ABA Year in Review 2016 – Short Form
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A. Legislative Developments

In March, the new Administration of the Argentine Antitrust Commission (the “Commission”) was appointed. The new President of the Commission is Esteban Greco, an economist who used to work in several antitrust matters before joining the authority. Furthermore, four new members have also been appointed: María Fernanda Viecens, Marina R. Bidart, Pablo Trevisan and Eduardo Stordeur.\(^1\)

The new Administration is planning to amend the current Antitrust Law No. 25,156 (the “Antitrust Law”). However, there is no visibility on when this new Antitrust Law will come into effect and if its provisions (which will be detailed below) will pass unchanged by Congress.

B. Mergers

In 2016, the number of notifiable transactions continued increasing due to the devaluation of the Argentine Peso. The USD 200,000,000 threshold set out in 1999 (when the Antitrust Law was enacted) is currently equivalent to approximately USD 13,000,000.

Due to the significant workload, there has been a great delay and the month review timeframe keeps increasing. However, it is important to state that with the new Administration, the review timeframe decreased from 36 months to an average of approximately 24/30 months (even in non-material transactions with

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\(^1\) Pursuant to Executive Order No. 1190/2016 issued on November 22, 2016, the members of the Commission have hierarchy of undersecretary.
minimum or no overlaps). In 2016, fifty transactions have been cleared by the Commission, while no rulings imposing remedies or rejecting transactions were issued by the authority.

Regarding merger control analysis, the proposed amendment to the current Antitrust Law (the “Bill”) would principally entail (i) an increase of the merger control thresholds and of the amounts for exemptions and fines, (ii) a suspensory system, (iii) the inclusion of a filing fee, (iv) the participation of third parties and (v) a fast track procedure for simple notification dockets.

C. Cartels and Other Anticompetitive Practices

On September 1, 2016, Resolution No. 18 was issued whereby the Commission requested Prisma Medios de Pago S.A. and its shareholders (namely, the most important banks in Argentina and Visa International Inc.) to give their explanations regarding the alleged antitrust conducts the Commission considers they would be responsible for.

The Commission considered that Prisma Medios de Pago SA and its shareholders would be responsible for carrying out the following antitrust conducts: a) competitive restrictions based on prices charged to users; b) competitive restrictions based on financing; and c) restrictions in order to inter-operate with competitors.

In addition to this investigation, the Commission has ordered the commencement of other market investigations in the following industries: (i) aluminum, (ii) steel, (iii) petrochemical, (iv) mobile communications, (v) oil, (vi) milk, (vii) meat.

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2 Resolution No. 18 of the Antitrust Commission, Case “Investigación de oficio contra Prisma Medios de Pago S.A. y sus accionistas en los términos del art. 1 y 2, inc. a), f), g), h), j), k) y l) de la Ley 25156 (C. 1613)”, Docket No. S01: 0391366/2016.
(viii) detergents, (ix) passenger ground transportation, (x) air transportation, (xi) supermarkets and (xii) pharmaceutical.

Regarding antitrust conducts, the Bill considers a leniency program.

D. Court Decisions

The challenge to the decision issued by the Federal Court of Appeals of the City of Comodoro Rivadavia overturning the Commission’s decision through which the antitrust authority has ordered almost all car terminals active in Argentina to pay the highest fine ever for price fixing is still under review.

2 Australia

By Elizabeth M Avery and Sally Kirk, Gilbert + Tobin

A. Legislative Developments

In March 2015, the Competition Policy Review (“The Harper Review”) issued its final report, completing the first major review of Australian competition law in over two decades and containing 56 recommendations on Australian competition policies and institutions.


Significantly, the Exposure Draft purports to amend section 45 of the Competition and Consumer Act (CCA) to provide that a corporation must not “engage with one or more persons in a concerted practice that has the purpose, or has or is
likely to have the effect of substantially lessening competition”. This will replace the presently narrower iteration of section 45, which requires “contracts, arrangements or understandings” to demonstrably affect competition before attracting liability.³

Further, the Bill included an “effects test” to the “misuse of market power” under section 46 of the CCA. The amended section prohibits corporations with a “substantial degree of [market] power” from engaging in conduct that “has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.”⁴ This will replace the current iteration of the section 46 test, which requires that corporations “take advantage” of their substantial market power for some illegal purpose.

Legislation amending section 46 of the Act as such was introduced into Parliament on 1 December 2016 with the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016, whilst the additional amendments contained in the Exposure Draft are set to be finalised in early 2017.⁵

B. Mergers

Over the course of 2016, the ACCC made 31 informal merger clearance decisions⁶ and provided 6 “public competition assessments”. Generally, such assessments are made when a merger is rejected, but also may occur when an application is approved subject to enforceable undertakings, or raises issues that

⁴ Competition and Consumer Act 2010 (Cth), s46(1)
⁶ ACCC, “Mergers Register – By Year”, http://registers.accc.gov.au/content/index.phtml/itemId/501191
the ACCC considers to be in the public interest. Out of the 6 assessments made this year, none were applications actually opposed by the ACCC, and only 3 were approved subject to enforceable undertakings.

On 18 February 2016, the ACCC announced it would no longer oppose the acquisition of Covs Parts by GPF Asia Pacific Pty Ltd (GPC) from Automotive Holdings Group Limited (AHG). Previously, in December 2015, the ACCC rejected GPC’s original proposal, but accepted that a revised version, made subject to the attachment of a section 87B enforceable undertaking, would be unlikely to contravene section 50 of the CCA (prohibiting acquisitions likely to have the effect of “substantially lessening competition” in any market). Accordingly, the transaction was modified to exclude store acquisitions in certain areas.

In the Australian Competition Tribunal, a total of 11 decisions were delivered in 2016. Only 1 authorisation application was made and granted, namely, that in relation to Sea Swift’s proposed acquisition of Northern Territory and far north Queensland marine freight business, Toll Marine Logistics Australia. This decision was handed down by the Tribunal on 1 July 2016, following the ACCC’s opposition to an informal clearance application in July 2015. The authorisation, granted subject to conditions on “public benefits” grounds, marked

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7 ACCC, “Public Competition Assessments”, http://registers.accc.gov.au/content/index.phtml/itemId/501191
8 ACCC, “Public Competition Assessments”, http://registers.accc.gov.au/content/index.phtml/itemId/501191
only the second Tribunal determination of a merger authorisation application since this avenue was introduced in 2007.\(^\text{11}\)

C. Cartels and Other Anticompetitive Practices

In 2016, the ACCC also commenced proceedings against two global shipping companies, Nippon Yusen Kabushiki Kaisha (NYK) and Kawasaki Kisen Kaise (K-Line), regarding equivalent allegations of cartel conduct in connection with transportation of vehicles from Japan to Australia between 2009 and 2012.\(^\text{12}\) These are the first two criminal proceedings to have been brought under the criminal cartel provisions introduced in 2009 under the *Competition and Consumer Act 2010* (Cth). Whilst NYK pled guilty to its charges on 18 July 2016,\(^\text{13}\) K-Line has not yet entered any plea, receiving a first mention in court on 15 November 2016. Sentencing for NYK is now scheduled for April 2017.

In February, the Federal Court also delivered its trial judgment in the “Egg Cartel Case”. This involved allegations by the ACCC that the Australian Egg Corporation Limited (AECL), as well as prominent egg suppliers, Farm Pride and Twelve Oaks Poultry, engaged in cartel behaviour to maintain high prices, and thwart gross oversupply of eggs in the market.\(^\text{14}\) Justice White of the Federal Court dismissed the case, ruling that, although the defendants “intended” that members of the AECL would take action to address the oversupply, there was no

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\(^\text{11}\) Ibid.


attempt to induce any agreement or understanding involving culling hens or otherwise disposing of surplus eggs (as was alleged). The ACCC subsequently appealed; judgment was reserved at the time of writing.

D. Dominance

In April, $18.6 million penalties were ordered against Cement Australia Pty Ltd and related companies for entering into anti-competitive “flyash” agreements, in contravention of s45 of the CCA. Justice Greenwood, in the Federal Court of Australia, found that contracts entered between the parties had the purpose and effect of preventing competitors from entering the concrete market, and thus, of substantially lessening competition. In this case, the ACCC also alleged that the same conduct amounted to a misuse of market power under the current iteration of section 46, CCA. However, this claim was dismissed, as there was insufficient evidence to show that the defendants were “taking advantage” of their substantial market power. This was the only instance of alleged misuse of market power in 2016.

16 Note: these were subsequently reduced by the Federal Court to a sum of only $17.1 million. The ACCC appealed this decision. ACCC, 6 June 2016, “ACCC appeals Cement Australia level of penalties”, http://www.accc.gov.au/media-release/accc-appeals-cement-australia-level-of-penalties
3 Brazil

A. Legislative Developments

On 6 September 2016, the Administrative Council for Economic Defense (CADE) published a new resolution establishing a deadline of 30 (thirty) days to complete the analysis of fast-track\textsuperscript{18} merger filings. Although the deadline used to be observed by the General Superintendence of the agency under an informal commitment, the new provision provides for more legal certainty and predictability in relation to timing of clearance. CADE also approved, on 18 October 2016, a new resolution that rules on the notification of associative agreements, which are commercial contracts - generally between competitions and vertically related players - that require pre-merger notification in Brazil if certain conditions are met\textsuperscript{19}. The great innovation of Resolution No. 17/2016 is the removal of the vertical relationship threshold for notification, observed, for instance, in supply and distribution agreements. It means that from November/2016 on, only commercial agreements between competitors - that meet certain specific conditions - will require antitrust clearance.

The third amendment on the regulation in 2016 relates to how CADE defines the business activities that will be taken into account to determine the revenues that will be used for the purpose of fine calculation. Resolution 3, in force since 2012, provides list of activities based on which defendants should calculate their revenues that will serve as basis for fine calculation (fines resulting from

\textsuperscript{18} Resolução No 16 de 1\ de setembro de 2016 [Resolution No. 16],
http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?NMVKhAaTPZCcA-E- x95f1SHaQ8ki5cBEA8QINRGQF44sW-07Q0WLPuBSOxNy-tVe-toJFAG_3jAljjdOyMpA,

\textsuperscript{19} Resolução No 17, de 18 de outubro de 2016 [Resolution No. 17],
http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?ssjK4QTNM7ViqHpHE_48i LwuyZs8Gb8y0qA8QG-4hgS0Ymh59AA8GGKDFAGD1vCoXBwp2SQL6YqZfISBQA,
CADE realized that because the definitions of the activities are too broad, they not necessarily resulted in proportionate fines. The new rule allowed CADE to have more flexibility when applying Resolution 3, if they understand that fines will be disproportionate or unfair.

B. Mergers

On 30 March 2016, FedEx/TNT - the deal that created the largest global delivery services company and faced strong opposition from the competitor UPS, was unconditionally approved by CADE after a long review period (161 days)\(^\text{20}\). CADE has also approved the joint venture among broadcast TV companies SBT, Record and RedeTV\(^\text{21}\). The new company will create and distribute TV content, channels and programs as well as license the digital signal for pay-TV operators. As a condition for clearance, parties committed to behavioral remedies, which include commitment to invest in content and to subsidize small and medium operators.

CADE has also approved the acquisition of HSBC by Bradesco, subject to a settlement of behavioral remedies\(^\text{22}\) and also the acquisition of the sexual well-being business by Reckitt Benckiser from Hypermarcas, conditioned to the divestment of the K-Y brand of personal lubricants in Brazil\(^\text{23}\).
C. Cartels and other Anticompetitive Practices

In July, 2015 - following several other jurisdictions - CADE opened what is internationally known as the “Forex investigation”, related to the manipulation of foreign exchange rates. The inquiry started based on a Leniency Agreement24.

In 2016, CADE opened 5 inquiries related to the so-called “Car Wash Operation”, in addition to two proceedings that began in 2015. CADE’s General Superintendent has told the press that over 30 inquiries involving the Car Wash Operation are under scrutiny at the moment. So far, only seven of them have been made public. They involve public tenders related to: onshore platforms; construction of a nuclear power plant (“Angra III”) and of a hydroelectric plant, railways, urbanization projects, large size buildings and soccer stadiums.

Two important cartel convictions took place in February 2016: the chemical company Solvay was fined in the amount of BRL 17,4 million for taking part in an international cartel in the sodium-perborate market, which would have affected the Brazilian market (Unilever would have been the main client affected in Brazil). The investigation was opened following a leniency agreement signed between CADE and Evonik Degussa. The second one relates to bid rigging in public tenders for laundry services in Rio de Janeiro. The fines imposed sum up to R$27,3 million. CADE has also prohibited the company Brasil Sul Industria e Comércio - deemed the cartel leader - from contracting with Government entities for the period 5 years.

D. Dominance

In February, CADE convicted three port operators (Tecon Salvador and Tecon Rio Grande - both part of the Wilson Sons Group - and Intermarítima Terminais) for imposing abusive port storage fees, applying the combined fine of R$10,6 million.

Also in 2015, CADE convicted Eli Lilly for the practice of sham litigation, imposing a fine of R$36,679,586.16. CADE took the view that Eli Lilly managed to sustain a monopoly of an active ingredient used in pharmaceuticals for cancer treatments, by preventing the entry of competitors, by means of numerous court actions in multiple jurisdictions that would have benefited from misleading information.

E. Court Decisions

A lawsuit related to the merger between the chocolate companies Nestle and Garoto, which has been lasting for approximately 11 years, is finally about to come to an end, after an out of court settlement reached between CADE and the parties. The merger took place in 2002 and was fully rejected by CADE in 2005, when parties decided to challenge the decision in Court. CADE, Nestlé and Garoto agreed on late remedies to put an end to judicial discussions (remedies agreed were deemed confidential and have not been made public).

4 Canada

By Adam S. Goodman, Dentons Canada LLP

A. Legislative Developments

In September 2016, the federal government introduced Bill C-25,26 which, when passed, will amend the affiliation rules in the Competition Act (Act)27 to treat partnerships, trusts, sole proprietorships, and non-incorporated business entities similarly to the manner in which corporations are treated.

The Competition Bureau (Bureau) also released new Intellectual Property Enforcement Guidelines, providing new guidance regarding the Bureau’s enforcement approach to product switching, patent assertion entities, patent settlements, and standard essential patents.28

B. Mergers

Several high profile transactions cleared in 2016 without remedies.29 Following abandonment by the parties, the Bureau withdrew its challenge of Staples’
The Bureau obtained six gas station divestitures from Parkland regarding its acquisition of Pioneer;\(^32\) six local divestitures from Iron Mountain regarding its acquisition of Recall;\(^33\) two pharmaceutical product divestitures from Teva regarding its acquisition of Allergan;\(^34\) three location/asset divestitures from Crop Production Services (CPS) regarding its acquisition of WendlandAg;\(^35\) four location divestitures from CPS again regarding its acquisition of Andrukow Group Solutions;\(^36\) two gas station/supply agreement divestitures from Harnois regarding its acquisition of Therrien’s gasoline supply agreements;\(^37\) and two gas station divestitures from Couche-Tard regarding its acquisition of gas stations from Imperial Oil.\(^38\)


C. Cartels and other Anticompetitive Practices

2016 saw further guilty pleas related to the Québec construction industry, related to bid-rigging for sewer services, as well as to bid-rigging for a private ventilation contract. Concerning the ongoing auto parts investigation, Shinowa was fined $13 million by the Ontario Superior Court of Justice for bid-rigging related to electronic power steering gears. Nishikawa Rubber pled guilty and was fined USD $130 million in the United States related to sales in both Canada and the US.

D. Abuse of Dominance

In April 2016, the Competition Tribunal (Tribunal) found that the Toronto Real Estate Board (TREB) had engaged in abuse of dominance by restricting access to and use of proprietary Multiple Listing Service data, adversely affecting innovation, quality and range of real estate brokerage services in Toronto. Although TREB did not itself compete in the adversely affected market, the Tribunal found that it had a “plausible competitive interest” in protecting some of its members from new entrants in that market. Following this decision, the Bureau commenced an application against the Vancouver Airport Authority for

43 Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib. 7.
44 In this case, the relevant affected market was real estate brokerage services in Toronto.
45 Commissioner of Competition v The Toronto Real Estate Board, 2016 Comp. Trib. 7 at paras. 279-280.
restricting access for the supply of in-flight catering at Vancouver International Airport, another market in which the alleged dominant firm did not compete.\textsuperscript{46}

In 2016, the Bureau closed its investigation into Google’s online search services\textsuperscript{47} and TMX Group’s restrictions on market data.\textsuperscript{48}

E. Court Decisions

In 2015, the Ontario Court of Appeal ruled that the “discoverability” principle\textsuperscript{49} applied to private actions for damages based on the breach of the cartel conspiracy provisions of the Act, potentially extending the time to advance claims.\textsuperscript{50} In the same case, the court also ruled that the statutory cause of action in the Act did not foreclose the ability of the plaintiff to claim damages pursuant to tort law.\textsuperscript{51}

In certifying the cathode ray tube class action, the Ontario Superior Court of Justice held that “umbrella” purchasers (who purchased alleged cartelized products from non-defendants) had valid causes of action against the named defendants pursuant to restitutionary law.\textsuperscript{52}

\textsuperscript{46} Commissioner of Competition v. Vancouver Airport Authority, Notice of Application (September 29, 2016), Docket No.: CT-2016-015.


\textsuperscript{49} The discovery principle is a common law rule which provides that a limitation period begins to run not necessarily from the defendant’s conduct but from when “the material facts on which [the claim] is based are have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.” See Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation, 2016 ONCA 621 at para. 32.

\textsuperscript{50} Fanshawe College of Applied Arts and Technology v. AU Optronics Corporation, 2016 ONCA 621.

\textsuperscript{51} Ibid., para. 85.

\textsuperscript{52} Fanshawe College of Applied Arts and Technology v. Hitachi, Ltd., 2016 ONSC 5118.
5 China

By Peter Wang & Yizhe Zhang, China

A. Legislative Developments

In 2016, the Draft Amendment of the PRC Anti-Unfair Competition Law (the law hereinafter the “AUCL”, the draft amendment hereinafter the “Draft Amendment”) passed State Council review and is anticipated to be adopted as law during 2017. Notably, the Draft Amendment introduces two controversial new unfair competition behaviors, i.e., abuse of superior market position and unfair competition involving the internet.

B. Mergers

In the first three quarters of 2016, the Ministry of Commerce (“MOFCOM”) unconditionally cleared 259 merger cases, including 197 cases under its simple case procedure. Most cases under the simplified procedure were cleared within phase I of the statutory review period.

In 2016, MOFCOM imposed conditions only on one merger case, while also lifting conditions previously imposed in another case. In SABMiller/ Anheuser-Busch InBev, MOFCOM required that SABMiller divest its 49% interest in


China Resources Snow Breweries to its JV partner. This is the first MOFCOM published decision distinguishing relevant product markets based on mass versus mid-to-high-end brands and defining geographic markets according to individual Chinese provinces rather than as China-wide.

MOFCOM published three penalty decisions for transactions that were not properly notified. Two of those cases involved joint ventures, while the third involved gun-jumping in a two-step acquisition. In all three cases, MOFCOM found that the unnotified transactions did not give rise to competition concerns, and thus only imposed fines and did not require reversal of the transactions.

C. Cartels and other Anticompetitive Practices

In 2016, the National Development and Reform Commission (“NDRC”), the antitrust authority responsible for price-related conduct violations, issued large fines in several high-profile cases, including: (1) a fine of RMB 12 million against Haier for restricting the minimum resale price, in a case where the NDRC explicitly cited as evidence screenshots of text and chat messages contained on employees’ personal devices; (2) a fine of RMB 2.96 million against five natural gas suppliers, including two subsidiaries of China National Petroleum Corp., for abusing their dominant positions in the construction of non-residential

60 See NDRC’s administrative penalty decisions against the Haier, available in Chinese at http://www.shdrc.gov.cn/fzgggz/jggl/jghzcfjdjs/24137.htm?sukey=3997c0719f151520d9d8ab22467f976c98c4d515fe7612d065f5b252164f7724ae2681dc3fe38a088feeff499b492570.
natural gas networks in local markets;\textsuperscript{61} (3) a fine of RMB 1,686,900 against Chongqing Qingyang Pharmaceutical and a fine of RMB 118,300 against Chongqing Datong Pharmaceutical for price fixing and market division,\textsuperscript{62} where the NDRC regarded the two affiliated companies as single economic entity due to their common largest shareholder and common sales manager.

The State Administration of Industry and Commerce ("SAIC"), the antitrust authority responsible for non-price-related conduct violations, fined Tetra Pak RMB 667.7 million for abuse of dominant market position. This is the highest fine imposed by SAIC to date, representing 7\% of Tetra Pak’s relevant sales in China during 2011. The accused conduct included incentives that Tetra Pak employed—performance testing, warranty limitations, accumulative volume discounts, and customized purchase requirements—to encourage customers owning or leasing Tetra Pak packaging equipment to also purchase Tetra Pak’s packaging materials and aftermarket services.\textsuperscript{63}

\textbf{D. Court Decisions}

As of November 28, 2016, courts nationwide had published 611 unfair competition and antitrust decisions, 15 of which were issued under the Anti-Monopoly Law ("AML").\textsuperscript{64}

In Yingding v. Sinopec, plaintiff Yunnan Yingding Bio-energy, a privately-owned bioenergy manufacturer, alleged that Sinopec, a major stated-owned oil

\textsuperscript{61} See NDRC’s administrative penalty decisions against the five natural gas suppliers, \textit{available in Chinese at} \url{http://www.sdpc.gov.cn/xwzx/xwfb/201607/t20160712_811004.html}.

\textsuperscript{62} See NDRC’s administrative penalty decisions against the estazolam case, \textit{available in Chinese at} \url{http://www.sdpc.gov.cn/fzzggz/jgjyfzl/fjjygl/201602/t20160202_774116.html}.

\textsuperscript{63} See SAIC administrative penalty decision against Tetra Pak, \textit{available in Chinese at} \url{http://www.saic.gov.cn/zwgk/ggs/jzf/201611/t20161116_172375.html}.

\textsuperscript{64} See \url{http://wenshu.court.gov.cn/}. 
company, and its Yunnan branch abused their dominant market position by refusing to incorporate plaintiff’s biofuel into Sinopec's distribution system without justification. In 2014, the Kunming Intermediate People's Court ruled in favor of the plaintiff. In 2015, the Yunnan High People's Court reversed the first-instance decision and remanded the case.\(^65\) In 2016, the Kunming Intermediate People's Court rejected all the plaintiff’s claims, finding no abuse of dominance on the grounds that (1) although the defendants had a duty to purchase biofuel from the plaintiff under the energy laws, the lack of implementing rules regarding the sales amount, price, methods, etc. had rendered the defendants practically unable to establish a transactional relationship with the plaintiff, so defendants did not violate such duty by refusing to do so because their refusal to deal was due to objective reasons; and (2) there was no competition relationship between the parties regarding the sales of biofuel so the defendants’ conduct did not give rise to negative effect on competition.\(^66\)

Junwei TIAN vs. Abbott is the first follow-on antitrust civil litigation filed by a consumer following an earlier NDRC decision against baby formula manufacturers including Abbott. The Beijing High People’s Court ruled that the NDRC decision did not identify Carrefour as the other party that agreed with Abbott to implement resale price maintenance, and thus the plaintiff failed to prove the existence of an anticompetitive agreement between Abbott and Carrefour.\(^67\) Therefore the plaintiff did not establish that he suffered loss from his

\(^{65}\) See the full court judgment, available in Chinese at [http://www.pkulaw.cn/case/pfnd_1970324845016952.html?keywords=%E4%BA%91%E5%8D%97%E7%9B%88%E9%BC%8E&match=Exact&tiao=1.  


\(^{67}\) See the full court judgment, available in Chinese at [http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfde-453a-ae0a-a8f22dc22004.](http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfde-453a-ae0a-a8f22dc22004)
purchase of Abbott product at Carrefour as a result of Abbott’s violation of the AML

6 European Union

By Laurie-Anne Grelier & Peter Camesasca, Covington & Burling

A. Legislative Developments

Aside from facing the unprecedented challenge of handling the UK’s Brexit vote, the European Commission (EC) has continued other policy efforts this year. It released the preliminary results of its sector inquiry into online commerce and digital markets, finding that obstacles remain to achieving a borderless EU-wide marketplace and signaling the potential for follow-up enforcement.68 The EC also encouraged national governments to speed up efforts to bring their legal systems in line with EU principles before the end of the year, to further facilitate antitrust damage litigation.69

B. Mergers70

The ongoing wave of telecom transactions has continued to attract close scrutiny after the EC blocked Hutchison’s proposed acquisition of Telefonica UK, a decision which Hutchison is challenging before the EU courts. The EC cleared the proposed Italian joint venture between Vimpelcom and Hutchinson, as well as Belgian operator Telenet’s takeover of BASE, but only after in-depth investigations and securing fix-it-first divestments to allow for the creation of

70 See: EC merger webpage: http://ec.europa.eu/competition/mergers/cases/
new market operators. The deals also further fueled the broader political debate on pan-European telecom integration.

Consolidation in the agrochemical space has equally triggered mounting attention as the EC opened an in-depth investigation into ChemChina’s planned takeover of Syngenta and twice prolonged its ongoing review of the planned Dow-Dupont merger.

C. Anti-Competitive Practices

Cartel fine levels broke new records as the EC imposed fines totaling €2.9 billion (approximately US$3.2 billion) against five companies allegedly involved in the Trucks cartel case, the largest amount fined in a single case. The EC has issued three other cartel decisions thus far in 2016, levying fines totaling nearly €150 million (approximately US$167 million).\(^71\)

The EC also issued its first decision on the controversial issue of price signaling since the Wood Pulp setback more than 20 years ago. It accepted commitments from 14 container shipping carriers to modify their public price announcements, and closed its investigation without making any infringement determination.\(^72\)

D. Abuses of a Dominant Position

Continuing investigations against Google that it commenced in 2010, the EC supplemented its initial charges against the technology company by forming a preliminary conclusion that Google had favoured its own internet comparison shopping products in search result pages. The EC also issued new charges

\(^{71}\) See: EC cartel webpage: http://ec.europa.eu/competition/cartels/cases/cases.html
targeting the company’s practices towards third parties in online search advertising.\(^73\)

### E. Court Decisions

In the first EU judgment on reverse-payment patent settlements, the General Court (GC) upheld the EC’s €146 million fine (approximately US$162 million) against Lundbeck and four generic producers for agreements allegedly aimed at delaying generic entry for citalopram. The GC found that the agreements amounted to market sharing between rivals, such that the EC did not need to demonstrate that they adversely affected competition.\(^74\)

The EU’s highest court, the Court of Justice, clarified in VM Remonts the conditions under which companies can be accountable for their independent agents’ anticompetitive actions.\(^75\) It also gave guidance in Eturas to assess competitor coordination through online platforms and the platform provider’s facilitator role.\(^76\)


7 India

By Vinod Dhall and Mansi Tewari

A. Legislative Developments

This year witnessed a number of measures to further liberalise the merger provisions. The Government extended the target based *de minimis* exemption from filing for acquisitions, while also increasing the thresholds. The regular merger notification thresholds contained in the Act were also enhanced substantially. The Government additionally exempted groups exercising less than 50% of voting rights from the application of section 5 of the *Competition Act*.77 The Competition Commission of India (CCI) amended its merger regulations to clarify the conditions for the exemption from filing for minority acquisitions, provide parties a right of hearing before invalidation of a filing, further ease the filing process and clarify the trigger document for filing in the absence of a binding agreement.78

B. Cartels and Other Agreements

After the Competition Appellate Tribunal (COMPAT) set aside fines imposed by the CCI on cement companies on procedural grounds last year, the CCI re-heard the parties and issued a fresh decision imposing penalties of USD 1 billion on ten cement companies and their trade association for indulging in price-fixing and sharing of commercially sensitive information.79 Trade associations continued to be on the radar of the CCI as penalties for controlling entry into the market were

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77 [http://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf](http://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf)


imposed on a chemist and druggist association in Karnataka. Lupin, a pharmaceutical company was also penalised in this case for entering into an anti-competitive agreement with the association.\textsuperscript{80}

C. Mergers

The CCI imposed a hybrid remedies package as a condition for approval in relation to PVR’s proposed acquisition of multiplex/single screen cinema halls from DT Cinemas. Apart from directing the parties to exclude certain assets from the scope of the deal, the CCI imposed commitments on the parties including an undertaking not to expand in the affected relevant markets for five years, modification of the non-compete clause and removal of a right of first offer to PVR for the seller’s future projects.\textsuperscript{81}

D. Dominance

The CCI initiated an investigation against the Gas Authority of India Limited for alleged abuse of dominance by imposing one-sided and discriminatory terms in its dealings with customers.\textsuperscript{82}

E. Court Decisions

The Delhi High Court brought much needed clarity on the issue of interface between patent law and competition law by ruling that the CCI has jurisdiction to investigate cases of abuse of dominance by standard essential patent holders. It

\textsuperscript{80} \url{http://www.cci.gov.in/sites/default/files/712013.pdf}
\textsuperscript{81} \url{http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-07-288.pdf}
\textsuperscript{82} \url{http://www.cci.gov.in/sites/default/files/Case%2016-20_2016%20S%20281%2029%2003102016.pdf}
also noted that although the two overlap to some extent, there is no irreconcilable conflict between the patent law and competition law in India.\textsuperscript{83}

The CCI suffered setbacks when the COMPAT set aside several of its decisions, both on procedural and substantive grounds. The penalty of USD 258 million imposed by the CCI on Coal India for abuse of dominance was set aside on due process grounds, as a few members of the CCI who signed the order were not present during the hearings. COMPAT also set aside the penalties on Sanofi and GlaxoSmithKline for alleged bid rigging, due to the lack of sufficient evidence.\textsuperscript{84}

8 Japan

By Shigeyoshi Ezaki, Anderson Mori & Tomotsune

A. Legislative Developments

In May, the Japan Fair Trade Commission (JFTC) amended the “Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act” to broaden the scope of conduct that falls within the “safe harbor”\textsuperscript{85} of the Guidelines. According to the new guidelines, some types of non-price related restrictions on distributors (such as restrictions on selling competitive products and area of distribution) will not be illegal if they are imposed by a business entity which is a new entrant in the market or which has a market share of 20% or less.\textsuperscript{86}

\textsuperscript{83} http://lobis.nic.in/ddir/dhc/VIB/ judgement/30-03-2016/VIB30032016CW4642014.pdf
\textsuperscript{84} http://compat.nic.in/Judgements.aspx
\textsuperscript{85} Prior to the amendment, the safe harbor was a market share of less than 10% and ranking lower than 4th place in the relevant market.
B. Mergers

In 2016, the JFTC cleared two cases after Phase II review without conditions: the acquisition of shares by Osaka Steel in Tokyo Kohtetsu, and the business alliance between Nippon Paper Industries and Tokushu Tokai Paper.\(^{87}\) Several other Phase II cases, including the contemplated business integration between JX Group and Tonen General Group,\(^{88}\) are still pending as of the date of writing this chapter.

In June, the JFTC made an unusual statement on Canon’s acquisition of share options in Toshiba Medical Systems, stating that the acquisition was part of an entire acquisition scheme. As Canon had failed to notify the JFTC of the acquisition, the JFTC considered that such activity could lead to a possible violation of the Antimonopoly Act. Though the JFTC decided not to impose a penalty in this case, it issued a caution to Canon and warned companies to notify the JFTC prior to entering similar transactions.\(^{89}\)

C. Cartels and other anticompetitive practices

In March, the JFTC imposed administrative fines of approximately JPY 6.7 billion to 5 out of 7 manufacturers of aluminum and tantalum electrolytic capacitor products that were investigated for cartel conduct.\(^{90}\) This is the only decision issued by the JFTC in 2016 that involved an international cartel.

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\(^{87}\) Press release of the JFTC, January 28, 2016 and March 18, 2016  

\(^{88}\) Press release of the JFTC, March 30, 2016  

\(^{89}\) Press release of the JFTC, June 30, 2016  

\(^{90}\) Press release of the JFTC, March 29, 2016
In November, the JFTC made an announcement that the conduct of One-Blue LLC, a patent pool of standard essential patents (SEPs) relating to Blu-ray discs, constituted an unfair trade practice under the Antimonopoly Act. According to the JFTC, One-Blue, whose patent holders declared that they will license the SEPs on FRAND terms but were not able to reach an agreement as to license fees with Imation (a manufacturer of Blu-ray discs), unlawfully interfered in the transactions between Imation and its distributors in Japan. One-Blue’s conduct involved sending letters to these distributors, warning that the patent holders had a right to demand an injunction against them. The JFTC, however, merely made the above announcement and did not issue an order against One-Blue, as it had discontinued the conduct in question.

D. Court Decisions

In January, the Tokyo Appellate Court rejected an appeal from Samsung SDI (Malaysia) Bhd. in a cartel case relating to the production and sale of television cathode-ray tubes (CRTs) by foreign companies such as Samsung. Samsung which disputed the JFTC’s ability to apply the Antimonopoly Act to foreign companies. The Tokyo Appellate Court ruled that the Antimonopoly Act was

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Press release of the JFTC, November 18, 2016 (Japanese only)
http://www.jftc.go.jp/houdou/pressrelease/h28/nov/16111802.html

92 In 2009 and 2010, the JFTC ordered administrative fines of approximately JPY 4.2 billion against six CRT manufacturers that were involved in a cartel conduct to manipulate the prices of CRTs. This was the first time the JFTC ordered fines against foreign companies. These orders were upheld at the subsequent hearing procedures of the JFTC.

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applicable because the cartel was targeting the Japanese television manufacturers
who were the main purchasers of the CRTs.94

9 Korea

By Youngjin Jung & Gina Jeehyun Choi, Kim & Chang

A. Legislative Developments

During 2016, the Korea Fair Trade (“KFTC”) made a series of amendments
to the leniency regime in cartel investigations. As part of such amendments, on
March 29, 2016, the Monopoly Regulation and Fair Trade Law (“FTL”) was
amended to introduce a new provision that denies leniency benefits a leniency
applicant that had previously benefitted from the leniency program in the last
five years.95 Effective April 15, 2016, the KFTC further amended the leniency
regime to require officers or employees of the leniency applicant to attend the
KFTC hearing and impose non-disclosure obligation on leniency applicants.

On July 26, 2016, the KFTC proposed to amend the Fair Transactions in
Franchise Business Act to, among other things, toll the statute of limitations on
claims that may be brought before judicial courts while mediation is pending.96

94 The Tokyo Appellate Court decision, January 29, 2016 (LEX/DB L07120373). The summary of the
decision is mentioned in the email magazine of the JFTC issued on February 9, 2016 (Japanese only):

95 See KFTC Press Release on Monopoly Regulation and Fair Trade Law, 28 April 2016, available at
=&search_end_date=&search_start_date=

96 See KFTC Press Release on Fair Transactions in Franchise Business Act, 26 July 2016, available at
rpage=1&searchKey=&searchVal=기업결합&stdate=&endate=
B. Mergers

In 2016, the KFTC remained active and continued to strengthen its review of global mergers and acquisitions. During the first half of 2016, KFTC reviewed a total of 272 business combination filings amounting to KRW 266 trillion in value, of which 63 combinations (aggregate value of KRW 253 trillion) involved an overseas entity.97

After the KFTC, in conjunction with the U.S. Department of Justice and MOFCOM, probed into the proposed merger of Lam Research Corp. (“Lam”) and KLA-Tencor Corp. (“KLA-Tenor”) for nearly ten months, Lam and KLA-Tenor formally withdrew their application for approval of the business combination and called off the merger.98

In November of 2016, the KFTC imposed a corrective order with respect to the asset swap deal between Boehringer Ingelheim International GmbH and Sanofi SA and ordered one of the companies to sell off its assets in Korea related to certain pet pharmaceutical products.99


C. Cartels and other Anticompetitive Practices

In March of 2016, the KFTC imposed a KRW 59 million fine against two financial institutions in Korea for colluding on foreign exchange swap bids. This was the first instance of the KFTC imposing a fine against banks for colluding on the foreign exchange market.

In April of 2016, the KFTC imposed a combined fine of KRW 351.6 billion against 13 construction companies, including Samsung C&T and Hyundai Engineering & Construction, for rigging bids in projects to construct liquefied natural gas (LNG) tanks.

D. Dominance

In February of 2016, the KFTC imposed a fine of KRW 3.2 billion against Incheon International Airport Corp. ("Incheon Airport") for abusing its market dominant position against Hanjin Heavy Industries, its contractor in the development of a terminal.
E. Court Decisions

On August 17, 2016, the Seoul High Court overturned the corrective orders and administrative fines charged by the KFTC against three commercial freight vehicle manufacturers for allegedly colluding to fix prices.103

10 South Africa

Lara Granville104

A. Legislative developments

Criminal liability for certain competition law breaches was introduced in South Africa through section 73A of the Competition Amendment Act, No 1 of 2009.105 This provides that directors and persons with management authority which cause a firm to engage in collusion are guilty of an offence and may be liable for a fine and/or imprisonment.106 The amendment had been on the books, waiting for promulgation, since 2009.

The Competition Commission ("Commission") published its final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation.107 The guidelines are intended to provide some certainty on how the Commission will evaluate the public interest consequences of mergers (including impacts on employment).

104 The author would like to thank Roxanne Bain for her assistance.
B. Mergers

The highest administrative penalty to date for failure to notify a merger and prior implementation was imposed by the Competition Tribunal ("Tribunal") when it confirmed a consent agreement between the Competition Commission and Life Healthcare Group (Proprietary) Limited and Joint Medical Holdings Limited in terms of which the parties agreed to pay (R10 million).

The Tribunal approved the mergers between Anheuser-Busch Inbev SA/NV and SABMiller plc ("ABInbev/SABMiller") and Coca-Cola Beverages Africa Limited and Various Coca-Cola Bottling and Related Operations ("Coca-Cola"). The imposition of stringent conditions to address public interest concerns following extensive engagement with the Minister of Economic Development was common to both mergers. In ABInbev/SABMiller, in addition to a moratorium on retrenchments which is to endure indefinitely, the merging parties undertook to invest R1 billion for the development of agricultural outputs and the promotion of black farmers in South Africa. Similarly, in Coca-Cola, the merging parties agreed to establish an enterprise development fund to which they must contribute at least R400 million.

C. Cartels and other anticompetitive practices

After many years of facing multiple competition complaints in relation to its conduct in the flat steel, long steel and scrap metal sectors, ArcelorMittal South Africa Limited ("AMSA") agreed to settle all the complaints against it and pay an

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administrative penalty of R1,5 billion.\textsuperscript{111} This is the largest fine for anticompetitive conduct imposed on a single company in South Africa's history. Furthermore, AMSA agreed to cap its profits over a period of 5 years and committed to R4,5 billion capital expenditure over the same period.

The Commission conducted several dawn raids at companies operating in the glass, packaging and cargo shipping industries as part of its investigations into alleged anticompetitive practices.\textsuperscript{112}

The Commission's market inquiries into the healthcare sector, the retail grocery sector and the liquid petroleum gas industry are still ongoing. The healthcare inquiry panel released papers for comment on medical schemes claims data, market definition for the financing of healthcare and a consumer survey.\textsuperscript{113} The retail grocery inquiry panel has received submissions on its statement of issues.\textsuperscript{114} The Commission has released draft recommendations in the LPG inquiry.\textsuperscript{115}

D. Abuses of dominance

Media24 was found to have contravened section 8(c) of the Act by engaging in predatory pricing to force a rival newspaper out of the market.\textsuperscript{116} As this was Media24's first contravention of section 8(c), an administrative penalty could not be imposed. The Tribunal therefore imposed a "credit guarantee remedy" in terms

\begin{footnotesize}
\begin{enumerate}
  \item Available at http://www.compcom.co.za/healthcare-inquiry/.
  \item Available at http://www.compcom.co.za/retail-market-inquiry/.
\end{enumerate}
\end{footnotesize}
of which Media24 was to ensure that current or new participants in the relevant market affected by Media24's conduct shall be entitled to credit terms with an associate company of Media24. Media 24 has appealed both the finding of a contravention as well as the remedy imposed, while the Commission has lodged a cross-appeal, seeking an order that Media24 contravened section 8(d)(iv) of the Act, namely "selling goods or services below their marginal or average variable cost", rather than section 8(c). This offence does attract an administrative penalty for a first time offender in terms of the Act.

E. Court decisions

In August 2016, the High Court of South Africa ordered South African Airways Limited to pay R104.6 million in damages to Nationwide Airlines Proprietary Limited ("Nationwide") for abusing its dominance in the airline industry and causing Nationwide's demise.\(^\text{117}\)

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11 United Kingdom

By Jonathan Tickner & Jasvinder Nakhwal, Peters & Peters

A. Legislative Developments

In comparison to 2015, when the enactment of the *Consumer Rights Act 2015* substantially changed the landscape for private enforcement of competition law violations, there have been far fewer legislative developments of note. The most significant change of 2016 is yet to occur, when before 27 December 2016 the UK Government are required to implement the EU Damages Directive, which is

intended to harmonise the rules governing private enforcement of competition claims across the EU.

The UK’s private enforcement regime already largely conforms to the Damages Directive, but there are several areas requiring legislative changes in order to bring the UK into compliance. The most significant changes will be codifying the right of defendants to use the passing-on defence, the nature and scope of which is currently unclear under UK law, and giving courts the power to quantify harm where it is excessively difficult for a claimant to do so on the evidence. The Damages Directive introduces a rebuttable presumption that cartels cause harm.\(^{118}\)

Although not a legislative development in itself, the UK’s decision in June to leave the EU has wide-ranging implications for the nature and enforcement of competition law in the UK. Currently, the UK is still subject to the obligation to transpose EU directives into UK law.

\section*{B. Mergers}

In July, the CMA provisionally approved Celesio's takeover of Sainsbury's 277 pharmacies (which are mostly located within Sainsbury’s own supermarkets). In order to avoid a substantial reduction of competition, the CMA has required Celesio, which already operates around 1540 pharmacies across the UK, to sell pharmacies in 12 areas where it currently competes particularly closely with

\(^{118}\) \textit{Ibid.}
Sainsbury's if the takeover is to go ahead. It will not be allowed to close the pharmacies.¹¹⁹

C. Cartels and Other Anti-Competitive Practices

To date, no prosecutions have been brought under the new criminal cartel offence introduced in 2014, but in March an individual, Barry Cooper, pleaded guilty under the old offence as part of an ongoing CMA investigation into price-fixing and market sharing in the supply of precast concrete drainage products.¹²⁰ The CMA decided last year to close its other 2 open investigations into criminal cartels.¹²¹

Civil penalties of £2.2m and £826,000 were imposed on a fridge supplier¹²² and a bathroom supplier¹²³ respectively, for seeking to prevent dealers or retailers offering online discounts. In its civil investigation into a cartel relating to galvanised steel tanks, which was the subject of criminal proceedings last year, the CMA announced that 3 parties had agreed to pay £2.6m in fines.¹²⁴

D. Court cases

In Deutsche Bahn AG v MasterCard Incorporated,¹²⁵ the Court made a number of interesting comments in relation to the use of counterfactuals in competition law cases. MasterCard argued in its Defence that, absent the conduct at issue, its

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¹²¹ Ibid.
¹²⁵ Deutsche Bahn AG & Ors v MasterCard Incorporated & Ors [2015] EWHC 3749 (Ch)
prices would have been no different, to which the claimants replied that this was only so because MasterCard was engaging in a separate form of anti-competitive conduct, about which no complaint had been made in the original claim. The Court found that a claimant may argue that any unlawful aspects of a defendant’s conduct, including those not previously at issue, should not form part of the counterfactual, even if that conduct was not raised in the Defence. Moreover, claimants may be allowed to amend their Particulars to include time-barred allegations about unlawful aspects of the defendant’s conduct, provided any new claims arise out of facts already in issue.

12 United States

By Lisl Dunlop, Manatt, Phelps & Phillips, LLP

A. Legislative developments

The House passed a bill to amend the Clayton and Federal Trade Commission Acts to align the merger review standards and processes for the Federal Trade Commission (FTC) with those of the Department of Justice Antitrust Division (DOJ). The bill is now under consideration by the Senate.

B. Mergers

Both agencies continued their aggressive approach to horizontal mergers, bringing several court proceedings to block transactions, resulting in the transactions being enjoined or abandoned by the parties. The most notable proceedings have been in the healthcare field.

The FTC brought district court proceedings to challenge two significant hospital mergers. In both cases, two different district courts denied the FTC a preliminary injunction on the grounds that the FTC had not met its burden to establish an appropriate geographic market, but both decisions were overturned on appeal. Both appellate courts endorsed the FTC’s approach to geographic market definition, relying on the “hypothetical monopolist” test outlined in the agencies’ Horizontal Merger Guidelines, and stressed that in the hospital merger context the appropriate “consumers” that may be subject to immediate anticompetitive impact are insurers, not patients.

In July 2016, the DOJ sued to block two major transactions in U.S. health insurance markets: the acquisition of Cigna by Anthem, and the acquisition of Humana by Aetna. The transactions would reduce from five to three the number of large, national health insurers in the U.S., raising concerns about restricting competition in plans and services sold to large employers, as well as Medicare Advantage plans. Those cases are being tried in two district court proceedings in late 2016.

C. Cartels and other Anticompetitive Practices

The DOJ has focused its criminal antitrust enforcement on domestic investigations in industries such as public real estate foreclosure and tax lien auctions, water treatment chemicals, heir location services and online poster

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127 F.T.C. v. Penn State Hershey Medical Center, __ F. Supp.3d __, 2016-1 Trade Cases ¶79,616 (M.D. Penn., May 9, 2016); F.T.C. v. Advocate Health Care, 2016-1 Trade Cases ¶79,668 (N.D. Ill., June 20, 2016).
128 F.T.C. v. Penn State Hershey Medical Center, 838 F.3d 327 (3rd Cir. 2016); F.T.C. v. Advocate Health Care Network, __ F.3d __, 2016 WL 6407247 (7th Cir. 2016).
sales. The DOJ also continues to investigate and prosecute companies and executives for their roles in conspiracies in several global industries: automotive parts; cathode ray tubes; capacitors; LIBOR; and “roll-on, roll-off” ocean cargo.

Overall, in 2016 DOJ has collected approximately $400 million in fines, obtained guilty pleas for jail terms for individual corporate executives, and obtained a number of criminal indictments for both individuals and corporations. The DOJ continues to make identifying and punishing culpable individuals a high priority.\footnote{U.S. Dep’t of Justice, ‘Deputy Assistant Attorney General Brent Snyder Delivers Remarks at the Yale Global Antitrust Enforcement Conference,’ (19 February 2016), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.}

D. Court Decisions

American Express successfully appealed a district court decision ruling that the company’s “anti-steering” rules violated antitrust law.\footnote{U.S. v. American Express Co., 838 F.3d 179 (2d Cir. 2016). The anti-steering rules prohibited merchants from encouraging customers to use credit cards other than American Express.} The Second Circuit Court of Appeals said that the lower court incorrectly focused on the impact of the restrictions on merchants without considering the benefits American Express delivers to consumers on the other side of the credit card market. The DOJ and plaintiff states have sought a rehearing en banc.

The Second Circuit also vacated a $147 million district court judgment against two Chinese companies relating to the Vitamin C cartel at the request of the Chinese Ministry of Commerce.\footnote{In re Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2016).} The Second Circuit said that courts are bound to grant deference to a foreign government’s interpretation of its own laws and that the lower court abused its discretion by asserting jurisdiction in the case.