not adopt any decisions regarding abuse of dominance in 2015. The NCA has an ongoing investigation against Telenor (the incumbent and largest player in the Norwegian telecoms sector) for alleged abuses of dominance in the Norwegian mobile market. Both the NCA and the European Free Trade Surveillance Agency (the "ESA") conducted dawn raids at Telenor's premises in December 2012. On February 1, 2016 the ESA issued a Statement of Objections to Telenor for abuse of a dominant position within the mobile market. The Statement of Objections concerns Telenor's conduct in three Norwegian markets: the market for wholesale mobile access and origination services, the market for mobile broadband services to residential customers, and the market for mobile communications services to business customers. The ESA has taken the preliminary view that Telenor's pricing of access and origination services at the wholesale level likely impeded competing offers in the market for mobile broadband services to residential customers, since Telenor has charged prices to wholesale customers that were higher than the prices Telenor offered to residential mobile broadband users. In the market for mobile communications services to business customers, the Authority is concerned that clauses in Telenor's contracts have impeded competition by making it very difficult for its customers to switch provider and by making it overly expensive for competitors to capture customers from Telenor.

In 2015, it became public that one of the other ongoing investigations by the NCA is against Jotun (an international paint manufacturer) for abuse of a dominant position.

---

5. COURT DECISIONS

The Norwegian asphalt cartel case concluded in 2015. In 2013, the NCA issued a cartel decision in the asphalt sector with an all–time high fine; it was also the first major leniency case in Norway. One company, NCC, was fined NOK 140 million (approximately EUR14.8 million) for colluding, by way of market sharing: price fixing, 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 23.2 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’s decision to the District Court of Oslo and claimed that the decision should be annulled. The District court reduced the fine significantly to NOK 40 million (approximately EUR 4.2 million). Both the NCA and NCC appealed the court’s judgement to the Court of Appeal. The Borgarting Court of Appeals concluded in May 2015 that NCC Roads AS was liable for the infringement carried out by one of its employees and held the parent company NCC AB jointly and severally liable for the infringement. The Court reinstated the fine imposed by the Competition Authority. In addition, the Court increased the fine to NOK 150 million (approximately EUR 15.8 million) due to recidivism. NCC AB and NCC Roads AS appealed this judgment to the Supreme Court of Norway. The Appeals Committee of the Supreme Court of Norway rejected the appeal.

Another prohibition decision of the NCA that continued its judicial review in 2015 was the decision in V2011–12 Ski Taxi BA/ Follo Taxisentral BA/ Ski Follo, concerning taxi services. The NCA found that competitors had restricted competition by objecting by submitting a joint tender for a public contract for delivering transportation services for a hospital’s patients. The NCA’s decision was overturned by the District Court of Follo in 2013. The Court disagreed with the NCA’s findings that the parties should have submitted separate individual bids and found there was no illegal bid–rigging between competitors. The NCA appealed the court judgement. In February 2015, the Borgarting Court of Appeal found there had been an infringement by object, but reduced the fine. The judgement of the Court of Appeal was appealed and has been accepted before the Supreme Court.

Kvale
www.kvaleco.no
Fridtjof Nansens plass 4, 6th Floor
PO Box 1752 Vika, 0122
Oslo, Norway
(T) + 47 22 47 97 00
(F) + 47 21 05 85 85

---

11 (In Norwegian):
http://www.konkurransetilsynet.no/imageVaultFiles/id_6947/cf_5/Offentlig_versjon_av_vedtak_V2013-3.PDF


14 Borgarting lagmannsrett, Case 13-075034ASD-BORG/01 (in Norwegian):
1. MERGERS

On May 2, 2014, JCDecaux Europe Holding ("JCDecaux") notified the Portuguese Competition Authority ("PCA") of its acquisition of Cemusa – Corporación Europea de Mobiliario Urbano, S.A. ("Cemusa"). JCDecaux is a global leading player in the market for outdoor advertising. Cemusa is a Spanish advertising company, which operates in various countries and holds, among other things, the contract for outdoor advertising in New York City bus shelters and newspaper kiosks.

On August 7, 2014, the PCA initiated an in–depth investigation stating that the acquisition raised serious concerns about possible impediments to effective competition.¹ The PCA’s concerns were related to the increase of the degree of market concentration, competitive closeness between the companies, and the potential increase to existing barriers to entry and expansion.

During the proceedings, JCDecaux submitted two "remedies" packages demonstrating its intention to alleviate the PCA’s competition concerns. The PCA also received and assessed submissions from third parties, including associations of the market sector who expressed their views in opposition of the merger.

Before the PCA could issue a final decision with respect to the proposed acquisition, JCDecaux applied to withdraw from the merger proceedings and the PCA ended the proceedings on March 19, 2015.² This proceeding was part of a multi–jurisdiction merger control proceeding, and the result of the JCDecaux’s withdrawal of the PCA application was that Cemusa’s Portugal operations were not part of the scope of the overall acquisition. The merger was ultimately cleared by the Comisión Nacional de los Mercados y la Competencia ("CNMC") (the Spanish competition authority) with respect to the Spanish market.³

On August 20, 2015, the PCA was notified of a merger concerning the acquisition of TAP, the state–owned airline company, by the Atlantic Gateway consortium, a joint venture between JetBlue Airways, Azul Brazilian Airlines founder David Neeleman, and Portuguese bus company Barranquiro Group.⁴

This merger arose as a consequence of the memorandum of understanding between Portugal and the European Commission, the European Central Bank and the International Monetary Fund in 2011, in which Portugal committed privatize a number of state–owned companies. The notification to the PCA took place after the European Commission determined that this acquisition was not within the scope of its jurisdiction under European merger rules.

---


The PCA allowed the merger as it determined that it would not create significant impediments to effective competition in the relevant market at stake. None of the acquiring companies were active on the same air routes operated by TAP and the PCA stated that there was no risk of eliminating the potential competition on the TAP routes to Brazil.

2. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In June 2013, the PCA started an investigation into the extended warranty contracts of Peugeot Portugal Automóveis, S.A. ("Peugeot"), with respect to a clause which resulted in consumers losing the right to the manufacturer’s warranty if they carried out repair or maintenance services by independent repair shops. The PCA concluded that this restriction could result in the closure of independent repair shops and could affect the prices paid by consumers for repair and maintenance services.

Confronted with the PCA’s competition concerns, Peugeot offered a set of commitments to remedy the potential concerns identified. Peugeot committed to: (1) modify all contracts and documents which included the clause mentioned above; and (2) communicate to its official dealer and repairer networks the inapplicability of any restrictions on clients choosing independent repair shops which would result in them losing the extended warranty rights.

Following a public consultation, the PCA concluded that Peugeot’s commitments were adequate to eliminate the potential harmful effects on competition and on consumer welfare. On March 5, 2015, the PCA converted Peugeot’s commitments into mandatory conditions.

This proceeding was the first of a number of similar proceedings initiated by the PCA relating to extended warranty contracts and other competition concerns of companies in the automotive sector, such as Ford Lusitana, S.A., FCA Portugal, S.A (Fiat), Seat Portugal, Unipessoal, Lda and SIVA Sociedade de Importação Automóveis, S.A. (which is the distributor of Audi, Volkswagen and Skoda brands).

---

9 PCA Decision in case PRC 2015/3 (in Portuguese): http://www.concorrencia.pt/vPT/Praticas_Proibidas/Decisoes_da_Adc/Documents/Decis%C3%A3oPRC201503.pdf (last consulted on March 10, 2016). This case was eventually closed as the competition concerns were dealt with.
On May 29, 2015, the PCA issued a Statement of Objections addressed to 15 banking institutions regarding alleged anticompetitive practices. The PCA's concerns related to the possible exchange of commercially sensitive information between the banks concerning their retail credit products (mortgages, consumer products, and small and medium enterprise credit products). At this time, the inquiry is protected by investigation secrecy until the adoption of the final decision.

3. ABUSES OF DOMINANCE

The PCA carried out an investigation between January 2010 and December 2013 into Associação Nacional de Farmácias, Farminveste – S.G.P.S., S.A., Farminveste – Investimentos, Participações e Gestão, S.A., and HMR – Health Market Research, Lda. (“ANF Group”) for abusing their dominant position. The PCA concluded that the prices charged by the ANF Group for the pharmacies' commercial data (upstream market) and those charged by the ANF Group for pharma market studies based on the data (downstream markets) did not provide an equally efficient competitor active in the downstream market with a sufficient margin to cover the remaining production costs.

On December 31, 2015 the PCA imposed a fine of €10.340.000 on the ANF Group for abusing its dominant position in the form of a margin squeeze in the Portuguese pharmacies' commercial data market and in the markets of pharma market studies based on the data. This fine was the highest imposed by the PCA in 2015. The PCA's decision is subject to judicial review by the Competition, Regulation, and Supervision Court.

4. COURT DECISIONS

In 2013, the PCA imposed a fine of €3.7 million on Sport TV, for applying a discriminatory remuneration system in distribution agreements for Sport TV television channels, entered into between Sport TV and the operators of subscription–based television services from January 1, 2005 to March, 31 2011. The Competition, Regulation and Supervision Court had previously reduced the fine to €2.7 million.

On March 11, 2015, the Lisbon Court of Appeal confirmed the PCA decision against Sport TV for abusing its dominant position in the market of conditional–access premium sports television channels, by applying discriminatory conditions to subscription–based television operators over a period of more than six years.

RUSSIA

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

1. LEGISLATIVE DEVELOPMENTS

On October 5, 2015, Federal Law No. 135–FZ, “On Protection of Competition” and other related laws1 (the “Competition Law”) was amended by the “Fourth Antimonopoly Package”. 2 The law was developed by the Federal Antimonopoly Service (“FAS Russia”) and prepared in pursuit of the "road map" on development of competition and antimonopoly regulation in accordance with the recommendations of the Organization for Economic Co-operation and Development ("OECD").

The main types of unfair competition in the Competition Law include: defamation; misrepresenting customers; the incorrect comparison of goods or services with those of a competitor; the use of the intellectual property of a competitor; the acquisition and use of exclusive rights to legal entities, goods, works, or services which impede the business activities of competitors; collusion with a competitor; and the illegal receipt, use, or disclosure of information that is a commercial or trade secret.

Under the amendments to the Competition Law, FAS Russia’s power to issue warnings before initiating proceedings has been significantly expanded. Accordingly, in addition to being able to issue such warnings for actions related to abuse of dominance and the imposition of unprofitable terms in a contract, FAS Russia may also issue warnings related to unreasonable price fixing and the creation of discriminating conditions. Moreover, the warning can be issued where there is evidence of several forms of anticompetitive behavior as well as to the state body / local government where there is evidence of a violation of Article 15 of the Competition Law (which prohibits anti–competitive actions and acts of state bodies / local governments).

The amendments also specify and develop procedural provisions of the Competition Law. For example, the amendments regulate the procedure for cases in which experts, specialists, and translators participate. The amendments introduce the procedure for challenging members of the commission considering the case. The amendments also establish rules for considering the case in an open or closed session and contain provisions on the types of evidence that may be used in the process. The Competition Law also sets out the procedures for reconsidering decisions and orders of the regional offices of FAS Russia.

The amendments came into force on January 5, 2016.

2. MERGERS

With the adoption of the Fourth Antimonopoly Package, preliminary approval of joint venture (“JV”) agreements by FAS Russia has become obligatory if certain thresholds are met. All JV agreements entered into by competitors that have combined assets of over RUB 7 billion (approx. USD 124.4 million, EUR

---

1 О Защите Конкуренции No.135-ФЗ (с изменениями и дополнениями) [On Protection of Competition No. 135-FZ, as amended], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF], 2006, № 31 (1 ч.), Cт. 3434 [Russian Federation Collection of Legislation] 2006, № 31 (1 п.). Art. 3434 (Russ.).
102 million) or combined revenues of over RUB 10 billion (approx. USD 177.7 million, EUR 146 million) must be considered by FAS Russia. This provision supplements the existing requirement that, in certain cases, the formation of a legal entity must be approved by the regulator. This change in the law allows FAS Russia to better determine where the JV agreement is in compliance with the law, whereas prior to the amendments, there was a high risk that FAS Russia would consider such agreements to constitute cartel activity prohibited by Article 11 of the *Competition Law*.

The amendments also introduced provisions allowing entities to file information on a proposed transaction with FAS Russia before the official submission of the relevant application or notification. This allows parties to offer terms and conditions aimed at preserving competition ahead of time and it is expected that FAS Russia will take this information into consideration when deciding whether to grant clearance of the transaction.

The *Competition Law* also provides for the electronic submission of applications and documents and for the publication of such information on the official website of the antimonopoly authority. The purpose of this amendment is to enable entities and other interested persons to more easily send opinions on proposed transactions and for the antimonopoly authority to understand the possible consequences of a transaction before making a final decision.

3. **CARTELS AND OTHER ANTICOMPETITIVE PRACTICES**

Cartel enforcement has significantly intensified in Russia over the past couple of years. The prosecution of cartels has repeatedly been declared by FAS Russia as one of its top enforcement priorities.

There have been a large number of bid-rigging cases which can be explained by the widespread practice of conducting tenders in various sectors of the Russian economy. According to Russian law, tenders are mandatory in respect of, among other things, state procurement, and the selling and leasing of state or municipal property. The investigation into bid rigging cartels focuses more on identifying artificial conduct of tender participants rather than collecting evidence of their explicit collusion. These cases are generally less dependent on dawn raids than other types of cartels.

For example, FAS Russia found Vostok LLC, Roads of Siberia LLC, DEP No. 363 OJSC, and DEP No. 364 OJSC liable for participating in a bid rigging cartel in relation to the maintenance and repair of road M-54 “Yenisei” from Krasnoyarsk through Abakan, Kyzyl to the boundary with Mongolia. The total amount of fines imposed exceeded RUB 109 million.³

An important ongoing cartel case involves proceedings initiated by FAS Russia against Russian agents of the largest ocean-going container carriers, based on evidence of a cartel agreement in the market of international container shipping. The investigation is covering the container shipping industry and involves all major players within this market, such as Nyk Line, A.P. Moller–Maersk Group and others. This is the second international cartel investigation in Russia.

It is notable that, for the first time, the antimonopoly authority used external experts and obtained market analyses while investigating this

---

cartel case. In June 2015, FAS Russia received a comprehensive study of the market of international container shipping regarding certain routes, including the procedure for setting prices for the transportation of cargo in containers. After receiving the expert report, FAS Russia reopened the case and delayed the hearing until February 6, 2016. This will be the longest and most international investigation done in Russia to date.

4. **ABUSE OF DOMINANT POSITION**

The *Fourth Antimonopoly Package* also contains provisions related to abuse of dominance. Such amendments will have a serious impact on the practical and theoretical approach to abuse of dominance in Russia.

Under the amendments, FAS Russia cannot consider a company holding less than 35% of a market share to be holding a dominant position unless the industry is controlled by federal industry laws or in cases of "collective dominance". The amendments also eliminated the register of companies holding more than 35% of the relevant market share. The inclusion of an entity on the register with a market share exceeding 50% created a presumption of market dominance that was difficult to challenge. If any participant in a transaction was included on the register, approval of the antimonopoly authority was required irrespective of the value of the assets and revenue of the parties. The elimination of the register will likely reduce the number of transactions subject to merger control.

The law also gives the Russian government, the right to set rules for non–discriminatory access to goods and services in highly–concentrated markets where a company has a market share of over 70% and an FAS ruling has confirmed that it has abused its dominant position in violation of antimonopoly legislation. FAS Russia plans to approve or add rules for non–discriminatory access to goods and services in the aircraft, power, ports, mail, and railway transport industries.

One of the most important cases on abuse of dominance involved the Android mobile operating system. A commission of FAS Russia determined that Google had abused its dominant position by requiring vendors of mobile phones to pre–install Google applications on mobile phones. This case is being considered in several jurisdictions, including the European Union. The problems created by Google extend beyond the EU and Russia, impacting innumerable companies. Regulators are concerned that the failure to remedy Google’s abuse of its dominant position in mobile will allow it to push competitors out of this dynamic market.

5. **COURT DECISIONS**

In 2015, courts upheld certain significant decisions of lower courts and of FAS Russia. Overall, courts dismiss approximately 16% of FAS Russia decisions challenged by the claimants.

On June 16, 2015, the Commercial Court of Moscow Region confirmed the decision by the FAS that Baxter CJSC had violated Russian antimonopoly legislation by refusing to enter into a drug–supply contract with a medical service company without any economic or technological justification. Baxter CJSC’s procedures for selecting contractors did not contain clear rules for consideration of offers, performance criteria, and the termination of the contractual relations. The court disregarded the due diligence

---


conducted by Baxter, holding that such matters should be determined only by law enforcement, not a private company.6

The courts took the similar approach in respect of TEVA Pharmaceutical Industries Limited ("TEVA"). On October 13, 2015, Moscow Arbitration Court dismissed a claim by TEVA challenging an order of FAS Russia to hold TEVA administratively liable for failure to execute an FAS determination. In December 2013, the antimonopoly service found that TEVA violated and abused its dominant position when it refused to enter into a contract with "Biotek" supplying "Copaxone" medicine without any economic and technological justification, referring to the exclusive rights of the patent holder.

In January 2014, Biotek asked TEVA twice to enter into the contract for supplying "Copaxone" but the company refused to enter into the contract. TEVA failed to execute the remedy of FAS Russia and was held administratively liable and fined RUB 300,000.7 Both the Arbitration Court and the Court of Appeal confirmed the legitimacy of the remedy.

On August 17, 2015, the Supreme Court of the Russian Federation indicated that the lower courts had correctly established that unscheduled inspections may be conducted without the prior initiation of an administrative case into violations of antimonopoly legislation. FAS Russia had conducted an inspection in respect of CJSC ARGUS–SPECTR and its 68 dealers on compliance with antimonopoly legislation and CJSC ARGUS–SPECTR had challenged the FAS Russia order to conduct the unscheduled inspection.8

---


8 Ruling of the Supreme Court of the Russian Federation as of August 17, 2015 No. 400-3C14-2879: https://kad.arbitr.ru/PdfDocument/03c64ee3-2062-4ce4-9f4-3f1a550f61dd/VAS-7907-2013_20150817_Opredelenie.pdf
SPAIN

By Susana Cabrera, Konstantin Jöergens, José Luis Azofra Parronda, Carlos Bobillo Barbeito and César Borja Galán Santos of Garrigues LLP

This year was noteworthy for the landmark ruling of the Spanish Supreme Court (Tribunal Supremo, the ”SSC”) in Case 2872/2013 BCN Aduanas,¹ which clarified the basic principles that should govern the procedure for calculating fines under the Spanish Competition Act 15/2007 (Ley de Defensa de la Competencia, “SCA”).² In particular, the SSC held that:

- The Fining Guidelines of the Spanish Competition Authority (the Comisión Nacional de los Mercados y la Competencia, National Markets and Competition Commission, “CNMC”), largely based on the European Commission’s Fining Guidelines, are contrary to the fining system established in the SCA.
- The theoretical maximum amount of the fines that can be imposed in Spain is 10% of the total turnover in the preceding business year of the infringing company, and not 10% of the turnover generated in the affected market (as ruled by the Spanish High Court, the ”SHC”, in Audiencia Nacional at first instance).
- The 10% turnover limit for very serious infringements must be interpreted as a sliding scale used for the calculation of fines and not, as has been applied to date, as an ex post limit or cap on the final fine only once the latter has been calculated.

1. LEGISLATIVE DEVELOPMENTS

In November 2014, the European Parliament issued a Directive³ in relation to actions for damages arising from breaches of competition law.

The Directive is intended to harmonize and simplify damage claims in national courts arising from infringements of competition law, and to provide a mechanism for addressing the evidence considered and the conclusions reached by EU Member States courts.

The Directive is binding on EU Member States, which have until December 27, 2016 to implement its provisions. It is not, however, binding on the European Commission.

Spain recently released draft legislation to implement the Directive, joining seven other Member States, including the UK, Sweden, and the Netherlands, which have also made progress in the implementation process.

2. MERGERS

In 2015, the CNMC issued 92 merger decisions. All of the decisions unconditionally cleared the proposed transactions in Phase I, with the exception of five mergers, two of which were abandoned by the parties, two which were cleared subject to commitments, and one which was outsourced under Phase II subject conditions.¹

The acquisition by DIA, one of the main Spanish supermarket chains, of sole control over

---

³ Directive 2014/104/EU of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
¹ C/0634/15 DIA/EROSKI and C/0643/15 TAMINCO/CEPSA, C/0612/14 TELEFÓNICA/DTS.
160 retail stores of its competitor Eroski was cleared in April 2015. The remedies proposed by DIA, to address the competition concerns identified by the CNMC, involved the divestment of three retail stores across three geographical areas (Nava de la Asunción, Villanueva de Córdoba, and Trujillo).

In June 2015, the transaction by which Taminco acquired Cepsa Química’s methylamines and derivates unit was also cleared in Phase I. To address the CNMC’s concerns regarding the proposed acquisition, in particular, the potential market closure for trimethylamine’s supply for one of CEPSA’s customers, Taminco undertook to supply trimethylamine to that customer on the terms and conditions agreed with Cepsa for a period of four years.

Finally, the CNMC cleared Telefónica’s acquisition in Phase II in April, 2015, after 6 months of consultation, because the CNMC was concerned that the transaction raised competition issues in the relevant markets (i.e. pay–TV market; wholesale commercialization of individual audiovisual contents and editing markets; marketing and wholesale distribution of TV channels; and access conditions to Telefónica’s IP network in Spain). The CNMC accepted Telefónica’s remedies as adequate once they were submitted to third parties for comment. Through these commitments, Telefónica agreed to make a wholesaler offer to its TV Premium contents competitors. The CNMC is closely monitoring the fulfillment of these obligations with a view to facilitating the proper functioning of the telecommunications and pay–TV markets.

Also related to mergers is the Decision of the CNMC of September 17, 2015, in which CNMC imposed a €3 million fine on Mediaset for failing to comply with the commitments imposed on it by a 2010 merger decision. Specifically, the CNMC held that Mediaset did not comply with the remedy prohibiting the development of commercial practices that, *de jure or de facto*, led to direct or indirect tying in the sale of advertising space for the Telecinco or Cuatro TV channels. This was the latest chapter in a series of decisions issued by the CNMC as a result of successive violations of behavioral remedies by Mediaset. The fines imposed in these cases amount to €22.6 million to date.

In a similar case, Atresmedia was fined €2.8 million on November 18, 2015, for failing to fulfill conditions related to its acquisition of La Sexta TV channel in 2012. This case is almost identical to Mediaset as, amongst other reasons, Atresmedia was fined for linking the sale of advertisements within the TV channels it controls (Antena 3 and La Sexta), thus eliminating the possibility of customers being free to design and select the advertisement package of their choice.

As of 2016, the CNMC expects to see mergers in the food and grocery markets and in the energy market, as a result of the divestments of oil companies due to the decline in prices.

### 3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On January 8, 2015, the CNMC imposed a €98.2 million fine on 40 companies and three sectoral associations in the waste management and urban sanitation sectors. In its Decision, the Spanish Competition Authority declared the existence of a single and continuous cartel infringement which consisted of several heterogeneous types of conduct and practices, such as bilateral agreements and temporary joint ventures. The CNMC concluded that this conduct was aimed at maintaining the *status quo* of the

---

2 C/0230/10 TELECINCO/CUATRO.
3 C/0432/12 ANTENA3/LA SEXTA.
market through a market–sharing agreement. According to the CNMC, the fact that the agreement had manifested itself in different forms conduct would not cast doubt on the finding of a single and continuous infringement, since all of the conduct was aimed at achieving the same anticompetitive objective and reflected certain structural links. Regarding the parties' allegations that the proceedings were time barred, the CNMC stated that the "reserved information period" occurred prior to the commencement of formal investigative proceedings and therefore could not be taken into account for the calculation of the limitation period.

On February 26, 2015, the CNMC imposed fines totaling €88.2 million on nine companies and two sectoral associations in the dairy industry. According to the decision, the entities involved violated Article 101 of the Treaty on the Functioning of the European Union (the "TFEU") and Article 1 of the LDC by exchanging strategic information on raw cow milk prices, volumes and surpluses at the national and regional levels. The CNMC held that all of these exchanges amounted to a single and continuous infringement whose aim was to control several different markets.

On June 18, 2015 the CNMC imposed a €57.68 million fine on several paper and corrugated board producers for exchanging information on costs and prices. The CNMC held that, irrespective of the fact that paper and corrugated board producers could have competing interests, all of the companies involved had participated in a single and continuous infringement with the aim of artificially increasing existing market prices. Interestingly, two members of the CNMC's Council harshly criticized the factors taken into account to calculate the fine.

On July 23, 2015, following a leniency application, the CNMC imposed a €162 million fine on 21 vehicle manufacturers for participating in a cartel from 2006 to July 2013, which was the highest fine imposed to date for competition law infringements in Spain. According to the CNMC, the vehicle manufacturers exchanged sensitive commercial information, including turnover figures in sales and aftersales markets, profits broken down by department (expressed in terms of total figures and percentage), expenses (in terms of total figures and percentage), and the trade margins of their dealer networks. The CNMC concluded that these exchanges constituted a single and continuous infringement allowing each company to determine its competitors' strategy, thereby amounting to a "by object" infringement of competition law. It should be noted that, despite defining the violation as a cartel, the CNMC ultimately imposed a more lenient fine.

On June 18, 2015 the CNMC imposed a €300,000 and €6 million, respectively, for participating in a single and continuous infringement. In this case, the CNMC considered three agreements. The first agreement was a national roaming agreement between Telefónica and Yoigo, which was found to be exempt under Article 1.3 LDC (101.3 TFEU) but for three clauses: (i) the use by Yoigo of Telefónica's 4G network in those urban areas where Yoigo has or could reasonably have its own 4G network; (ii) the prohibition on Yoigo selling Telefónica's network capacity to third parties; and (iii) the clause making the contract subject to the validity of the national roaming agreement between both companies. Pursuant to the second agreement, Yoigo was required to give Telefónica access to its 4G network in urban areas. However, the contract was prohibited since Telefónica had a reasonable possibility of developing its own
network. Finally, in the third agreement, the parties agreed to jointly distribute Yoigo’s mobile services with Telefónica’s telecom landline services. The CNMC characterized this contract as a horizontal agreement for the purposes of Article 1 LDC (101(1) TFUE), in spite of the parties’ efforts to define it as an agency agreement. The CNMC held that the agreement could benefit from the individual exemption except for three clauses: (i) the indefinite duration of the agreement, Telefónica having the option to terminate the contract every six months; (ii) the prohibition on Yoigo targeting Telefónica’s previous customers; and (iii) Telefónica’s use of its telecom landline products’ prices as a tool to monitor Yoigo’s competitive behavior.

On July 23, 2015, the CNMC held that Distribuidora de Televisión Digital and Telefónica (two Spanish television broadcasters) had participated in a single and continuous infringement in the distribution of football broadcasting rights market and fined them €15.5 million for the infraction. According to the CNMC, both companies concluded a number of contracts with the purpose of sharing their sources of supply (i.e. broadcasting rights at the wholesale level) and avoiding competition in the retail market (i.e. resale of football broadcasting rights to paid and public TV). As a result, the exclusionary effects of the agreements were not only felt in the television broadcasting markets but also in those for ‘triple and quadruple plays’ (i.e. combined offers of pay–TV, ADSL, telephone and mobile phones), particularly due to the importance of football rights for the Spanish pay–TV market. Additionally, the CNMC held, under Article 1 of the LDC, even though it recognized that this conduct could also have been defined as an abuse of a dominant position, that DTS offered special contractual conditions to Telefónica, thereby excluding other television broadcasters from the market. The CNMC could not find any justification for this agreement as it held that it would have been more economically rational to sell the broadcasting rights to all TV broadcasters. Conversely, the joint distribution contract between DTS and Mediapro (another television broadcaster) was exempt under Article 1.3 of the LDC (which is similar to Article 101(3) TFEU). Thus, the CNMC held that, unlike the agreements concluded with Telefónica, this agreement was drafted in FRAND terms and was economically necessary and indispensable to the market, particularly due to the high cost of football broadcasting and the reduction in demand in recent years. As a result, it allowed Mediapro to compete in the pay–TV market.

Finally, other interesting decisions of the CNMC in 2015 recognized infringements of Article 101 TFEU and Article 1 LDC in the legal and road transport sectors. Fines were not imposed on undertakings but only on associations (such as transport business associations and the Spanish General Bar Council), mainly on the basis of the anticompetitive nature of the general recommendations issued in their respective fields. Similarly, the CNMC imposed a fine of €2.79 million on two intellectual property rights management associations for abuse of a dominant position, which is prohibited by Article 102 TFEU and Article 2 LDC.

4. COURT DECISIONS

As mentioned above, one of the major developments in Spain involves fine setting in competition law cases, since both the SHC and the SSC have ordered the CNMC to recalculate some of its fines in cases4 where the Fining
Guidelines were applied, in light of the new fine calculation criteria set out by the SSC in its landmark case of January 29, 2015.5

Other relevant judgments in 2015 include the following:

The SHC, in its judgment of January 25, 2016,6 annulled, on procedural grounds, some of the highest competition law fines in Spanish history. The fines, totaling €43 million, had been imposed on September 27, 2013, by the Spanish Competition Commission, now the CNMC, after finding that six transport shipping container associations and the Valencia Port Authority had engaged in a transport cartel.

The CNMC initiated its investigation on June 14, 2011. Under the SCA, once initiated, cartel investigations must be concluded within 18 months. During this period, the clock can be stopped in certain circumstances, for example, while the relevant authority is waiting for responses to requests for information. In this case, the CNMC suspended the limitation period on six separate occasions, which would have extended the deadline for issuing a decision by 296 days (from December 14, 2012 to October 6, 2013). Ultimately the decision was issued on September 27, 2013.

The SHC held that time suspensions were possible before the original deadline of December 14, 2012, but not after this date. On this basis, only three of the six time suspensions were upheld valid, which resulted in the CNMC having failed to issue a decision within the statutory deadline. The annulment of the fines is not, however, a definitive victory for the companies, since the judgment can be appealed to the SSC. Moreover, the CNMC is entitled to start a new investigation in cases where a competition decision has been annulled only on grounds of procedural irregularities.

Another important series of judgments demonstrates the Spanish courts' strict approach regarding search warrants and the need for the CNMC's inspections to comply with the scope and purpose of the CNMC's Orders of Investigation and with judicial authorizations. Thus, in its judgments of December 10, 2014 (UNESA7 and Campezo8) and February 27, 2015 (Transmediterránea9), the SSC annulled the CNMC's respective Orders of Investigation on the grounds that: (i) they were not sufficiently precise and did not clearly indicate the scope and purpose of the investigation; (ii) they were inconsistent with the judicial authorization; and (iii) they were too vague and imprecise.

This interpretation was applied by the SHC which, on April, 201510, annulled the €61 million fine imposed on electricity suppliers as a result of inspections carried out at UNESA's headquarters. The SSC also applied this interpretation and, on June 1, 2015,11 annulled the €48.2 million fine imposed on Transmediterránea.

Finally, on July 1, 201512, the SHC annulled a €8.2 million fine imposed on the Spanish Postal Service ("Correos") for a margin squeeze practice against its competitors in the provision of postal services to large customers. However, the SHC concluded that Correos, with

---

9 TS Judgment of February 27, 2015 (appeal no. 1292/2012).
11 TS Judgment of June 1, 2015 (appeal no. 874/2014).
12 SHC Judgment of July 1, 2015 (appeal no. 118/2014).
its discount policy, was not preventing alternative operators from competing for large customers. In this sense, the SHC considered that the impugned conduct had not been sufficiently proven insofar as Correos’ competitors were able to use their own capacity to reach the targeted customers without having to resort to Correos' network.
1. LEGISLATIVE DEVELOPMENTS

The Swedish government has initiated an inquiry into whether the Swedish Competition Authority (the "SCA") should be given competence to impose fines for cartel infringements and abuse of dominance and to prohibit concentrations. The SCA is currently required to apply to the Stockholm District Court in order to impose administrative fines in cartel and dominance cases or to block a merger. The inquiry shall report its conclusions and any proposals for reform by 12 May, 2016.1

The Swedish government presented a legislative bill to regulate the SCA's right to review and copy electronically stored material in connection with on–site inspections ("dawn raids"). In short, the SCA regularly uses IT forensic tools to create identical mirror images of an investigated company's servers, computers and other storage media. These copies are subsequently removed from the company and transported to the SCA's premises for review. Up until now, there has been no legal basis for the SCA's practice. The legislative bill proposes to amend this by introducing an express legal basis in the Competition Act for the SCA to remove electronically stored material to the SCA's premises for review, subject to the company's consent. The change to the Competition Act came into effect 1 January 2016.2

2. MERGERS

The past year has seen a high level of merger activity in the food industry sector. Three of the total number of five mergers that were subject to the SCA's in–depth review concerned consolidation between food producers and/or suppliers.2 In addition three mergers between food suppliers were cleared during a phase one review.3

In March 2015, Orkla, a supplier of branded consumer goods and concept solutions to the grocery, out–of–home and bakeries sector, which is listed on the Oslo Stock Exchange, notified the SCA of its acquisition of Cederroth, a Swedish company active in personal care, healthcare, wound care, household, and first aid primarily in the Nordic countries. The transaction gave rise to horizontal overlaps and affected markets in a number of jurisdictions. In Sweden, the SCA initiated an in–depth review focusing on horizontal overlaps in the supply of (i) food supplements and (ii) weight management products, two product areas where the combined market shares raised prima facie concerns.4 In July 2015, the SCA filed a motion with the Stockholm District Court applying, in the first instance, for it to order the Cederroth weight management business sold under the Allévo brand to be divested before the transaction could be completed. In the alternative, the SCA also applied to the Court to prohibit the transaction.5 Within the narrow relevant market identified by the SCA, the supply of food and meal replacement products to the grocery retail

---

4 SCA Decision dnr 161/2015 of April 8, 2015.
5 SCA application to the Stockholm District Court in dnr 514/2015 of July 8, 2015.
channel, the transaction constituted a 3 to 2 merger (the merging parties being numbers 1 and 3, respectively); the parties’ combined market share would be double that of the remaining player. According to the SCA, barriers to entry were high and buyer power was insufficient to counter any incentive of the merged entity to increase prices or reduce its consumer offering due to a lack of alternative suppliers.

Following the summons application, the parties initiated discussions with the SCA which led to a modification of the authority’s primary claim to the extent that Orkla would be permitted to divest the Allévo brand after closing the acquisition, subject to a conditional fine of SEK 100 million. The Court subsequently issued a judgment in line with the adjusted claim without a main hearing. This is only the second time that the SCA has altered its initial claim and “settled” the case once court proceedings had begun. Following completion of the transaction in late August, Orkla’s management of the Allévo brand and compliance with the commitments was subject to the review of an independent monitoring trustee approved by the SCA. In December, the healthcare company Karo Bio was proposed by Orkla and approved by the SCA as a buyer of the Allévo brand. The sale of Allévo to Karo Bio was undertaken in late December 2015.

In March, the SCA unconditionally cleared Arla Foods’ acquisition of Atria Scandinavia’s business in the cheese and dairy industry, Falbygdens Ost, following an in depth review. Arla Foods is the leading dairy company in Sweden and the largest producer and supplier of branded hard cheese to the grocery retail channel. Falbygdens Ost was also a supplier of hard cheese in Sweden, without any cheese production of its own. However, concerning primarily hard cheese, Falbygdens Ost had its own facilities for maturing, cutting, flavouring, and packaging the cheese it bought from dairy producers, including Arla Foods. At a horizontal level, the parties’ activities primarily overlapped within sales of a sub-segment of hard cheese consisting of certain matured Swedish hard cheeses, called "Swedish Classics," to the grocery retail channel. Within this segment, rival Skånemejerier was and would remain the largest supplier post-transaction and there were a number of other (albeit smaller) suppliers. There was also a vertical relationship between the parties as Arla Foods sold cheese to Falbygdens Ost as input for further processing.

The SCA analysed the risk of unilateral effects in detail by, *inter alia*, conducting a consumer survey and applying sophisticated economic methods. According to the SCA’s economic investigation, the acquisition of Falbygdens Ost could give Arla Foods an incentive to increase prices on matured Swedish Classics. It could not be concluded that Skånemejerier would constrain such a price increase. However, the SCA also found that any incentives that Arla Foods might be given to raise prices post-transaction were balanced by *inter alia* the fact that the merger would lead to efficiency gains since the combined entity would internalise the pre-merger cost to Falbygdens Ost of purchasing inputs from Arla Foods. Furthermore, retail customers had not expressed concerns about price rises and the SCA concluded that countervailing buyer power was sufficient to prevent any limited incentives Arla Foods might gain to increase prices. The potential vertical foreclosure effects were moreover not considered to be such as to lead to consumer harm.

---

The SCA also initiated an in–depth review of Kronfågel's acquisition of Lagerberg, two companies active in the production and sale of chicken products for human consumption. The SCA subsequently, in January 2016, filed a motion with the Stockholm District Court to block the concentration on the basis that it would lead to anti–competitive effects in the sale of grilled and chilled chicken products to the grocery retail channel where the concentration would constitute a 3 to 2 merger. The motion was preceded by several months of commitments negotiations between the SCA and the parties. The SCA had applied to Court for an extension to its statutory merger review deadline on three occasions before filing the motion to block the merger.

The SCA also initiated an in–depth review of, and subsequently filed a motion with the Stockholm District Court in order to prohibit the acquisition by Logstor, a producer and supplier of pre–insulated piping systems, of rival Powerpipe. In brief, the SCA argues that the merger would constitute a 4 to 3 merger in the market for the sale of pre–insulated piping systems for district heating in Sweden. According to the SCA, the merged entity would achieve a combined market share exceeding 70% and the SCA considered that competing producers Isoplus and Uponor's likely response, with market shares of less than 10% each, to a price increase by the combined Logstor / Powerpipe would be to follow suit and increase prices themselves.

Mergers in the food industry sector which were cleared in first phase review include Lantmännen's acquisition of Vaasan Group and Danish Crown's acquisition of Dalsjöfors Kött Holding ("DLK"). Lantmännen's acquisition of Vasaan related to bake–off products where the parties were numbers 1 and 2 in Sweden and had activities throughout the Nordic region, with relatively high market shares. Danish Crown's acquisition of DLK concerned a merger in the slaughter industry. The merger raised potential issues in the sale of pork and beef meat to the processing industry or directly to the grocery retail channel where the parties’ combined market share was up to 30–40%. The SCA cleared the acquisition and noted that HK Scan would remain the biggest actor in the market post–transaction, that there was a degree of excess capacity in the slaughter industry, and that the grocery retail chains had sufficient bargaining power to resist any attempted price increases since fresh meat was a generic product with suppliers being fully substitutable.

The only second phase clearance decision that did not concern food retail related to concrete: Heidelberg Cement Sweden's acquisition of sole control of Contiga. The parties' Swedish activities gave rise to horizontal overlaps in the production and sale of concrete elements albeit with relatively low market shares around 20%. The SCA, however, focused on the vertical relationship identified between the parties. Heidelberg's subsidiary Cementa is the only producer in Sweden of cement used as input for concrete elements. The SCA found that Cementa may post–merger have the ability to foreclose competing concrete elements producers. However, considering the limited presence of the merged entity on the downstream market and the fact that Cementa had higher margins for the sale of cement than of concrete elements, the SCA concluded that Cementa lacked incentive for input foreclosure. Nor was there any risk of customer foreclosure in light of the merged entity’s modest share of cement purchases, combined with the fact that

---

9 SCA Decision dnr 186/2015 of April 15, 2015.
Cementa was the sole supplier of the target company already before the transaction. The transaction was unconditionally cleared.

As mentioned in last year's antitrust year review, the Stockholm District Court in December 2014 issued a judgment granting the SCA's motion to block the merger between Sweden's two leading property agent franchises Swedbank Franchise ("Swedbank") and Svensk Fastighetsförmedling. At the time of last year's publication, Swedbank had appealed the decision to the Market Court and the judgment was expected in April. Swedbank subsequently decided to abandon the transaction and withdrew its appeal. It commenced a process of untangling the two businesses, which eventually resulted in the purchase of Svensk Fastighetsförmedling by its franchisees.

3. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

In 2013, the SCA filed a summons application to the Stockholm District Court to impose administrative fines on three healthcare companies, Aleris, Capio, and HjärtKärlgruppen, for alleged coordination in the context of a public procurement of services within clinical physiology and clinical neurophysiology. The SCA claimed that the companies shared information regarding upcoming tenders and had agreed to share the volumes of the contracts regardless of the winning tender. The SCA suggested that this conduct was confirmed by bilateral cooperation agreements between the companies.

In December 2015, the Stockholm District Court decided in favor of the SCA's application, and held that the cooperation agreements had the object of restricting competition. The District Court did not accept the healthcare companies' argument that the cooperation generated improvements to the quality and continuity of healthcare services to patients that would outweigh its negative effects. Nor did the Court accept that the healthcare companies lacked capacity to participate and deliver sufficient volumes in the tenders individually. The cooperation agreements were found to reduce the companies' incentives to compete through price competition. The companies were fined a total of approximately SEK 28 million.

4. ABUSE OF A DOMINANT POSITION

The Market Court has upheld a judgment by the Stockholm District Court from 2014 where the latter Court had found that the SCA's claim to impose administrative fines on Swedavia, the Swedish state owned company in charge of running Arlanda Airport, for abuse of dominance did not breach the right not to be punished twice for the same offence ("ne bis in idem"). In a judgment from November 2011, the Market Court had considered the supplementary charge adopted by Swedavia and imposed on taxi companies for receiving passengers and potential customers in the arrival hall to be abusive and had ordered Swedavia, subject to a conditional fine, to not impose this extra charge. Swedavia argued that the Market Court judgment from 2011 precluded the SCA from subsequently putting forward a claim against Swedavia for fines for the same practice and that the SCA's application was inadmissible. However, the Market Court agreed with the Stockholm District Court and found that the 2011 Market Court judgment did not preclude the SCA from subsequently pursuing a claim against Swedavia.

12 Stockholm District Court Case T 12305-13, judgment of December 18, 2015.

13 Market Court Case MD 2015:4, judgment of April 17, 2015.
15 A particular twist is that the SCA in December 2010 had received complaints about Swedavia's practice but chosen not to further investigate the matter. The SCA's decision not to investigate the complaint lead to the civil claim to the Market Court which was the subject of the 2011 judgment.
order on Swedavia to stop the abusive practice was not of a penal character since *inter alia* the fine attached to the judgment could only be levied if Swedavia breached the judgment. Since the SCA’s claim to impose administrative fines was found not to breach the right not to be punished twice for the same offence, the Market Court held that the claim was admissible. The hearing before the District Court on the merits of the claim is expected to take place in April 2016.

The Swedish Supreme Court has also rejected a claim for annulment of an arbitration award finding that Systembolaget, Sweden’s alcohol retail monopoly, had abused its dominant position. Systembolaget had partially terminated the supply agreement with Absolut Vodka maker, The Absolut Company Aktiebolag ("Absolut"), and refused further purchases of certain products in response to the prosecution of members of the Absolut staff for bribing Systembolaget employees. This conduct was considered by an arbitration tribunal to amount to abuse of dominance and Absolut was awarded damages of SEK 57 million. Systembolaget relied on the *Eco Swiss* judgment of the EU Court of Justice and applicable Swedish procedural law, claiming that the award was in breach of competition rules and thereby contravened rules of public policy and, as a result, should be annulled. However, the Swedish Supreme Court found that even if the arbitration tribunal had not considered the rules on abuse of dominance correctly, this was not an error which would qualify the award for annulment under the principles set out in the *Eco Swiss* judgment. The Court also rejected Systembolaget’s application of a request for a preliminary ruling from the EU Court of Justice.

In March 2014, the SCA applied to the Stockholm District Court for permission to expand the search concerning seized documents that had been obtained during a dawn raid inspection at the premises of two companies operating in the lock and security market, ASSA and Copiax. During the initial review of the digitally stored data, the SCA had come across information that suggested that additional infringements had taken place. ASSA opposed the request for an expanded search but the District Court ruled in favour of the SCA. ASSA appealed to the Market Court and argued that if the SCA were allowed to extend its search, this would breach the rule of law and infringe ASSA's right of defence. The Market Court held in favour of ASSA, refused the SCA's application and annulled the District Court judgment. In particular, the Market Court noted that transportation to and search of digitally stored material at the SCA's premises had been undertaken on the basis of ASSA's consent, a consent that was premised on the scope and purpose of the investigation as delineated by the Stockholm District Court's initial decision to permit the dawn raid. The consent given by ASSA did not extend to search the digitally stored material at the SCA's premises for other purposes or potential breaches outside the scope of the initial decision by the Stockholm District Court.

During 2015, the SCA has also put forward a claim against Nasdaq OMX (the Stockholm Stock Exchange) for abuse of a dominant position on the market for services related to trading in Swedish, Danish and Finnish securities. The claim stemmed from a complaint by the competing stock exchange, Burgundy, that

---

16 Swedish Supreme Court Case T 5767-13, judgment of June 17, 2015.
17 C-126/97 Eco Swiss China Time Ltd v Benetton International NV, June 1, 1999.
19 SCA application to the Stockholm District Court in dnr 406/2015 of May 27, 2015.
Nasdaq OMX prevented Burgundy from placing its trading system in a computer hall by forcing Verizon, owner of the computer hall, not to allow access. The computer hall at hand contained Nasdaq OMX’s own trading system as well as a large number of securities traders’ computers. If Burgundy had been able to place its trading system in the computer hall it would have increased the speed and reduced the cost at which actual and potential customers could communicate with Burgundy. According to the SCA, the physical location of the computers is decisive for the possibility of an actor to be successful on this market. According to the SCA, Nasdaq OMX’s conduct was meant to, and also had the effect of, raising entry barriers for a close competitor. The SCA has requested the Court to impose administrative fines of approximately SEK 31 million on Nasdaq OMX. The case is still pending before the Court.
1. LEGISLATIVE DEVELOPMENTS

On 29 June 2015, the Competition Commission ("ComCo") published its Revised Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector ("Motor Vehicle Notice") and its explanations to the Motor Vehicle Notice.\(^1\) The Motor Vehicle Notice came into force on 1 January 2016 and replaces the Notice of 2002. The new Motor Vehicle Notice continues to regulate, contrary to the current regulation in the EU, not only the secondary market (maintenance and repair services and sale of spare parts) but also the primary market (sale of new motor vehicles). In the EU, the primary market is no longer subject to sector-specific rules but falls within the ambit of the general rules on vertical agreements. As a result, multi-brand representations can, in principle, still not be limited in the motor vehicle sector in Switzerland, whereas this is possible in the EU if certain conditions are met.

The regulation under the Motor Vehicle Notice is similar to the situation under the 2002 Notice, but has been aligned with the approach taken in the general Notice on the Assessment of Vertical Agreements of June 2010\(^2\). In particular, the revised Motor Vehicle Notice contains a list of potentially serious restrictions (Articles 14 – 19). However, in accordance with the Federal Act on Cartels and Other Restraints of Competition (the "Cartel Act")\(^3\) and the general Notice on the Assessment of Vertical Agreements, an agreement is, according to the wording of the Motor Vehicle Notice, only illicit if it has some actual negative effect on competition (significant restriction of competition).\(^4\) In addition, the assessment of selective distribution systems has changed. Whereas the Notice of 2002 only allowed for selective distribution systems which were based on purely selective criteria, the new Motor Vehicle Notice allows for a selection on quantitative criteria under certain circumstances. The Motor Vehicle Notice provides for a transitional period of one year during which existing agreements must be adapted to the new regulation.

On 6 January 2016, the Secretariat of ComCo published an explanatory note on selected instruments of investigation which replaces its former explanatory note of 6 April 2011 on dawn raids.\(^5\) As to the dawn raid procedure, the authority, inter alia, confirms that it will not wait for the arrival of external counsel before it proceeds with a search. Furthermore, the note elaborates on the authority's approach to communication with external legal counsel (legal privilege) in the context of dawn raids and the handling and analysis of electronic data seized. The document also contains a section on interrogations and requests for information. The Secretariat confirms its current practice that only legal and de facto representatives of an investigated company will be interrogated as parties to which the right to remain silent applies; any other person, including current and former employees, will be interrogated as witnesses.

---

4 However, see the case law of the Federal Administrative Court in Section 5 below.
ComCo has started to rely on framework conditions when conducting settlement negotiations. According to these conditions, the content of negotiations will not be part of the file of the proceedings, negotiations are not recorded and drafts for a settlement agreement are without prejudice.

2. MERGERS

As in 2014, ComCo had to assess several mergers in the media sector. Once again, ComCo has neither prohibited (nor only approved under conditions or obligations) any mergers in 2015, due to the (qualified) dominance test which still applies under the Swiss merger control regime, rather than the SIEC test applied in the EU. According to Article 10 of the Cartel Act, a merger is only in violation of the Cartel Act if it creates or strengthens a dominant position which, in addition, allows for an elimination of effective competition and, at the same time, does not improve the conditions of competition in another market which outweigh the negative effects of the dominant position.

ComCo conducted an in-depth assessment (phase II investigation) of the merger of 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 group of companies) into a joint venture of Swisscom and Tamedia. In March 2015, ComCo concluded that the merger leads to a dominant position of Swisscom in the market for address directories but does not eliminate competition in the market, and thus approved the merger.6

Following another phase II investigation, ComCo approved in August 2015 the acquisitions of Ricardo, an operator of various online platforms, by Tamedia and of JobScout24, an online jobs portal of Ricardo, by JobCloud, another jobs portal jointly owned by Tamedia and Ricardo. ComCo concluded in both decisions that Tamedia has a dominant position in the market for jobs classifieds but that there is no indication for an elimination of competition.7

In the third phase II investigation of last year, ComCo held that the joint venture between Swisscom, Ringier (another leading Swiss media group) and the Swiss Broadcasting Corporation for the marketing of online, television, print and radio commercials did not eliminate effective competition in any of the relevant markets affected.8

Following a request for advice under Article 23(2) of the Cartel Act, the Secretariat of ComCo published in early 2015 a recommendation on the application of Article 9(4) of the Cartel Act to a concentration between a company jointly controlled by a dominant company and a third party. Article 9(4) provides that a notification of a transaction is – regardless of any turnover thresholds – mandatory if one of the undertakings involved has been held to be dominant in a final decision under the Cartel Act and the transaction relates to such market or a neighbouring, upstream or downstream market. The Secretariat states in its advice that a full-function joint venture does not qualify as an economically independent entity but forms part of a single economic entity consisting of the joint venture and each of the companies jointly controlling it. Therefore, according to the Secretariat, the dominant position of one of the

6 Law and Policy on Competition (LPC), 2015/3, p. 375.
8 (In German): https://www.weko.admin.ch/weko/de/home/aktuell/letzte-entscheide.html ("Zusammenschlussvorhaben SRG / Swisscom / Ringier AG").
mother companies triggers the notification obligation under Article 9(4).

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March 2015, ComCo imposed fines totalling 161,000 Swiss francs on the members of a cartel in the market for tunnel cleaning services. According to ComCo, the three participating companies had agreed on prices and surcharges between 2008 and 2013 in order to divide public tenders among themselves. The investigation was initiated by dawn raids. All three companies admitted their participation in the cartel and filed leniency applications. The first applicant escaped a fine, while the second and third applicants were granted a reduction of their fines of 50 per cent and 10 per cent, respectively, for their cooperation. Moreover, the fines were reduced by another 15 per cent due to the conclusion of amicable settlements with the authority.

In a decision dated 29 June 2015, ComCo held that Musik Olar, an importer and wholesaler of stringed instruments, had agreed with its resellers on mandatory price recommendations and rebate policies. ComCo found that by fixing maximum rebates to be applied by their resellers, the company had imposed minimum resale prices which significantly impeded price competition between 2010 and 2013. The investigation concluded with an amicable settlement agreement under which Musik Olar agreed not to influence future resale prices of its distributors. The company received a fine of 65,000 Swiss francs. The fine was reduced by 50 per cent due to the company's leniency application and by another 20 per cent for entering into a settlement agreement.

ComCo announced in July 2015 that it sanctioned 10 wholesalers in the sanitary industry (bathroom fixtures and fittings) with fines totalling 80 million Swiss francs for entering into various horizontal agreements on price elements and factors relevant for the determination of sale prices, such as gross prices and exchange rates. Furthermore, the commission criticised the members of the alleged cartel for agreeing to not include certain manufacturers in their catalogues. Most of the wholesalers concerned were members of a union of wholesalers of the sanitary industry, which served as a platform to conclude the illicit agreements. ComCo’s reasons were still not published at the time of writing.

On 19 October 2015, ComCo closed its investigation into the online hotel booking platforms market. The investigation against Booking.com, Expedia and HRS was launched in 2012. ComCo prohibits the so-called broad price parity clause (or broad most favored nation clause) under which hotels are not allowed to offer better conditions (lower prices, amount of rooms available) through any other distribution channel. However, unlike the German competition authority, but in line with the decisions of the authorities of the UK, Italy, France, and Sweden, ComCo did not prohibit the narrow price parity clause where the prohibition to advertise lower prices is limited to the hotels' own websites. ComCo, however, explicitly left the assessment of narrow parity clauses open for the time being. There were no fines imposed since the conduct did not fall within any of the

9 Law and Policy on Competition (LPC), 2015/1, p. 81.
categories of agreements which are subject to direct sanctions under the Cartel Act.\(^\text{12}\) ComCo sanctioned four concession holders of the Volkswagen group of companies in October 2015 for horizontal price fixing with fines ranging from 10,000 to 320,000 Swiss francs. According to the commission’s findings, the companies had agreed on a list of common rebates and delivery charges for new vehicles of Volkswagen group brands in early 2013 and communicated the coordinated rebate policy at association meetings of the Volkswagen group partners, with the objective of implementing the conditions throughout all authorized dealers in Switzerland. The fact that the price agreements had only been in force for a short period was taken into account in the calculation of the fines. One concession holder, AMAG, did not receive a fine due to its leniency application, which triggered the investigation. ComCo closed the investigation against AMAG in August 2014 following an amicable settlement. At the time of writing the reasons for the decision had not yet been published.

4. ABUSE OF DOMINANT POSITION

On 21 September 2015, ComCo concluded another investigation against Switzerland’s telecom incumbent, Swisscom, imposing a fine of approximately 8 million Swiss francs. According to ComCo, Swisscom abused its dominant position in the market for broadband connections for business customers in the context of a public tender regarding connections of Switzerland’s public postal services company, Swiss Post, to the broadband network. The tender was awarded to Swisscom after it made a significantly lower offer than its competitors. ComCo concluded that Swisscom over-priced its services on the wholesale level, on which its competitors were dependent, in order to be able to offer the procured service (margin squeeze). At the same time, ComCo found Swisscom to have abused its dominant position by charging excessive prices to Swiss Post. \(^\text{13}\) The investigation was opened following a report filed by Swisscom’s competitor Sunrise. Swisscom’s appeal of the decision is currently pending before the Federal Administrative Court.

5. COURT DECISIONS

On 28 January 2015, the Swiss Federal Court overturned several judgements of the Federal Administrative Court of 3 December 2013,\(^\text{14}\) in which the court had annulled ComCo’s decision of 2 November 2009. ComCo had sanctioned pharmaceutical companies Pfizer, Eli Lilly, and Bayer for resale price maintenance. The companies issued price recommendations for pharmaceuticals that treat erectile dysfunction (Cialis, Levitra, and Viagra); retailers followed these price recommendations to a great extent and, thus, according to ComCo, they amounted to vertical price agreements. The Federal Administrative Court concluded in its 2013 decisions that the Cartel Act did not apply due to the regulatory regime for therapeutic products, which limits marketing of the products, and due to other factual limitations that do not allow for effective competition in the relevant market. Contrary to the Federal Administrative Court, the Federal Court held in its judgement that competition may be limited but is not excluded and is thus still possible within the applicable.


\(^{13}\) Decision of 21 September 2015 regarding “Swisscom WAN-Anbindung” (in German): http://www.weko.admin.ch/aktuell/00162/index.html?lang=de; also, the judgement of the Federal Administrative Court of 14 September 2015 in Section 5 below.

\(^{14}\) In particular B-364/2010 (Pfizer), B-362/2010 (Bayer) and B-360/2010 (Eli Lilly) (in German): http://www.bvger.ch/publiws/pub/search.jsf.
regulatory framework. Hence, the Federal Court considers the Cartel Act to be applicable and concluded that the fact that competition in the relevant market is limited should be taken into account when assessing the alleged resale price maintenance under the substantive rules of the Cartel Act. The case is now pending before the Federal Administrative Court for reassessment.

On 14 September 2015, the Federal Administrative Court confirmed a 2009 ComCo decision that Swisscom had abused its dominant position in the wholesale market for broadband services by improperly pricing its services, thereby hindering its competitors at the retail level (margin squeeze). The court reduced the fine from 220 to 189 million Swiss francs since it considered Swisscom to have committed the violation negligently rather than intentionally. Apart from a detailed discussion of the concept of margin (price) squeeze, the judgement contains an analysis of various procedural guarantees including the principle of nemo tenetur (privilege against self–incrimination). The question of whether the principle applies to undertakings and antitrust proceedings has been left open. However, the decision elaborates in detail on possible limitations to the principle and concludes that, if nemo tenetur were to apply, a limitation of its applicability to statements of a purely factual nature (as opposed to statements amounting to a confession) is only meaningful if limited to facts which could not have an incriminating effect at a later stage of the proceedings.

In a 13 November 2015 decision, the Federal Administrative Court confirmed ComCo’s 2012 decision in which the commission fined BMW for restricting imports into Switzerland. According to both the court and the commission, BMW had prohibited its dealers in the EEA from selling new vehicles of the BMW and MINI brands to customers outside the EEA and thus to customers in Switzerland (export ban). The Federal Administrative Court states that absolute territorial restrictions (prohibition of passive sales) constitute a significant restriction of competition within the meaning of Article 5(1) of the Cartel Act, regardless of their actual effect on competition. The court thereby confirms its highly controversial concept of per se significant restrictions of effective competition, a concept developed by the Federal Administrative Court in its Gaba/Gebro judgements of December 2013. According to Gaba/Gebro, agreements for which the Cartel Act provides a rebuttable presumption that they eliminate competition (see Article 5(3) and (4) of the Cartel Act), such as absolute territorial restrictions, constitute per se significant restrictions of competition within the meaning of Article 5(1) of the Cartel Act. Before Gaba/Gebro, it was generally accepted in doctrine and case law that certain conduct is, in view of the effects–based approach of Swiss competition law in accordance with Article 96 of the Swiss Constitution, only prohibited under Article 5(1) of the Cartel Act if the authority can prove that the conduct did in fact have a negative effect on competition. Interestingly, the Federal Administrative Court confirmed this understanding of Article 5 of the Cartel Act in its window mountings judgements of September 2014 in the context of horizontal price agreements without making reference to its earlier Gaba/Gebro judgements. The BMW judgement of 13 November 2015 confirms again

---

17 Decision B-3332/2012 (in German): http://www.bvger.ch/publiws/pub/search.jsf.
18 See our comments on the Gaba/Gebro and window mountings judgements in section 5 of our last year’s contribution.
the court’s position taken in Gaba/Gebro, at least with regard to absolute territorial restrictions.

However, the BMW decision has not been the Federal Administrative Court’s last word in the debate on whether an agreement must have some actual negative effect on effective competition in order to be illicit. On 17 December 2015, only one month after the BMW decision, the very same court annulled a decision of ComCo regarding alleged resale price maintenance between an importer of mountaineering equipment (Altimum SA) and its retailers. In its 20 August 2012 decision, the commission concluded that the price recommendations issued by Altimum amounted to an illicit vertical agreement on resale prices between Altimum and its retailers. The Federal Administrative Court now states that price recommendations constitute vertical agreements on resale prices if either the recommended price has explicitly or tacitly been accepted by retailers (agreement) or the issuer of the recommendation exercises pressure on the retailers or incentivises adherence to the recommendation and the recommendation is followed to a great extent (“dans une large mesure”) by retailers (concerted practice). When assessing the effects on competition, the court confirmed again that an agreement must have actual negative effects on effective competition in order to be in violation of Swiss competition law. In its assessment of those negative effects, the court concluded that the market position of the issuer of the price recommendation is relevant, but not sufficient to establish such negative effects. In addition, the degree of adherence to the recommendation and the market position of those retailers which adhere to the recommendation must be considered.

The decision is significant for two reasons. First, in the past, the commission has taken a rather strict approach to price recommendations by relying heavily on the degree of adherence. Consequently, issuers of price recommendations bore the risk of ending up in an illicit vertical agreement on prices (rather than a unilateral behaviour) without having induced or forced retailers to adhere to the recommendation. The court has now stated that mere adherence to a price recommendation by its addressees is insufficient for the recommendation to qualify as an agreement or concerted practice. Second, the court has added another chapter to the current debate over whether agreements which are considered to be particularly harmful to competition by their nature are prohibited regardless of their actual effects. In the Altimum decision, the court confirms again that hardcore agreements, and in particular vertical price agreements, are prohibited only if there is proof for an actual negative effect on competition. However, the Federal Administrative Court also makes reference to its contradictory position taken in the BMW judgement with regard to absolute territorial restrictions and holds that the Federal Court will have to decide the question in the Gaba/Gebro case (which also concerned absolute territorial restrictions).19

Both the Altimum and BMW judgements, as well as the window mountings and Gaba/Gebro judgements, are under appeal and currently pending before the Federal Court.

19 Decision B-5685/2012 (in French): www.bvger.ch/publiws/download?decisionId=94c41efe-d067-4b1a-a08b-3a7c524d7719.
UKRAINE

By Timur Bondaryev of Arzinger

1. LEGISLATIVE DEVELOPMENTS

During the previous year, Ukraine began actively harmonizing its national competition legislation with the provisions of the EU–UA Association Agreement. All major changes were made after a new head and new members of the Antimonopoly Committee of Ukraine were appointed (hereinafter, the “AMCU”). One of the more expected changes, which went into force on March 3, 2016, aims to provide increased transparency regarding the activity of the AMCU and obliges the AMCU to publish its decisions. This development is significant since the AMCU did not previously publish decisions and there was little transparency around law enforcement practice. The published decisions will relate to the AMCU merger and concerted practices clearances, cases regarding competition law infringements, and cases regarding infringements in the sphere of unfair competition. The decisions will be published in full with confidential information removed. The AMCU also plans to issue guidelines clarifying the procedure for meeting the new law’s requirements when filing confidential information.

On January 26, 2016, the Ukrainian Parliament also adopted a law amending the Ukrainian merger control rules. The law became effective in May 2016. The amendment increased the financial thresholds, which have been in place for over 14 years. Now, there are two categories of mandatory transaction notification:

(i) transactions where, in aggregate, the merging parties have over Euro 30 million in worldwide assets or turnover and over Euro 4 million in Ukrainian–based assets or turnover from Ukrainian operations; and

(ii) transactions where a foreign purchaser has over Euro 150 million in worldwide turnover and the target or seller group (or one of the JV partner groups) has over Euro 8 million in Ukrainian–based assets or turnover from Ukrainian operations.

The same amendment also eliminated the mandatory filing requirement for market shares greater than 35%, which applied regardless of whether the financial thresholds were exceeded.

These changes mean that, in order for the filing obligation to be triggered, either both parties to a transaction or only the target/seller group must be active in the Ukraine. Thus, according to the amendments, foreign–to–foreign transactions where the target/seller group is not active in the Ukraine will not be regulated. The only type of foreign–to–foreign transaction that will remain subject to regulation are mergers of foreign parties with parties active in the Ukraine. For more information regarding these developments, please refer to the “Mergers” section below.

Another important development concerns the approach of the AMCU to calculating fines. On September 15, 2015, the AMCU adopted Recommendations for its approach to calculating fines for competition law infringements. These Recommendations introduced a two-tier system for fine calculation, comprised of the determination of the basic fine amount and then further adjustment based on mitigating or aggravating circumstances. The shortcomings of this approach became apparent during the first five months the system was in use. As such, on February 16, 2016, the AMCU adopted new Recommendations that clarified how to calculate

1 [Recommendations on approaches for calculation of fines for competition law infringements], (Recommendations No. 6-pp, issued February 2, 2016) (Ukraine):
the basic fine amount for bid rigging, failure to obtain merger clearance, and failure to provide revenue from product sales information in a merger. These Recommendations also clarify how to approach calculating fines for informational violations and violations of other important provisions.

It should also be noted that these Recommendations are internal and temporary AMCU documents, which creates the risk that there will be selective enforcement. However, it is worthy of mention that the Parliament of Ukraine, in the first reading, adopted draft law No. 2431, titled "On amendments to legislation on protection of economic competition regarding the calculation of fines by bodies of the Antimonopoly Committee of Ukraine for violations of legislation on protection of economic competition." The draft law provides for the adoption of Guidelines regarding fine calculation methods as a by–law.

Another important proposal contained in the draft law is the ability of business entities to obtain independent and impartial judicial review of a fine or obligation levied by the AMCU. It should be noted that, in addition to this proposal, Article 255 of the EU–UA Association Agreement provides parties subject to an antitrust investigation with the right to independent review of any sanctions imposed.

Lastly, the AMCU has also initiated amendments titled "On Protection of economic competition", which are aimed at clarifying the case investigation procedure conducted by the AMCU.

2. MERGERS

Several developments in the merger control sector occurred in 2015. Historically, Ukrainian merger control has been recognized worldwide for its low notification thresholds and capturing foreign–to–foreign transactions. However, as stated above, the Ukrainian Parliament adopted the law amending merger control antitrust laws in January 2016 and work on these amendments was done throughout 2015. The amendments are expected to come into force in early June 2016. The most significant changes included increased notification thresholds, the introduction of pre–filing consultation, and the introduction of a simplified procedure. The amendments also included a remedies negotiation procedure and increased state fees for application reviews. Additionally, the amendments eliminate the need for Phase II reviews, which had previously been misused by the AMCU. As a result of the amendments, the AMCU can only launch Phase II reviews if there are competition threats present that are significant enough to result in the merger being blocked. Lastly, the amendments made the failure to disclose UBOs a ground for rejecting an application during the preview period. Previously, the AMCU rejected applications that were missing UBOs as a matter of practice.

In October 2015, the AMCU also made amendments to its own powers and clarified timing for Phase II reviews, which now cannot last for more than 135 days after Phase I ends. Previously, merger cases could be reviewed by the AMCU without any time limits, which resulted in much uncertainty for merging parties and their legal counsel.

http://www.amc.gov.ua/amku/control/main/uk/publish/article/121390
2 [On amendments to legislation on protection of economic competition regarding the calculation of fines by bodies of the Antimonopoly Committee of Ukraine for violations of legislation on protection of economic competition], (Draft Law No. 2431): http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?p1f3511=54479
In early July 2015, the AMCU also started publishing its decisions before the new laws requiring publication were adopted. It is worth noting, however, that, in most cases, these innovations are not helpful, as merging parties primarily provide information to the AMCU on a confidential basis. Thus, this step was not very effective, but does show that the authority is striving for reform.

With respect to the authority’s practice, the AMCU became more open and friendly to businesses. Many past practices have left with the authority’s previous management team. Discussing the case with the parties and greater availability of AMCU officers for telephone calls, when required by the parties, became the new Ukrainian reality.

Finally, in mid–September 2015, in order to show its friendlier approach to business, the AMCU offered amnesty for mergers that closed before September 15, 2015 without approval where approval was required. The merging parties may self-report their infringement until September 15, 2016 and receive a flat fine of approximately $3,820. It is worthy of note that the merging parties are still required to provide extensive documentation and information to the AMCU to receive ex post facto merger clearance as part of the amnesty proceedings. Based on the authors’ knowledge, many companies have taken advantage of the opportunity and self-reported. However, as amnesty–based cases are confidential, it is difficult to assess the exact scale of the project.

At the same time as the amnesty program, the AMCU increased the basic fine amount for the failure to notify. In accordance with the Recommendations previously discussed, the minimum basic fine is now approximately $19,000. It may be decreased or increased up to 50% based on mitigating or aggravating circumstances.

In the same Regulations, the AMCU also clarified that the repeated provision of false information (which often occurs in mergers when parties repeatedly forget to disclose something) should be considered as a single infringement.

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2015, the AMCU addressed 524 infringements related to anticompetitive concerted practices and imposed fines of $8.8 million.

On April 29, 2015, the AMCU completed a food retailers cartel case that required almost 4 years to investigate and decide and resulted in a fine of $7.6 million. The decision concerned 18 food retailer chains who have a combined market share in Kyiv of over 95%. The defendants in the case were retail chains operating under well–known brands, including "Metro" and "Auchan" Marketing and research company "ACNielsen Ukraine" was also a defendant and contributed to the exchange of information between the cartel parties. The cartel was focused on creating unfavourable conditions for producers and suppliers that adversely affected competition and pricing for everyday goods. A court of first instance decided several of the retailers' cases and dismissed their claims to invalidate the AMCU decision, except that of Auchan. The decision on Auchan was upheld by the courts in appeal and cassation proceedings. Moreover some of the retailers who lost at first instance ultimately managed to win the case.

At the end of 2015, the AMCU launched an investigation into cartel behavior in the light petroleum products retail market. Based on the results of the market investigation, the AMCU found that, regardless of the global reduction of
petroleum prices in 2015 and 2016, the pricing policy of the domestic market operators did not reflect the price changes in the price of petrol and diesel fuel. The AMCU found that, during the latter part of 2015 and the beginning of 2016, the national market leaders established and maintained the same high price for high–octane petrol. Based on its assumption that such actions may lead to a lessening of competition in the retail market for light petroleum products, the AMCU launched an investigation.

4. ABUSE OF DOMINANCE

Abuse of dominance tends to be the most common infringement of Ukrainian competition legislation. During the previous year, there were 2169 abuse of dominance infringements and a total of $2.8 million in fines levied by the AMCU.

Lukoil, a subsidiary of a Russian oil company that supplies fuel for aircrafts in several Ukrainian airports, was fined by the AMCU for abuse of dominance. The company was found guilty for overpricing fuel in two airports – the Kharkiv city airport and the Odessa city airport. The fine totaled approximately $701,311. This was a pioneer case for the AMCU in terms of applying the new Recommendations for fine calculations. Lukoil brought the case to court, lost at first instance and is currently appealing.

Another important monopoly abuse decision is the "Zeonbud" LLC case. In that case, Zeonbud, a monopolist in the market for telecommunications services related to digital distribution of television programs, was fined $1.6 million for setting tariffs for telecommunications services related to the distribution of television programs at a level that would be impossible if there were substantial competition in the market.4

A fine was also calculated in this case using the new Recommendations for fine calculations. Zeonbud appealed the AMCU decision and the court of first instance decided in its favour, specifying that the AMCU failed to meet obligatory requirements during the case investigation.

The AMCU also imposed a fine on the Russian gas monopolist, "Gazprom", that totaled approximately Euro 2.8 billion for abuse of dominance in the market for natural gas transit via the Ukrainian gas transportation system during 2009–2015.5 Gazprom did not observe its obligations under an Agreement concluded between Gazprom and the National Joint Stock Company "Naftogaz of Ukraine" because it transferred natural gas at a much smaller volume than agreed, which led to abuse of dominance issues. According to national competition law, Gazprom is entitled to claim a doubled rate of damage in court based on the AMCU decision. This case may become one of the first claims for damages in a competition–related case.

In 2015, the AMCU started an investigation of the national market for tobacco products. In October 2015, the authority launched an investigation against the Trade Company Megapolis–Ukraine Ltd., a monopolist in the cigarette market, alleging abuse of dominance in the national market for tobacco products (filtered and non–filtered cigarettes). The company is accused of setting prices for retailers at a level that would not exist if there was considerable competition in the market. It is possible that this will be the first case in which the AMCU uses its right to order the compulsory split–up of a business entity abusing its market monopoly.

---


5 AMCU decision on competition law infringement and imposing of fine, No. 18-p, issued January 22, 2016: http://www.amc.gov.ua/amku/doccatalog/document?id=120807&schema=main
5. **COURT PRACTICE**

One of the main trends in court practice was the development of bid rigging case law. In particular, the Higher Commercial Court of Ukraine established a long-awaited standard of proof for such cases. The standard includes the following:

- The similarity of action of entities must be the result of coordination of competitive behavior and not a simple coincidence that results from the specifics of the relevant product market;
- Evidence must be provided confirming the negative impact of the entities’ actions on competition; and
- Bid rigging cannot be implied because a company’s bid is rejected for not meeting the tender documentation requirements.

---

**Arzinger**

arzinger.ua

Eurasia Business Centre  
75 Zhylyanska St.  
5th Floor, 01032 Kyiv, Ukraine  
(T) +38 (044) 390 55 33  
(F) +38 (044) 390 55 40
UNITED KINGDOM

By Jonathan Tickner, Peters & Peters Solicitors LLP

A. LEGISLATIVE DEVELOPMENTS

The introduction of the Consumer Rights Act 2015 ("CRA") on 1 October 2015 substantially changed the landscape for private enforcement of competition law violations in the UK. The changes were designed to make it easier for parties, particularly individuals and small and medium-sized enterprises ("SMEs"), to bring private enforcement actions in the UK.

The Competition Appeal Tribunal's ("CAT") jurisdiction has been extended to cover stand-alone and hybrid claims, in addition to follow-on claims. Previously, the CAT was only able to adjudicate on claims where the defendant had already been found to have infringed competition law, and could not take account of anything beyond the findings of fact from that decision. Claimants were unable to rely on inferences from the decision, and claims were often subject to extended procedural challenges brought by the defendant on the basis of jurisdiction.

In addition, the limitation period for claims brought before the CAT has been aligned with that of the High Court, extending it from two to six years from the time of the infringement decision or loss being discovered, or the determination of any appeal. The CAT is now also able to award injunctive relief, and has been given the power to stay proceedings while ADR is considered.

The CRA also introduced a fast-track procedure designed for claims by SMEs in the CAT. Under this procedure, there are restrictions on costs and evidence, at the CAT's discretion, and a CAT chairperson ultimately decides on allocation of the claim. Fast-track cases must in general take no longer than three days and their use is likely to be limited to simple matters. In contrast to other proceedings before or outside of the CAT, the CAT has also been given a discretion as to whether to require an applicant to give a cross-undertaking in damages when seeking injunctive relief.

In addition, a new form of class action allows both follow-on and stand-alone claims to be brought before the CAT on behalf of a defined group for aggregate damages, with claimants automatically included unless they specifically opt-out. These actions may be brought in respect of infringements that have already been discovered and sanctioned by the UK and EU authorities. In order to be heard in the CAT, a collective action must first be certified, which requires that all of the proceedings in question "raise the same, similar, or related issues of fact or law and are suitable to be brought in collective proceedings".

In opt-out collective actions, the unsuccessful party will be required to pay the other party's costs, and lawyers may not act on contingency fee arrangements, such as damages-based agreements. The award of exemplary damages is also prohibited, whereas otherwise they are in principle available at the court or tribunal's discretion for infringements of competition law in cases where it is deemed necessary to punish and deter the defendant. Additionally, the CAT will only allow a person to act as a representative if it is "just and reasonable" for them to do so, which inter alia takes account of whether the proposed representative would "fairly and adequately act in

1 Consumer Rights Act, 2015, c. 15: http://www.legislation.gov.uk/ukpga/2015/15/contents

2 Kuddus v Chief Constable of Leicestershire [2002] 2 AC 122, per Lord Nicholls.
the interests of the class members”. Claimants are required to advertise the collective action in order to give potential class members a chance to opt–out, and claimants not domiciled in the UK must expressly opt–in to all collective actions of which they wish to be a part.

Further, newly introduced voluntary redress schemes offer up to a 20% reduction in fines where an undertaking is able to compensate the losses of those affected by its infringements. Approval for a voluntary redress scheme does not protect the undertaking from claims against it, though the CAT will take the scheme into account when deciding whether or not to allow a collective action.

2. MERGERS

The Competition and Markets Authority (“CMA”) formally cleared Poundland’s now completed acquisition of fellow value retailer 99p Stores in September, following a phase 2 investigation. The investigation found that although the companies were each other’s closest competitors, distinguishable from other retailers because they sell nearly all products at a single price point, they would still face competition from other value retailers, including supermarkets Tesco and Asda.

In October, following a phase 2 investigation, the CMA provisionally cleared a merger between major telecoms companies BT and EE, having found that BT and EE operate in largely separate areas of the telecoms industry, and that because they are relatively small operators in each other’s primary sectors it was unlikely that the merger would have a significant effect on either market. The CMA also found it unlikely that the merged company would have both the ability and incentive to disadvantage competitors to which it supplies services on a wholesale basis, and that the effects would be limited even in cases where it did. The merger was formally cleared at the start of 2016.

Major bookmakers Betfair and Paddy Power completed their agreed merger in February 2016, having been cleared in December following a phase 1 investigation. With respect to horizontal effects, the CMA found that the two bookmakers were not each other’s closest competitors, and that they would still face competition from a number of alternative providers, several of which would have a higher or similar market share, and concluded that the merger would therefore not lead to less competitive fixed odds or prices in the supply of online betting and gaming services. Vertically, the CMA considered that Betfair’s exchange data was not essential for betting operators to price and manage customer risk, and so the merged entity would not have the ability to foreclose its competitors by refusing to supply or increasing the price of its data service. A phase 1 investigation into an agreed merger between competing bookmakers Ladbrokes and Gala Coral was commenced by the CMA in December and, at their request, they were fast–tracked to a phase 2 investigation at the start of 2016.

The CMA welcomed Ryanair’s decision in September to withdraw its final appeal over the requirement that it reduce its shareholding in Aer Lingus to 5%. The CMA’s Ryanair/Aer Lingus inquiry group had previously decided “that it was bad for competition – and ultimately for passenger – for Ryanair to retain influence over one of its major competitors through its shareholding”. 8

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

As of the end of 2015, there have still been no prosecutions brought under the new criminal cartel offence, introduced in 2014, which removed the requirement to prove dishonesty. However, in September, Nigel Snee, the former Managing Director of Franklin Hodge Industries, was given a suspended custodial sentence of 6 months having pleaded guilty in 2014 to the old offence. 9 Mr Snee admitted to dishonestly agreeing with others to fix prices, divide up customers, and rig bids between 2005 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage. Two other directors charged alongside Mr Snee, Clive Dean and Nicholas Stringer, were acquitted in June when the jury were not persuaded that they had acted dishonestly. 10 The CMA’s civil investigation into the conduct was ongoing at the start of 2016. 11

A four and a half–year investigation into alleged anti–competitive conduct on the part of three pharmaceutical companies was concluded in February 2016, with GlaxoSmithKline (“GSK”) being fined £37.6m for agreeing between 2001 and 2004 to pay over £50m to two competitors to delay their entry into the UK market for the anti–depressant paroxetine. GSK’s branded version of the drug, Seroxat, earned sales exceeding £90m in 2001. When the independent entry of generic products took place at the end of 2003, the average price of paroxetine fell by over 70% in 2 years. The two competitors who entered into the anti–competitive agreements with GSK, Generics (UK) Limited and Alpharma Limited, were fined £5,841,286 and £1,542,860 respectively. In addition to finding the behaviour of the three companies to have breached the competition law prohibition on anti–competitive agreements, the CMA found that GSK had also infringed the prohibition on abuse of a dominant position by seeking to induce them and one other company, Norton Healthcare Limited, to delay their entry into the UK paroxetine market independently of GSK by way of payments. 12

A civil penalty of £382,500 was imposed in August on CESP, an organisation of private consultant ophthalmologists, for a number of competition law infringements, including recommending that its members refuse to accept lower fees offered by an insurer and charge insured patients higher self–pay fees, circulating collectively set price lists that did not pass on lower local costs, and facilitating the sharing of consultants’ future pricing and business

intentions, enabling members to align their responses.\(^\text{13}\)

In May, a civil penalty of £735,000 was imposed on an association of estate and lettings agents for entering into agreements that would prevent them from advertising their fees or discounts in their local newspaper. The CMA found that the arrangements had the potential effect of reducing competitive pressure on estate and lettings agents' fees in that area, and may have made market entry more difficult by preventing potential competitors from using the level of their fees to attract new customers. The local newspaper was also fined for its involvement in the agreement not to advertise, illustrating that parties can breach competition law even when they are not active in the market where the anti-competitive arrangement is taking place.\(^\text{14}\) This was highlighted by a ruling of the Court of Justice in October, which found that a consultancy firm based in Zurich had participated in a cartel between producers of heat stabilisers by, among other things, acting as a facilitator that organised and participated in meetings.\(^\text{15}\)

The CMA closed its investigation into MasterCard and Visa’s multilateral interchange fees in May, after it was confirmed that an EU regulation that would cap those fees would be entering force in the near future.\(^\text{16}\)

4. ABUSES OF DOMINANCE

In August, the CMA issued a statement of objections to pharmaceutical companies Pfizer and Flynn Pharma, alleging that they had each abused a dominant position by charging excessive and unfair prices in the UK for phenytoin sodium capsules, an anti-epilepsy drug, in breach of UK and EU competition law. In September 2012, Pfizer sold the UK distribution rights for its branded phenytoin sodium capsules, Epanutin, to Flynn Pharma, who genericised the drug. Pfizer continued to manufacture the drug, which it sold to Flynn at prices that were between 8 and 17 times higher than the price at which it had previously sold Epanutin in the UK. Flynn then sold the drug on to customers at prices which were between 25 and 27 times higher than those historically charged by Pfizer.\(^\text{17}\)

As noted above, in 2015 pharmaceutical company GSK was also found to have abused a dominant position in connection with payments to competitors to delay their entry into the UK market for the anti-depressant paroxetine.\(^\text{18}\)

5. COURT DECISIONS

In the Air Cargo litigation, the Court of Appeal endorsed Arden LJ’s view in Newson\(^\text{19}\) on the question of who belongs to the class of persons that a cartel intended to injure and struck out the claimants’ economic tort claims. Although the Court found that when a cartelist intends to cause harm to a particular class, a cause of

---


\(^{15}\) Case C-195/14 P, AC-Treuhand AG v Commission [2015]


\(^{19}\) Air Canada & ors [2015] EWCA Civ 1024 at [168]-[172].

action against the cartelist arises for every member of that class, it found, as did Arden LJ in Newson, that where there is the possibility of the immediate victims passing on their losses down the supply chain, there cannot have been an intention to harm them specifically. The Court explained that expanding the class to cover the whole supply chain would open up "an unknown and unknowable range of claimants".

The Court of Appeal's ruling in Arcadia v Visa reaffirmed that the standard English rules on limitation apply equally to competition law cases. The appellants argued on appeal from the High Court that those rules should not apply in competition claims, given their complexity and the requirement for the claimant "to know and be able to plead the primary facts which inform the economic contentions and assessments which form the basis of claims under Article 101 and the domestic legislation". The Court dismissed this argument, stating that competition claims should not "be treated in principle in any different way to other claims".

In Jetavia v Bilta, not itself a competition law case, the Supreme Court raised questions about the Court of Appeal's decision in Safeway v Twigger, that Safeway could not recover a penalty it paid in settlement of an OFT investigation from the directors and employees involved in the anti-competitive conduct in question. Lords Hodge and Toulson agreed with Professor Watts that "In the absence of some countervailing policy reason, it is not just for someone who falls foul of a statute by reason of the acts of its employees or other agents to add to its burdens and disabilities by depriving it of any recourse against those employees or other agents". Jetavia raises the possibility of a challenge to Safeway in the future.

---

21 Arcadia Group Brands Ltd & Ors v Visa Inc & Ors [2015] EWCA Civ 883
22 Jetavia SA and another v Bilta Ltd (in liquidation) and others [2015] UKSC 23
23 Safeway Stores Ltd v Twigger [2010] EWCA Civ 1472
ARGENTINA

By Marcelo den Toom and Mercedes de Artaza of M. & M. Bomchil

1. LEGISLATIVE DEVELOPMENTS

Competition agency changes

The Competition Act 25,156 of 1999 (the "Competition Act") contemplated the creation of an independent agency, the Antitrust Tribunal, which would replace the then existing agencies, the Commission, with investigatory powers (the "Antitrust Commission"), and a Secretariat of State, as adjudicatory authority.

The Tribunal was never formed due to inaction from the Executive and, ultimately, the Competition Act was amended in 2014 to eliminate all references to it. The same amendment, while maintaining the dual-agency system already in force, granted most of the empowerments of the Commission and Secretariat of State to a new agency to be created by Presidential Decree, and relegated the Commission to a mere advisory role.

However, by the end of 2015 the new agency was still not created, and thus the Secretariat of Trade (the "Secretariat"), the then "temporary" adjudicatory authority, issued Resolution No. 359 by which it temporarily assigned many of its empowerments to the Commission, the agency whose existence was set to cease by the latest reform to the Competition Act.

This assignment was implemented for a limited period until December 9, 2015 but was subsequently extended until June 30, 2016. In summary, the assignment tends to treat matters as they were before the 2014 amendment, which will probably will never enter into force. The new Administration has expressed its desire to promote a bill amending the Competition Act in full (more on that below).

Fast-track complaint process for SMEs

By Resolution No. 369 dated September 10, 2015, the Secretariat created the "Office for the Defense of Commercial Good Practices for Micro, Small and Medium Enterprises" (Defensoría de las Buenas Prácticas Comerciales para la Micro, Pequeña y Mediana Empresa) which is, amongst its tasks, empowered to receive and process abuse of dominance claims filed online by SMEs.

Changes in the Commission and current status

On December 10, 2015 a new Administration took office in Argentina. Through Decree No. 366 issued on February 17, 2016, Mr. Esteban Greco, an economist with public and private sector experience in antitrust and regulatory matters was appointed as the new chairman of the Commission. This decision is the first of a set of changes claimed to be introduced by the new government in the area of competition law, which includes the renewal of the remaining four Commission Board members, the improvement of the efficiency of internal processes, and a comprehensive reform of the Competition Act, mainly aimed at leniency programs for cartel cases and the increase of merger control notifications mandatory thresholds.

The importance of the improvement of the efficiency of the agency is highlighted by the fact that, as recently reported, merger reviews take on average two and a half years. Prohibited conducts investigations take five years and market–wide investigations last seven years.
New bills

Bill No. 1264–D, introduced before the House of Representatives on March 26, 2015, proposes the adoption of a leniency program, providing full immunity to the "first-in" applicant and fine reductions to other cartel members providing significant evidence.

Bill No. 5616–D, introduced before the House of Representatives on October 15, 2015, proposes a comprehensive amendment of the Competition Act, introducing, inter alia, the following changes: (i) reinstating the independent agency contemplated in the original 1999 wording of the law; (ii) declaring concerted practices to be illegal per se; (iii) incorporating a leniency program; (iv) establishing safe harbors for dominance positions (no dominance finding with shares equal to or lower than 20%, dominance finding with shares equal to or higher than 70%); and (iv) changing the merger thresholds and the way fines are calculated.

2 MERGERS

Approximately 67% of the cases closed during 2015 consisted of approvals without undertakings, 12% were approvals with undertakings, 10% were decisions approving compliance with undertakings and the remaining 11% were approvals for the compliance of undertakings and voluntary party withdrawals from the merger review process (when the deal did not close) and decisions declaring transactions as non–reportable. No prohibition decisions were issued in 2015.

The merger cases worth commenting on include the following:

- In British Airways/Iberia (air transport)\(^1\) the Secretariat ordered the parties to maintain certain frequency and available capacity levels in the Buenos Aires – London route. The parties challenged the decision before the Court of Appeals on Civil and Commercial matters, alleging inter alia that the decision ignored the existence of bilateral commitments assumed by Argentina, Spain and the United Kingdom in the air transport area, which granted the right, but not the obligation, to exploit air routes. While a final decision is still pending, the court granted an injunction suspending the effects of the administrative decision.

- In Cinemark / Hoyts\(^2\) (multiplexes), the Secretariat imposed behavioral undertakings that applied in two of the relevant geographic markets, aimed at restricting the parties’ growth and maintaining price levels to those in force in less concentrated areas, for a term of five years.

- In both the abovementioned Cinemark / Hoyts case as well as in NEC (IT)\(^3\), the Secretariat considered that certain types of confidentiality clauses included by parties in transactional documents must be considered as ancillary and subject to similar considerations as non–compete clauses. In particular, they must be limited to five or two years from the closing of the deal, depending on, respectively, whether the transaction includes the transfer of know–how or not.

---

\(^1\) "Iberia Líneas Aéreas de España S.A. y British Airways plc s/ notificación Ley 25.156", Secretariat of Trade, Resolution No. 9 (February 2, 2015).
\(^2\) "Hoyts General Cinema South America, Cinemark Argentina Holdings s/ notificación Ley 25.156", Secretariat of Trade, Resolution No. 88 (May 6, 2015).
\(^3\) "Sandro Scaramelli, Roberto Andrés Carzalo, Corporación para la Defensa del Sur S.A, Nec Corporation s/ notificación Ley 25.156", Secretariat of Trade, Resolution No.100 (May 13, 2015).
– In *Sanofi/Genzyme*⁴, the Secretariat applied a fine of Argentine Peso ("ARS") 860,000 (approximately US Dollars ("USD") 50,000⁵) to both notifying parties for late filing. The parties alleged that the 86–day delay was due to the fact that the transaction was a hostile takeover and the acquirer could not access local target sales information in advance, and consequently had to rely on public sources wherefrom it concluded that a notification was not required. This argument was disregarded by the Commission, who also considered that both parties had notified other mergers in Argentina in the past and thus could not ignore local regulations and its interpretations.

As to advisory opinions on the application of merger control rules to specific cases, the Commission decided on, among others, the following matters:

– As regards the scope of the term "assets" as the object of an economic concentration: (i) in *Whirlpool*,⁶ the Commission decided that a contract whereby a party manufactured a certain product according to another party’s specifications, insofar as the agreement did not contemplate exclusivity obligations or a purchase option in favor of the party hiring such services, should not be construed as an "assets transfer" subject to notification; and (ii) in *Coppel*,⁷ the Commission confirmed previous decisions holding that the transfer of commercial real estate does not qualify as that of a turnover–generating asset (that triggers a notification), insofar as the acquirer is not in the real estate business, as in such a case the opposite decision applies, as the *IRSA/Puente case*⁸ illustrates.

– The analysis of foreign–to–foreign mergers where the target does not have assets in Argentina is a recurring case subject to interpretation, as the *Competition Act* includes a *de minimis* exemption requiring that both the local assets being transferred as well as the (presumably) local price of the transaction do not exceed certain thresholds, but on many occasions the authorities do not review the transaction under the exemption (possibly as they believe it is not appropriate for foreign–to–foreign cases where target’s presence in the country is achieved through sales), but rather through an effects test that looks at the size of target’s sales in the relevant market. In *International Flavors*,⁹ however, the Commission mixed both, using target’s local sales as a proxy of what target’s local business would be worth, had the parties assigned a local price of the transaction in the relevant acquisition agreement.

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

– In *Braun Medical*, four pharmaceutical companies comprising the totality of the gelatin–based plasma volume expanders market were sanctioned for their participation in a bid rigging cartel.¹⁰

---

⁴ “Sanofi y Genzyme Corporation s/ notificación Ley 25.156”, Secretariat of Trade, Resolution No. 45 (March 25, 2015).
⁵ Exchange rate USD 1 = ARS 15.
⁷ “Coppel S.A. y Cuarenta y Ocho Sociedad Colectiva s/ Consulta Interpretación Ley 25.156*, Secretariat of Trade, Resolution No. 1 (January 12, 2015).
⁸ “Irsa Inversiones y Representaciones S.A., Puente Hnos. s/ notificación artículo 8 Ley 25.156”, Secretariat of Domestic Trade, Resolution No. 392 (September 30, 2010).
The investigation lasted several years and included dawn raids and hearings with the affected public institutions (hospitals).

Fines of ARS 10 million (about USD 650,000) to each company, and ARS 200,000 to their managers were imposed.

### 4. ABUSES OF DOMINANCE

The Secretariat imposed fines in two dominance cases during 2015.

- In *Clorox*¹¹, the authority imposed a fine of ARS 50 million (approximately US 3.3 million) for the implementation of a policy directed to the wholesale channel aimed at maintaining a minimum "price gap" between the defendant’s bleachers and those of competing brands in exchange for the application of discounts and rebates (or, in some cases, the decision of defendant to sell to those wholesalers), with the result that the price of those other lower quality brands was increased, and their sales reduced.

- In *Círculo Odontológico Santafesino*,¹² a fine of over ARS 3.5 million (approximately USD 230,000) was imposed on a local dentists' board for the establishment of regulations that hindered the direct enrollment of dentists by requiring a minimum residence of five years in the relevant city, with the associated exclusionary effect as the enrollment was required to provide services to local HMOs. In addition, the Commission approved a settlement proposed by the parties under the provisions of section 36 of the *Competition Act*,¹³ whereby all clauses identified as anticompetitive were deleted.

### 5. COURT DECISIONS

- *Ami Cable Holding LDT*¹⁴ examined the nature of undertakings imposed under section 13 of the *Competition Act*. This section provides that a final decision in a merger case may consist of: a) an approval without undertakings; b) an approval subject to undertakings; or c) a prohibition.

  This case concerned the merger of the two largest cable-TV companies in Argentina and was approved under section 13 a) (approval without undertakings) but, in a truncated decision: (i) by two Commissioners, it was also subject to the compliance of certain behavioral undertakings offered by the parties;¹⁵ and (ii) by the President of the Commission, under no such conditions.

  Years later, the Secretariat concluded that none of the undertakings were fully complied with and revoked the approval.

  The matter was then considered by the courts, which concluded that the authority had effectively authorized the merger under section 13 a) of the *Competition Act*, as appeared from the literal language of the decision and the reasons behind the President's vote. Thus, the court followed, the administrative decision could not be revoked as such option was only available in plain approvals in cases where the decision was based on false or incomplete information.

  Interpreting the undertakings as a condition to the approval, the court reasoned, would deprive section 13 b) of its meaning. If

---

¹¹ "Clorox Argentina S.A. s/ denuncia Ley 25.156", Secretariat of Trade, Resolution No. 65 (April 17, 2015).
¹² "Ricardo Ángel Berruti c/ Círculo Odontológico Santafesino s/ infracción a la Ley 25.156", Secretariat of Trade, Resolution No. 393 (September 21, 2015).
¹³ According to section 36, the parties may agree to immediately or gradually cease with the investigated conducts or to modify certain aspects of them. If approved
anything, compliance with some of those undertakings – that i.e. contemplated non-discrimination provisions as regards the parties own and third-party programming – should be analyzed under the Competition Act conduct provisions.

– In Vale, the Ministry of Economy and Public Finances filed a revocation request before the Court of Appeals that had decided against a decision of the Commission imposing certain undertakings under the general monitoring empowerments granted to the Commission by the Secretariat in the final decision that approved the transactions without undertakings.

The Court of Appeals considered that the Secretariat had not delegated to the Commission the power to impose undertakings, and that in any event under procedural rules, the Commission, assimilated to a first instance court, could not challenge (directly or indirectly) the decision of a higher court, as such revocation request was reserved to those having a direct interest in or suffering a direct damage from the decision.

– In Pirelli, the Supreme Court of Justice revoked the decision of the Criminal Economic Court of Appeals that had reduced the aggregate fines of around ARS 236 million (approximately USD 15.7 million) fines for late filing imposed by the Secretariat to Telefonica and other companies for failure to timely notify their acquisition of substantial influence over Telecom Argentina, Telefónica’s main competitor in the area of telecommunications.

The Court, following the Attorney General’s decision, challenged some of the Court of Appeals’ arguments as follows: (i) the foreign companies’ lack of notification could not be justified as an "excusable error" under local laws, given that due to their market presence they should be deemed as fully acquainted in local regulations; (ii) the time elapsed during the preliminary investigation initiated by the Commission in order to assess if a notification was required had to be considered for purpose of calculating the amount of the fines; and (iii) the "first landing exemption", that exempts from notification acquisitions where the acquirer is a single foreign company with no assets in Argentina, is only applicable if complied by all, but not some, of the notifying companies.

The Court ratified the Commission’s reasoning leading to a finding of substantial influence as regards Telefónica. Among other facts, the Court considered the fact that Telefónica was the only shareholder of the acquiring group involved in the telecommunications business and the existence of contractual provisions between the parties aimed at controlling entry of new shareholders. The Court also disregarded the language included by the parties in the transaction agreements erecting "Chinese walls" between Telefónica and Telecom Argentina, as such provisions could not preclude the authorities from applying the Competition Act and decide whether or not the provisions prevented anticompetitive harm or not.

– The Court of Appeals of Comodoro Rivadavia reversed a 2014 decision of the Secretariat that had imposed fines in excess of AR$ 1 billion (approximately USD 66.67 million)

on several major automobile manufacturers (Fiat, Ford, GM, Honda, Peugeot–Citroën, Renault and VW) for alleged concerted practices in the sale of automobiles for their resale in the southernmost province of Tierra del Fuego.

According to the Secretariat, the car manufacturers’ actions were aimed at artificially maintaining the price of vehicles sold in the province (which is subject to a special tax regime whereby transactions carried out therein are exempt from federal taxes) as high as in the rest of the country.

In short, the Court of Appeals was not convinced of the evidentiary value and cohesiveness of the “facilitating practices” identified by the Commission and the Secretariat in support of their decision.

– In Catedral Alta Patagonia, the defendant operator of a ski resort in Patagonia was fined and ordered to abstain from blocking ski passes and charging differential fees to photographers rendering their services within the ski center, considering such practices to be abuses of dominance, due to the defendant’s market position in ski resorts in the relevant geographic market. However, the Court of Appeals revoked the decision as it deemed the defendant’s regulatory arguments in support of the prohibition, which regulated the presence of photographers in the slopes for security reasons, as reasonable.

19 Cámara de apelaciones de general Roca “Catedral Alta Patagonia S.A. s/ apelación resolución Comisión Nacional de Defensa de la Competencia” (21 April, 2015).
enforcement, and advocacy.\(^5\) Significantly, the Bureau’s new bulletin on *Corporate Compliance Programs* explicitly indicates that the Bureau will treat a "credible and effective" corporate compliance program that is in place when the contravention occurred as a mitigating factor when making recommendations within the company’s leniency application.\(^6\)

2. MERGERS

In 2015, the Bureau permitted significant transactions in the magazine\(^7\) and newspaper\(^8\) sectors without remedies, citing amongst other things declining print readership and "competitive pressures from digital alternatives."\(^9\) In permitting, without remedy, a transaction involving French-language book retailers in the acquisition of Archambault by Renaud–Bray, the Bureau conversely treated French-language "bricks and mortar" and online sales separately, indicating that "digital trade books (i.e., e–books) are relatively limited in Quebec".\(^10\)

1. LEGISLATIVE DEVELOPMENTS

There were no significant legislative amendments in 2015. The former Conservative government, however, introduced Bill C–49\(^1\) in late 2014. Controversially,\(^2\) the bill would have authorized the Commissioner of Competition to investigate and report on price gaps between products in the US and Canada. Bill C–49 died on the order table when the federal election was called in August 2015. The bill originated as a consumer protection initiative at a time when the Canadian and US dollars were trading at and around par an

The Competition Bureau (Bureau) also released new guidelines regarding the production of electronic documents,\(^3\) corporate compliance programs\(^4\) and its general approach to outreach,
In the Pioneer/Parkland transaction involving the acquisition of gas stations, the Competition Tribunal (Tribunal) granted an injunction preventing closing in six local markets,\(^1\) although the Bureau had sought relief concerning 14 markets.\(^2\)

As a condition to the joint acquisition by Canada’s two largest mobile carriers, BCE and Rogers, of mobile phone retailer, GLENTEL, the Bureau required the implementation of a confidentiality protocol to protect against the sharing of competitively sensitive information.\(^3\)

As it concerned international mergers, the Bureau required the complete divestiture of Holcim’s Canadian operations as condition to the closing of the Holcim/Lafarge transaction.\(^4\)

Furthermore and parallel with a challenge in the US brought by the Federal Trade Commission, in late 2015, the Bureau brought an application in the Tribunal challenging Staples’ proposed acquisition of Office Depot. In its materials before the Tribunal, the Bureau argued that the transaction would result in Staples acquiring an 80% share of the “just-in-time” office product supply segment for organizations across Canada, including businesses, governments, healthcare and educational institutions.\(^5\)

### 3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Concerning cartels, the Superior Court of Québec sentenced Pétroles Global to a CAD $1 million fine for retail gasoline price fixing in a contested proceeding.\(^6\) This case was significant because the court held that a corporation could be found to be criminally liable as a result of the actions of managers and directors with authority, expanding the class that could attract corporate liability beyond the “directing minds” of the organization.

Following a guilty plea, an individual accused was sentenced to an 18–month conditional sentence, 60 hours of community service, and a fine of $23,000 for bid rigging related to IT services to Library and Archives Canada.\(^7\)

A jury trial concerning charges of bid rigging against seven individuals and three companies resulted in not guilty verdicts concerning all accused.\(^8\)

In the criminal chocolate proceedings, the Ontario Superior Court ruled that factual information disclosed by successful Immunity

---

\(^{11}\) Commissioner of Competition v. Parkland Industries Ltd., 2015 Comp. Trib. 4.


and Leniency Program applicants during the initial proffer was not subject to settlement privilege.\(^{19}\) By the end of 2015, all outstanding charges stemming from the chocolate investigation had been stayed. The only conviction entered in the case was the 2013 guilty plea and related CAD $4 million fine against Hershey, who participated in the Bureau’s Leniency Program.\(^{20}\)

4. ABUSE OF DOMINANCE

In March 2015, the Tribunal ruled that the Bureau could continue to pursue its abuse of dominance application against Direct Energy, notwithstanding Direct Energy had exited the relevant residential water heater market.\(^{21}\)

The Tribunal also issued two decisions concerning the refusal to deal provisions of the *Competition Act*. In one case, the Tribunal refused to grant leave to an applicant seeking supply of automotive data, indicating that a private litigant seeking leave to bring an application must present “non-speculative, cogent evidence” in support of leave.\(^{22}\) In the other, the court refused to grant leave to bring a refusal deal application, but did grant permission for the application to bring an application under the price maintenance provisions.\(^{23}\)

4. COURT DECISIONS

In early 2015, the Supreme Court of Canada released its decision in *Tervita Corp. v. Canada (Commissioner of Competition)*, its first decision in a merger case in over 15 years.\(^{24}\) In the decision, the Supreme Court held that the Commissioner of Competition had not properly quantified the anticompetitive effects of the merger as it was required to do pursuant to efficiencies defence mounted by the acquiror.

Nine years after the air cargo class action commenced, Justice Leitch of the Ontario Superior Court of Justice certified it as a class action.\(^{25}\) However, she refused the plaintiff’s request for a global class, ruling that the court lacked jurisdiction over absent foreign claimants.\(^{26}\)

Another jurisdictional issue was decided in favour of defendants in 2015, when Justice Perrell of the Ontario Superior Court of Justice ruled that the court lacked jurisdiction over two defendants in the rechargeable lithium ion batteries class action,\(^{27}\) although the court went on to certify the action against the remaining defendants.\(^{28}\)

\(24\) *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 S.C.R. 161.
\(25\) *Airia Brands Inc. v. Air Canada*, 2015 ONSC 5352.
\(27\) *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148.
\(28\) *Shah v. LG Chem, Ltd.* 2015 ONSC 2628.
In the LCD panel class action, the Ontario Superior Court of Justice dismissed a motion for summary judgement based on the passage of a limitation period, but refused to allow another plaintiff to be added as a named plaintiff because of the expiry of the limitation period.

---

29 Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation, 2015 ONSC 2046.
30 Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation, 2015 ONSC 3414.
1. LEGISLATIVE DEVELOPMENTS

There were no relevant amendments to the Mexican Competition Law ("MCL") in 2015. However, the Federal Economic Competition Commission ("Cofece") released six guidelines covering the following topics: (i) relative monopolistic practices and illegal concentrations investigations; (ii) monopolistic practices investigations; (iii) immunity program (leniency); (iv) merger control; (v) absolute monopolistic practices investigations; and (vi) information exchange. Below we have analyzed each of the guidelines in further detail:

(i) Relative Monopolistic Practices and Illegal Concentrations Investigations

These guidelines aim to provide undertakings, practitioners, authorities and the general public with information on how Cofece conducts an investigation on the potential existence of a relative monopolistic practice (i.e. abuse of dominance and/or vertical restraint conducts) or an illegal concentration, by explaining each stage of the proceeding.

The guidelines include an introduction to the concepts of (i) relative monopolistic practices, understood as actions conducted by undertakings with substantial market power to unduly displace third parties from, or preclude their access to, a particular market; and (ii) illegal concentrations, understood as transactions where the resulting undertaking acquires or increases its dominant position. Although much of their substantive content is included in the provisions of the MCL, the guidelines provide additional relevant information on certain matters related to the proceeding. Among the most relevant in our view are: (i) clarifying that the undertakings involved in an investigation shall be responsible for evidencing that the relative monopolistic practice or concentration under investigation generates efficiency gains and, therefore, shall not be sanctioned; (ii) stating that the ultimate purpose of an investigation is for Cofece to eliminate anticompetitive effects and not to unnecessarily interfere with legitimate business models; (iii) indicating that the proceeding is of a public nature and therefore the Investigation Unit (Autoridad Investigadora) shall continue with an investigation regardless of a withdrawal of the complaint that triggered the investigation (note that Cofece is also empowered to initiate investigations on its own initiative); and (iv) explaining how Cofece evaluates the evidence gathered throughout the investigation.

In addition to the foregoing, the guidelines include a list of Cofece’s investigative tools, including: (i) issuing requests for information and documents; (ii) subpoenas; (iii) dawn raids (visitas de verificación); (iv) inspection of places; (v) requests for market studies and surveys; and (vi) interviews.

(ii) Monopolistic Practices Investigations

These guidelines aim to: (i) explain in detail the concepts of "objective cause" and "indicia", that could lead to the initiation of an investigation; (ii) detail the available mechanisms to initiate an investigation; (iii) list the specific requirements to file a complaint and those applicable to the formal petitions that can be submitted by the Federal Executive; (iv) list the sources of information that Cofece consults regularly; and (v) explain how a leniency application could lead to the commencement of an investigation.
In essence, the guidelines establish that the mere possibility that illegal conduct is being carried out is sufficient for the purpose of initiating an investigation. It is during the investigation when the conduct and its potential illegality has to be shown. The guidelines further detail the specific applicable requirements for initiating investigations on absolute monopolistic practices and relative monopolistic practices and their differences.

(iii) Immunity Program (Leniency)

These guidelines aim to provide undertakings and the general public with information on how Cofece acknowledges, analyzes, and resolves leniency applications. In addition, the guidelines establish that Cofece will handle each application on a case by case basis in a transparent, accessible, and open manner when discussing the application with the applicants and bearing in mind the particularities of each case.

The guidelines provide that all contacts regarding a leniency application shall be done with the Head of the Investigation Unit or the General Director of Absolute Monopolistic Practices Investigations using the assigned code at the commencement of the proceedings and that no document should be submitted with the Correspondence Office of Cofece (Oficialía de Partes). The guidelines also mention that it is possible for a potential applicant to request an informal meeting with Cofece before formally submitting an application, in order to discuss the potential application without penalty.

The guidelines also establish that only cartel conduct (i.e. price fixing, restriction of output, market allocation, bid rigging, and exchange of information with the purpose or effect of any of the foregoing) carried out in, or with effects in, Mexico can be submitted when applying for leniency. Furthermore, the guidelines detail the available benefits for applicants, including: (i) a fine reduction of a minimum of one measure unit (i.e. MXP$ 73.04 – approximately US$ 4.5) for the first applicant; (ii) a fine reduction of up to 50%, 30% or 21% of the applicable fine for the second and ulterior applicants; and (iii) full criminal immunity for all applicants.

The guidelines include a detailed explanation of the different stages of the leniency application processes. These stages are: (i) the submission of an application, including requirements for companies and individuals, timing and formalities for the application (email or voicemail), code assignment and mark, and an initial meeting with Cofece; (ii) the investigation stage, where the cooperation obligations of the applicants are detailed and the confidentiality treatment of the information submitted; and (iii) the Cofece resolution, including the detailed content of this resolution.

(IV) Merger Control

These guidelines provide information on the concept, regulation and proceedings associated with the merger control notification carried out under the MCL. Specifically, the guidelines include information on Cofece operational practices when analyzing transactions notified under the merger control process.

It includes a list of specific transactions that could be analyzed as a concentration, including mergers, acquisition of shares and assets, and other actions by means of which an undertaking acquires control over another or over certain assets. It also includes explanations of the timing of notifications, the obliged parties, application of the thresholds, how to calculate the value of assets, exceptions to the merger control process, remedies and sanctions, and other relevant concepts.
The guidelines also include relevant practical considerations for the notifying parties, such as the convenience of submitting with Cofece information on the status of merger control processes in other jurisdictions and the level of detail of the economic information required. It is also important to mention that the guidelines are considered to be a reference document that may change from time to time in accordance with the ongoing practices of Cofece.

(v) **Absolute Monopolistic Practices Investigations**

These guidelines aim to provide undertakings, practitioners, authorities and the general public with information on how Cofece conducts an investigation proceeding on the potential existence of an absolute monopolistic practice (i.e. cartel conduct), by explaining each of the stages of the proceeding.

The guidelines include an introduction to the concept of absolute monopolistic practices, understood as those agreements between competitors to fix prices, restrict output, allocate markets, bid rigging, or the exchange of information in any such regard.

Although much of the substantive content is included in the provisions of the MCL, the guidelines do provide additional relevant information on certain matters related to the proceeding. Among the most relevant in our view are: (i) an explanation of actions that are considered to be indicia of the existence of cartel conduct; (ii) clarification that the proceeding is of a public nature and therefore the Investigation Unit (Autoridad Investigadora) shall continue with an investigation regardless of a withdrawal of the complaint that triggered the investigation (note that Cofece is also empowered to initiate investigations); and (iii) explaining how Cofece evaluates the evidence gathered in the investigation.

In addition to the foregoing, the guidelines include a list of Cofece’s investigation tools to gather evidence regarding conduct under investigation. These tools include leniency applications, in addition to those referred to above under the "Relative Monopolistic Practices and Illegal Concentrations Investigations" subsection.

(vi) **Information Exchange**

These guidelines aim to provide undertakings, practitioners and the general public with information on how Cofece analyzes information exchanges to assess if such exchanges could be considered illegal under the MCL provisions. These guidelines are probably the most substantive in content as they represent the formal recognition from Cofece that certain information exchanges should be analyzed using an effects based analysis, when no evidence exists that the agreement is merely a vehicle to restrain or eliminate competition between the parties.

Furthermore, the guidelines specifically mention that, under certain circumstances, competitors "may collaborate to jointly improve the supply of products", for instance to "acquire better quality inputs or under most favorable terms and conditions." The guidelines state that such projects are competitive when the information exchanged and the collaboration are essential to achieve the goals of the project and are not a vehicle for unduly coordinating actions or displacing third parties from the market. Please note that even when the guidelines are not binding for Cofece, they provide helpful insight on where the authority stands.

Cofece also issued the Technical Criteria\(^1\) of a Quantitative Index to Measure Market Concentration and released the following drafts

---

\(^1\) Technical Criteria are binding upon Cofece, whereas Guidelines are not.
of Technical Criteria, currently under review after a public consultation process: (i) request for dismiss a criminal action; and (ii) request and issuance of precautionary measures and determination of pledges.

2. Mergers

Cofece resolved 130 concentrations, all of which were authorized (three with conditions).\(^2\)

Significant authorizations included: (i) the clearance of the transaction between Nissan and Daimler; (ii) the acquisition of Pilgrim’s Pride by Tyson; and (iii) the acquisition of Alstom’s Power & Grid business by GE.\(^3\)

3. Cartels and other Anticompetitive Practices

Cofece concluded two investigations for cartel conduct related to (i) CRT and (ii) passenger ground transportation in Chiapas. The first investigation was closed and the second investigation resulted in sanctions related to price fixing against the responsible parties, totalling approximately US$1.8 million.\(^4\)

There are currently 9 ongoing investigations, focusing on (i) sea transportation services in Quintana Roo; (ii) production, distribution and commercialization of latex products acquired by the public health sector; (iii) air compressors for automobiles; (iv) liquid crystal panels; (v) automotive harnesses; (vi) production and commercialization of corn in Colima; (vii) production, distribution and commercialization of eggs; (viii) production, distribution and commercialization of poultry products; and (ix) sugar.\(^5\)

4. Abuse of Dominance

Cofece concluded 11 investigations for abuse of dominance conduct but imposed only one sanction against Telcel in the market of interconnection services to end calls on mobile phones.\(^6\) There are three ongoing abuse of dominance investigations, focusing on: (i) industrial gases; (ii) access to federal zones and parking at the Mexico City Airport for the provision of public transportation services; and (iii) generation, processing and commercialization of credit information.\(^7\)

---

\(^2\) Information current as of October 31, 2015.


\(^5\) Information current as of October 31, 2015.


\(^7\) Information updated to October 31, 2015.
1. LEGISLATIVE DEVELOPMENTS

For the second straight legislative session, the House Judiciary Committee approved a bill to amend the Clayton and Federal Trade Commission Acts to align the standards and processes for Federal Trade Commission (“FTC”) or Department of Justice (“DOJ”) review of proposed mergers and acquisitions. An identical bill has been introduced in the Senate but has not yet been reported out of the Senate Judiciary Committee. Under the current system, some industries’ mergers and acquisitions are reviewed by the FTC, and challenges are brought in federal court under the Clayton Act. Other industries’ mergers are reviewed by the DOJ, and challenges are brought in federal court under the Clayton Act.

If the bills become law, the FTC would adjudicate contested mergers in federal court under the Clayton Act’s standards, rather than through its 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 FTC Chairwoman opposes this legislation.

2. MERGERS

In February 2015, the U.S. Court of Appeals for the Ninth Circuit upheld the decision of the district court that St. Luke’s Health System’s acquisition of Saltzer Medical Group violated Section 7 of the Clayton Act. The appellate court held that the merger’s alleged efficiencies were not sufficient to rebut the presumptively anticompetitive effects resulting from St. Luke’s 80% post-merger share of the Nampa, Idaho market for adult primary care. The court expressed skepticism about the viability of the "efficiency defense," and noted that "[i]t is not enough to show that the merger would allow St. Luke’s to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate." Ultimately, St. Luke’s Health System was enjoined from acquiring Saltzer Medical Group and ordered to unwind the acquisition to remedy the anticompetitive effects of the proposed merger.

The DOJ Antitrust Division filed suit to block Electrolux’s attempted $3.3 billion acquisition of General Electric’s appliances division, fearing that the merger of two of the country’s leading home appliance manufacturers would lead to less competition and higher prices.
After four weeks of trial, General Electric decided to back out of the proposed sale.

The FTC filed suit to block Staples’ $6.3 billion bid for Office Depot in December 2015, claiming that the proposed merger would significantly reduce competition nationwide in the market for supplying office supplies to large companies.\(^8\) The complaint marks the second time the FTC has objected to a merger between Staples and Office Depot; it also objected to a proposed merger between the two companies in 1996. In response to the FTC’s complaint, Staples offered to divest up to $1.25 billion in commercial contracts, but the FTC rejected this concession without making a counteroffer.\(^9\) A trial date is set for May 10, 2016.

3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2015, 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”) and the foreign currency exchange (“FX”) spot market; (ii) price fixing of automobile parts; (iii) price fixing, market allocation and bid rigging in international ocean shipping services; and (iv) customer allocation among heir location services firms. Heir location firms identify people who may be entitled to an inheritance from the estate of a relative who died without a will and assist them in securing the inheritance in exchange for a contingency fee.\(^10\)

Four major banks—Citicorp, JPMorgan Chase, Barclays, and RBS—pleaded guilty to conspiring to manipulate the FX market and one bank—UBS—pleaded guilty to manipulating the LIBOR rate. Together, the five banks agreed to pay more than $2.7 billion to settle those claims.\(^11\) In accordance with the DOJ’s pronouncement that it intends to increase its efforts to prosecute individuals for antitrust violations,\(^12\) the DOJ prosecuted two Rabobank traders for their participation in a conspiracy to manipulate LIBOR. These individuals were found guilty after trial and sentenced to terms of imprisonment of 12 and 24 months, respectively.\(^13\) Three other former Rabobank employees pleaded guilty to participating in that conspiracy and two more have been charged.\(^14\)

With respect to the ongoing investigation into the price fixing of automobile parts installed in cars sold in the United States, thirty–eight

---


\(^14\) Id.
companies have pleaded guilty to date and agreed to pay over $2.6 billion in fines.\(^{15}\) Fifty-eight executives have also been charged in the scheme.\(^{16}\)

The DOJ continued its investigation into price fixing and bid rigging involving cargo shipped to and from U.S. ports. Four executives and three companies have pleaded guilty to participating in the scheme.\(^{17}\) The companies have paid more than $136 million in fines.\(^{18}\)

The DOJ also brought the first charges in its investigation into customer allocation among heir location services firms. Two individuals and one company have pleaded guilty to charges of customer allocation for the purpose of decreasing competition among heir location services firms.\(^{19}\)

The DOJ, for the first time, recommended that corporate defendants receive a fine reduction for the implementation of an effective compliance program. Barclays, in the LIBOR investigation,\(^{20}\) and Kayaba, in the auto parts investigation,\(^{21}\) were granted fine reductions for instituting effective, forward-looking antitrust compliance programs.

4. MONOPOLIZATION

After a seven-week trial, the DOJ won its case against American Express, with the court ruling that the company’s “anti-steering” rules prohibiting merchants from encouraging customers to use other credit cards violate antitrust law.\(^{22}\) The court found that the company possessed market power in a highly concentrated market with high barriers to entry.\(^{23}\) The U.S. Court of Appeals for the Second Circuit heard argument on American Express’s appeal in December 2015 but has not yet issued a ruling.

Cardinal Health, Inc. agreed to pay $26.8 million, and agreed to injunctive relief, to resolve charges brought by the FTC that it illegally monopolized markets for the sale and distribution of low-energy radiopharmaceuticals.\(^{24}\) Notably, the settlement drew dissents from two FTC commissioners who did not think disgorgement was appropriate.\(^{25}\) The majority statement noted that disgorgement was warranted because Cardinal Health had profited from monopolistic practices for years and strictly prospective relief would not fully protect the public interest.\(^{26}\) Moreover, the majority dismissed the dissenters’ concerns that there was a lack of guidance about when the FTC would seek disgorgement, writing that the FTC, in 2012, had withdrawn its prior

---

\(^{15}\) Press Release, U.S. Dept. of Justice, INOAC Corp. to Pay $2.35 Million for Fixing Prices on Auto Parts: https://www.justice.gov/opa/pr/inoac-corp-pay-235-million-fixing-prices-auto-parts

\(^{16}\) Id.


\(^{18}\) Id.

\(^{19}\) Id.


\(^{23}\) Id.


policy that limited disgorgement to "exceptional" circumstances.27

5. COURT DECISIONS

2015 was a quiet year for antitrust cases at the U.S. Supreme Court, but there were several notable decisions in the Courts of Appeals. The U.S. Court of Appeals for the Second Circuit upheld the decision of the district court which found that Apple violated Section 1 of the Sherman Act by conspiring with book publishers to raise, fix, and stabilize the retail price of e–books.28 The Second Circuit held that Apple was the "vertical player" in a "horizontal conspiracy" between the book publishers because Apple's proposed contracts with the publishers only made sense if the publishers acted in concert to shift the entire e–book industry to an agency model. The court held that, because the shift to an agency model enabled the publishers to coordinate and raise prices, Apple facilitated a horizontal price–fixing conspiracy. In March 2016, the Supreme Court denied Apple's petition for certiorari. As a result of this denial, the decision of the Second Circuit stands, and a $400 million settlement that Apple had previously reached with consumers and state attorneys general will come into effect.29

In O'Bannon v. NCAA, the U.S. Court of Appeals for the Ninth Circuit, in a split–decision, upheld in part and reversed in part the decision of the district court regarding the NCAA's amateurism rules.30 The appellate court agreed with the district court that the rule of reason governs review of NCAA's rules regarding how much athletes can be compensated, but disagreed with the district court's holding that "paying students cash compensation would promote amateurism as effectively as not paying them." 31 The Ninth Circuit noted that "[t]he difference between paying student–athletes education–related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."32 It therefore vacated the district court's judgment requiring the NCAA to allow its member schools to pay athletes up to $5,000 in deferred compensation. On December 16, 2015, the Ninth Circuit denied O'Bannon's petition for a rehearing en banc, and on March 15, 2016, O'Bannon filed a petition for a writ of certiorari at the Supreme Court.

On April 15, 2015, the U.S. Court of Appeals for the Eleventh Circuit ruled that a threat by the country's leading manufacturer of ductile iron pipe fittings to terminate rebates given to its distributors if the distributors bought from a rival manufacturer violated Section 5 of the FTC Act.33 The manufacturer argued that the FTC should face a higher standard of proof in an exclusive dealing case because exclusive dealing arrangements are presumptively procompetitive. The court disagreed and held that the government must only prove that the defendant's anticompetitive conduct "reasonably appears to significantly contribute to maintaining monopoly power." 34 The court also found "unpersuasive" the manufacturer's argument that a rival's "entry and growth in the market demonstrate that, as a matter of law," the exclusive dealing program "did not cause

28 United States v. Apple, 791 F. 3d 290 (2d Cir. 2015).
30 O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
31 Id. at 1076.
32 Id. at 1078.
33 McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015).
34 Id. at 836-37.
substantial foreclosure” of competition. On November 4, 2015, McWane filed a petition for a writ of certiorari.

---

Id. at 838.