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# The Dominance and Monopolies Review

Fourth Edition

Editors
Maurits Dolmans and Henry Mostyn

Law Business Research

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Fourth Edition

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Maurits Dolmans and Henry Mostyn

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# CONTENTS


**Editors' Preface** ..... vii
*Maurits Dolmans and Henry Mostyn*

**Chapter 1** ARGENTINA ..... 1
*Camila Corvalán*

**Chapter 2** AUSTRALIA ..... 10
*Nicolas J Taylor and Prudence J Smith*

**Chapter 3** BELGIUM ..... 26
*Damien MB Gerard and Thomas Woolfson*

**Chapter 4** BRAZIL ..... 46
*Ana Paula Martinez*

**Chapter 5** CANADA ..... 64
*Arlan Gates and Eva Warden*

**Chapter 6** CHINA ..... 86
*Zhan Hao and Song Ying*

**Chapter 7** COSTA RICA ..... 98
*Edgar Odio*

**Chapter 8** EUROPEAN UNION ..... 108
*Thomas Graf and Henry Mostyn*

**Chapter 9** FINLAND ..... 129
*Anna Kuusniemi-Laine, Salla Mäntykangas-Saarinen and Kiti Karvinen*

**Chapter 10** FRANCE ..... 140
*Antoine Winckler, François Brunet and Frédéric de Bure*

**Chapter 11** GERMANY ..... 160
*Stephan Barthelmess and Tilman Kuhn*

**Chapter 12** INDIA ..... 177
*Anand S Pathak*

**Chapter 13** INDONESIA ..... 189
*Rahmat SS Soemadipradja and Verry Iskandar*

**Chapter 14** ITALY ..... 203
*Matteo Beretta and Gianluca Faella*

**Chapter 15** KENYA ..... 226
*Dominic Rebelo and Ciru Longden*

**Chapter 16** MEXICO ..... 238
*Luis Gerardo García Santos Coy, Mauricio Serralde Rodríguez and Jorge Kargl Pavía*

**Chapter 17** NETHERLANDS ..... 250
*Erik Pijnacker Hordijk*

**Chapter 18** PORTUGAL ..... 268
*Nuno Ruiz and Ricardo Filipe Costa*

**Chapter 19** SLOVENIA ..... 274
*Andrej Fatur and Helena Belina Djalil*

**Chapter 20** SPAIN ..... 286
*Francisco Enrique González-Díaz and Ben Holles de Peyer*

**Chapter 21** TURKEY ..... 301
*Gönenç Gürkaynak*

**Chapter 22** UNITED KINGDOM ..... 314
*Paul Gilbert*

**Chapter 23** UNITED STATES..... 332
*Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon*

**Appendix 1** ABOUT THE AUTHORS ..... 347

**Appendix 2** CONTRIBUTING LAW FIRMS' CONTACT DETAILS ..... 363

# EDITORS' PREFACE

This new edition of *The Dominance and Monopolies Review* tracks the evolution of abuse of dominance rules around the world.[1] The sheer range of global enforcement – from established agencies, such as the EU and the US FTC, to intensifying enforcement in India, China and emerging economies – makes identifying common trends difficult. But books such as the *The Dominance and Monopolies Review* make the task of comparatively analysing developments manageable.

This editorial picks out four such developments. First, the approach competition authorities over the world have taken to assessing product design improvements. Second, the possible expansion of abuse of dominance rules to cover privacy issues. Third, the application of abuse of dominance concepts to essential patents. And fourth, and probably most important, the evolution of the 'object versus effect' dichotomy under Article 102 TFEU.

The first trend is most evident in the different approach that global authorities have taken to reviewing Google's search result designs. In previous years, the US Federal Trade Commission, as well as courts in Brazil and Germany, have found that Google's search result designs improve quality and are pro-competitive.[2] In August 2015, the Taiwanese Fair Trade Commission (TFTC) – which has not shied away from enforcing competition laws against high-tech multinational companies such as Microsoft, Intel and Apple in the past[3] – reached a similar conclusion. The TFTC reviewed Google's display of a map in its search results and

1 The editors and their firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

2 Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc, FTC File Number 111-0163, 3 January 2013; District Court of Hamburg, Ref 408 HKO 36/13 *Verband der Wetterdienstleister v. Google*, order of 4 April 2013; and *BUSCAPE v. Google*, 18th Civil Court of Sao Paulo, Lawsuit no. 583.00.2012.131958-7, Summary Judgment Ruling.

3 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

found that the design provides 'convenience to users and is in line with users' benefits. It's hard to say it's anticompetitive and adopt the refusal to trade concept in this case.'[4] And in Canada, the Competition Bureau completed its 'extensive' investigation of Google, finding that Google's designs and algorithmic changes 'improve user experiences' and are 'beneficial to consumers'. The Bureau found no evidence that Google's designs 'had an exclusionary effect on rivals'.[5]

Likewise, the High Court of Justice of England and Wales in the *Streetmap* litigation, discussed in the United Kingdom chapter of this book, found that Google's display of a map in its search results is lawful. Mr Justice Roth held that displaying a map was 'pro-competitive' and an 'indisputable' product improvement.[6] Showing a map was not reasonably likely to have an appreciable effect on competition in the market for online maps, and, even if it had such an effect, the design change was in any event objectively justified because it improved quality. Alternative solutions to creating this improvement, such as showing rivals' maps in search results, were not 'effective or viable' because they would, among other things, create delays and reduce quality.[7] These cases are important because they involve a range of jurisdictions and products, and were based on alleged theories of harm that applied well beyond the specific facts of the case.

By contrast, in April 2015, the EU Commission issued a statement of objections focused on the allegation that Google favours its own comparison shopping service in its search results. The design the EU Commission challenges is an ad format for merchant product offers that Google shows with pictures and prices. Google's response to the statement of objections argued and showed that this design constitutes a product improvement valued by users and advertisers. It therefore represents competition on the merits.[8]

Interestingly, the statement of objections appeared to contemplate as a remedy that Google should show ads 'sourced and ranked by other companies within [Google's] advertising space'.[9] But showing rivals' ads would seem, on its face, to lead to the same quality problems as showing rivals' maps that Roth J found in *Streetmap*. And showing rivals' ads should be legally justified only where a company has a duty to supply its rivals (i.e., where an input is indispensable and there is no other way for rivals to reach customers), as the TFTC held in its investigation. Yet given the many ways that websites can attract traffic, from direct traffic to apps, and from social networks to partnerships with others sites, the statement of objections did not argue the essential facility standard applied to Google. If a duty to supply

4 PARR, 'Taiwan regulator finds no antitrust infringement in Google's search, Play Store practices', 5 August 2015, available at: http://app.parr-global.com/intelligence/view/1287782.

5 See the Canada chapter of this book; and Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google, 19 April 2016, available at: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

6 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 84. Leave to appeal denied, *Streetmap v. Google*, Court of Appeal (per Richards LJ), A3/2016/1210, 27 May 2016. See the United Kingdom chapter of this book.

7 Ibid., paragraphs 155, 166 and 171.

8 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

9 Google Blog, 'Improving quality isn't anti-competitive', 27 August 2015, available at: http://googlepolicyeurope.blogspot.co.uk/2015/08/improving-quality-isnt-anti-competitive.html.

rivals is imposed beyond the essential facility situation, this would very substantially change the law and commercial practice, potentially dampening investments in new solutions and assets to the detriment of consumers.

In India, the Director General of the Competition Commission issued a preliminary report challenging various aspects of Google's search and ad businesses. The report is, in the words of former Commissioner Ashok Chawla, 'only a beginning'; it allows Google to be heard on the preliminary concerns before the Commission comes to a final decision.[10] Given the thriving competition evident in India's online sector,[11] the CCI's action arguably risks condemning a product improvement without evidence of competitive or consumer harm. As David Balto commented, the 'question is whether Indian regulators will risk chilling innovation and harming competition in such a vibrant sector, particularly as there has been no harm to Indian consumers'.[12]

As to the second development, in March 2016, the German Bundeskartellamt initiated proceedings against Facebook on suspicion that its terms of services on the use of user data constitute an abuse of dominance.[13] Intriguingly, the press release suggests that the Bundeskartellamt views Facebook's use of data to be an exploitative abuse – allegedly, because Facebook's conditions of use violate data protection provisions. The Bundeskartellamt's investigation will look at whether Facebook unlawfully collects 'large amounts of personal user data' that enables its advertisers 'to better target their advertising activities'.[14] Of course, companies using customer data to better target their ads is not a new (or even online-specific) phenomenon.[15] But the Bundeskartellamt proceedings are the first case of which we are aware where it has been suggested that this may constitute an abuse of dominance.

On its face, the Bundeskartellamt's investigation has some appeal: why should extracting and using personal data in a way that harms consumers be any different to charging an excessive price or imposing unfair terms? That Facebook's terms of service may also violate data protection laws is no barrier – a dominant company setting fire to its rival's factory to solidify its dominance can also be an abuse of dominance, even if it also violates other laws. But it is arguably an inefficient use, and perhaps even a misuse, of regulatory powers to use

10 *Economic Times*, 'Probe Report on Google only a 'beginning' says CCI chief Ashok Chawla', 18 September 2015, available at: http://articles.economictimes.indiatimes.com/2015-09-18/news/66677418_1_cci-chief-ashok-chawla-investigation-arm-director-general-google-case.

11 See, e.g., *The Economist*, *India Online*, 'The battle for India's e-commerce market is about much more than retailing', 5 March 2016, available at: www.economist.com/news/leaders/21693925-battle-indias-e-commerce-market-about-much-more-retailing-india-online?cid1=cust/ednew/n/bl/n/2016033n/owned/n/n/nwl/n/n/NA/n.

12 D Balto, 'Opinion: Why India Must Not Put Tech Growth At Risk', 6 November 2015, available at: www.law360.com/articles/723998/opinion-why-india-must-not-put-tech-growth-at-risk.

13 Bundeskartellamt Press Release. 2 March 2016. www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.htm. See the Germany chapter of this book.

14 Ibid.

15 *Forbes*, K Hill, 'How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did', 16 February 2012, available at: www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#306f377a34c6.

competition law to pursue privacy goals. This appears to be what the Court of Justice had in mind when it held that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.'[16] Indeed, the goals of privacy law – to protect individuals from government and enterprise control – differ from the goals of competition law, which is to protect the generation of consumer welfare through the competitive process.

More fundamentally, it seems questionable whether – as some have suggested[17] – data always have the inherent qualities of a 'currency' or are the 'oil' of the new economy. For example, data are not fungible; they have no durable value; and they are not freely transferrable.[18] Moreover, consumers do not give data as 'payment' because data are (typically) non-rivalrous: if I tell a service that I live in Hampstead, like to sail, and enjoy Robertson Davies' Deptford trilogy novels, nothing prevents me from telling that to another service. The data are not 'used up' like oil. Accordingly, the value that a service like Facebook might derive from data comes not from the data as such (which is ubiquitous),[19] but from the skill in extracting information from the data, translating that information into usable knowledge, and turning that knowledge into action.[20] How the Bundeskartellamt grapples with these various issues, including in its joint study on 'big data' with the French competition authority, could prove one of the more fascinating developments of 2016 and beyond.

The third development concerns the circumstances in which the owner of an SEP can seek injunctive relief for a violation of its IP. As discussed in the European Union chapter of

16 Case C-238/05, *Asnef-Equifax*, paragraph 63. See also COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 164 'Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules.'

17 'Personal data is the currency of today's digital market', speech by Vice Commissioner Reding, 'The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age – Innovation Conference Digital, Life, Design', Munich, 22 January 2012. Available at: http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm.

18 As one study found, '90 per cent of the data in the world today has been created in the last two years [...] 70 per cent of unstructured data is stale after only 90 days.' RIS, Analytics Insights Deliver Competitive Differentiation (July 2013) (quoting Citi Research 2013 Retail Technology Deep Dive).

19 Every few days, humanity now generates five exabytes worth of data. This roughly corresponds to the volume of data produced in the entire period between the dawn of time and 2003. See 'La concurrence dans l'economie numerique', Fabien Curto Millet, A Quoi Sert La Concurrence. See also EU Commission, 'Digital Economy – Facts & Figures', March 2014: 'The digitization of products and processes has made a huge and exponentially increasing amount of data available'.

20 See, e.g, EU Commission Expert Group on Taxation of the Digital Economy, 13 and 14 March. ('The existence of data alone is not sufficient to generate value; the value comes from maximising the efficacy of use from the actual data; but the challenge is deciding at which point and where the value is created. Furthermore, the data that is the lifeblood of the digital economy is increasingly being generated by users, rather than the companies themselves.')

this book, on 6 July 2015, the Court of Justice issued its *Huawei* ruling, setting out a test that aims to strike the balance between maintaining effective free competition and safeguarding proprietors' IP.[21] The ruling confirms at the highest judicial level that EU competition law matters in SEP licensing. In particular, where SEP holders are in a dominant position, and commit to grant licences on FRAND terms in the context of a standardisation procedure, they are subject to special conditions before they can seek an injunction against potential infringers without violating Article 102 TFEU.[22]

The *Huawei* judgment, however, leaves a number of issues unaddressed, including when an SEP holder will be considered dominant in the first place. The judgment provides no guidance on what amounts to FRAND terms. Instead, it requires national courts to play a greater role by assessing whether offers made by parties are objectively FRAND. And the judgment, intriguingly, by relying on a theory of harm based on 'legitimate reliance', leaves open the possibility that the principles apply beyond SEPs to other essential IPRs.

The first national decision applying the Huawei ruling was the Düsseldorf Regional Court's decision in *SISVEL v. Qingdao Haier Group*. The Court held that Qingdao was infringing SISVEL's patents in certain mobile telecommunication standards. Qingdao raised the FRAND defence set out in *Huawei*. The Court found, however, that Qingdao had not provided appropriate security nor rendered accounts when SISVEL rejected Qingdao's counter-offer. The *Huawei* conditions were therefore not satisfied. The Court left open the question whether SISVEL's offer was FRAND in the first place. That is, the Court found that the rendering of accounts and security must be complied with independently of the specific details of the offer and the counter-offer. Arguably, this finding conflicts with the Court of Justice's requirement in *Huawei* that the SEP holder's offer, and the SEP user's counter-offer, must be on FRAND terms.[23]

How national courts apply the *Huawei* ruling – including the issues of whether a SEP confers a rebuttable presumption of dominance, and what constitutes FRAND prices and terms, and whether similar principles could apply to patent assertion entities' use of non-SEP essential patents – is likely to be one of the hotly litigated issues of 2016 and onwards. In the UK, for example, the UK High Court in *Unwired Planet v. Huawei* is scheduled in October 2016 to determine how to apply FRAND licensing principles for patents said to be essential to 2G, 3G and 4G.

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21 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*.

22 These conditions are as follows: (1) SEP holders must alert SEP users of the alleged infringement; (2) SEP users must indicate a willingness to conclude a licence on FRAND terms; (3) SEP holders must present a detailed written offer for a licence on FRAND terms; (4) SEP users must respond promptly and in good faith, and not engage in delaying tactics; (5) if the SEP user does not accept the offer, it must submit, promptly and in writing, a specific counter-offer on FRAND terms; (6) if no agreement is reached, an SEP user that is already using the technology must provide appropriate security and be able to render accounts; (7) the amount of the royalty may, by common agreement, be determined by a independent third party; and (8) SEP users can challenge validity, essentiality, and infringement in parallel to licensing negotiations and also after conclusion of the licence agreement.

23 Case C-170/13 *Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH*, paragraphs 63 and 65.

As to the fourth development, the previous edition of this book commented on the threatened re-emergence in Europe of form-based analysis, at the expense of the economic analysis of foreclosure effects in abuse cases, following the General Court's decision in *Intel*. We suggest that a close reading of recent EU case law, including the Court of Justice's decision in *Cartes Bancaires*, reveals that the exemption from the obligation to show anticompetitive effects applies only in a limited set of circumstances – specifically, for conduct that is 'by its very nature' abusive. This means, effectively, that based on past practical experience and economic theory, the conduct is always restrictive and harmful to consumers, and never justified except in unusual circumstances.

This reading is reinforced by recent decisions of the Court of Justice and national courts. In *Post Danmark II*, the Court of Justice confirmed that even in the case standardised, retroactive, conditional rebates applied by a statutory monopoly in a market protected by high barriers to entry,[24] anticompetitive effects must be 'likely' or 'probable'. [25] The Court also rowed back from Advocate General Kokott's fulmination against the as-efficient competitor test – a 'disproportionate use of the resources of the competition authorities and the courts' – finding the test to be 'one tool amongst others for the purposes of assessing whether there is an abuse'.[26]

The Court did state, however, that 'fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified'.[27] But the statement is limited to conduct that it is 'by its very nature abusive'.[28] Under consistent EU case law, these exceptional cases are already exempted from the requirement to show anticompetitive effects – so the judgment in this sense is not that surprising. In addition, the Court's rationale for dismissing an appreciability threshold was that 'the structure of the market has already been weakened by the dominant undertaking, so any further weakening of the structure of competition may constitute an abuse of a dominant position.'[29] The reasoning is therefore limited to cases where the effects of the conduct are alleged to occur on the same market as which the company is dominant. The finding would not apply, for example, to related-market abuses. In the *Streetmap v. Google* judgment discussed above, Roth J distinguished *Post Danmark II* for this precise reason. Roth J held that it would be 'perverse' to find that a product improvement on a dominant market 'contravenes competition law because it may have a *non-appreciable* effect on a related market where competition is not otherwise weakened'.[30]

Roth J's finding for related market abuses appears axiomatic. As the editors of this book, we would see the law go further: like leading commentators, [31] we consider that there

24 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraph 73.

25 Case C-23/14 *Post Danmark A/S v. Konkurrencerådet*, judgment of 6 October 2015, paragraphs 67 and 74.

26 Ibid., paragraph 61.

27 Ibid., paragraph 73.

28 Ibid., paragraph 73.

29 Ibid., paragraph 72.

30 *Streetmap v. Google* [2016] EWHC 253 (Ch), paragraph 98. Emphasis in original.

31 See, e.g., Whish & Bailey, *Competition Law* (8th edition, 2015), page 212; and Faull & Nikpay, *The EU Law of Competition* (3rd edition, 2014), paragraph 4.929.

should be a *de minimis* threshold in all Article 102 cases, as there is for Article 101 and the assessment of mergers. This would neither undermine existing rules concerning 'by nature' abuses, nor lead to unreasonable burdens on the European Commission or national competition authorities. And it would remove the contradiction that EU competition law may theoretically apply to conduct that cannot be shown to have even a miniscule effect on competition.

We would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fourth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions 2016 holds for the next edition of this book.

**Maurits Dolmans and Henry Mostyn**
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London
June 2016

# Chapter 1

# ARGENTINA

*Camila Corvalán*[1]

## I INTRODUCTION

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, which was inspired by the provisions of the United States Antitrust Law. This was replaced by Act No. 12,906, which was itself replaced by Act No. 22,262 in 1980. The enforcement of Act No. 22,262 led to the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC).[2]

The provisions envisaged by Act No. 22,262 were mostly focused on the analysis of anticompetitive conduct; in this law some anticompetitive conducts could be sanctioned with imprisonment and there was no mergers and acquisitions control. Finally, on 25 August 1999, Act No. 22,262 was abrogated and a new antitrust regulation was enacted: Act No. 25,156 (the Antitrust Law).

The Antitrust Law was complemented by Decree No. 89/2011, which was later amended by Decree No. 396/2001. The Antitrust Law and the decrees were complemented by regulations regarding the procedures established by them.[3] Some of the sections of the Antitrust Law were modified in September 2014 with the sanction of Act No. 26,993. The new regulation abrogated imprisonment and established a mergers and acquisitions control procedure. Further, the Constitution of Argentina promotes the effective competition between markets in Argentina.

The above is the complete regulatory plexus that currently controls both anticompetitive conduct and mergers and acquisitions procedures in Argentina.

Currently, the relevant authority that enforces the Antitrust Law and its complementary regulations is the Secretary of Trade of the Ministry of Production, assisted by the CNDC.[4]

---

1 Camila Corvalán is an associate at Estudio Beccar Varela.

2 Act No. 22,262, Section 6.

3 Resolution No. 40/2001; Resolution 26/2006; Resolution 164/2001.

4 Section 17, Act No. 25,156.

The CNDC is the agency that investigates both anticompetitive conduct and mergers and acquisitions procedures by formal requirement of the Secretary of Trade. The Secretary of Trade has full power to investigate and decide on the existence of anticompetitive conduct, either at the request of a party or *ex officio*.[5]

Investigations of anticompetitive conduct or analyses of mergers and acquisitions made by the CNDC end up with a non-binding recommendation to the Secretary of Trade. The Secretary of Trade will make the final decision in the case, subject to analysis. The decisions of the Secretary of Trade may be appealed by parties to the judicial courts.

## II YEAR IN REVIEW

In April 2015, the Secretary of Trade of the Ministry of Production and the CNDC (the Antitrust Authorities) investigated the case *Clorox Argentina SA s/Infracción Ley 25.156 (C.1122)*.[6] This case was initiated by a claim filed by a local producer of bleach named Queruclor SRL Company (Queruclor) against Clorox Argentina SRL Company (Clorox).

Queruclor's claim was based on refusal to sell and the elimination of discounts or bonuses on their products to wholesalers that sell both Queruclor and Clorox bleaches. This refusal implied that, in practice, wholesalers must choose between commercialising Queruclor or Clorox bleach. In this particular market, the wholesale sector represents 58 per cent of the market. Queruclor stated in its claim that Clorox's behaviour implies a patent abuse of dominant position. This conduct, stated Queruclor in its claim, implied a real prejudice for the company itself and for consumers, who as a consequence of the conduct have to pay more for the product in question.

The CNDC defined, as a first point of the analysis, the market involved in the investigation. The market involved was defined as bleach, a homogenous product where competition is mainly focused on the price of the good.[7] Further, the CNDC determined that Clorox held 50 per cent of the market share in the relevant market, consequently holding the dominant position.

The dominant position of Clorox, according to the Antitrust Authorities, allowed it to impose higher prices and limit the amount offered in the Argentine domestic market of bleach, directly harming the welfare of consumers. The Antitrust Authorities framed the above-mentioned as an exclusionary conduct.

Clorox was sanctioned by the Secretary of Trade with a fine of 50 million Argentine pesos; further, as a complementary sanction, the Secretary of Trade imposed on Clorox the publication of the resolution regarding the investigation in the largest newspaper of Argentina for one day. Finally, the Secretary of Trade obliged Clorox to arbitrate the means to prevent conducts, acts or behaviours of any kind that involved a restriction on the commercialisation of bleach.

To set the amount of the fine imposed on Clorox, the Secretary of Trade took into account the responsibility of Clorox against the unlawful conduct, the degree of knowledge

5 Section 20, the Antitrust Law.

6 Secretary of Trade, National Commission for the Defence of Competition, 17 April 2015 *Clorox Argentina SA s/ Infracción Ley 25.156 (C.1122).*

7 Secretary of Trade, National Commission for the Defence of Competition, 17 April 2015 *Clorox Argentina SA s/ Infracción Ley 25.156 (C.1122)*, page 58.

of matter derived from the regulator in the consummation of their economic activity, the company's ability to pay, the company's assets, the company's size and the background of the company regarding conduct, acts and behaviours before the Antitrust Authorities. The decision of the Antitrust Authorities was appealed. This case is currently being analysed by judicial courts.

## III MARKET DEFINITION AND MARKET POWER

According to legislation and usual practices in Argentina, the analysis of anticompetitive acts, conduct or behaviours follows a procedure in which, as a first issue, the definition of the scope of relevant product and geographic market involved in the investigation is highlighted. Following this, the Antitrust Authorities focus mainly on the analysis of market power and market shares of the companies involved in the case.

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

The relevant market of the product shall comprise of all products and services that consumers consider interchangeable or substitutable by reason of their characteristics, price and intended use. More precisely, sets of products or services constitute the same relevant market when said services or products are substitutes, from both the demand[8] and supply[9] side.

Having met the stage of defining the relevant market for the product, the next step is to do the same in geographical terms. Defining a geographic market involves the same

8 From the point of view of substitution of demand, which is to say from the perspective of the user or consumer, the analysis will look to determine for each of the products and services offered by the companies involved, the degree of substitution that exists between them and for goods and services offered by other companies. So that the replacement of the demand side is to be effective, consumers must evaluate the products as able to meet the same needs, under similar consumption opportunities. It is worth mentioning that substitutability from the user's point of view depends, then, on the attributes of the product or service and the similarities or differences that are observed for those offered by other vendors. The degree of substitution given in these attributes is usually the result of a qualitative analysis that assesses to what extent consumers or users of a service provided by a supplier 'replace' that supplier when it raises its prices close to 10 per cent in a steady manner or not transitory manner.

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

considerations that have been mentioned above for the definition of the relevant market for the product, with the difference that the substitution estimate, in this case, is in terms of physical distances or capabilities of displacement, for the users as well as the producers.

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

## IV ABUSE

### i Overview

The Antitrust Law applies to all behaviours that have effects in the Argentine territory. This means that the law is applied not only to acts and behaviours that occur in Argentine territory but also to certain acts or behaviours that take place in other countries and that have effects on the Argentine market. The current national government has declared that it intends to modify some of its sections – mostly the ones regarding thresholds for mergers and acquisitions notification.

The Antitrust Law does not prohibit conducts *per se*; conducts must be analysed in all cases by the rule-of-reason criteria.

Section 1 of the Antitrust Law establishes:

> *The following actions or behaviours are prohibited and shall be penalized according to the rulings of this Act: actions or behaviours, however expressed, relating to the production and exchange of goods or services, the purpose or effect whereof is to limit, restrict, forge or distort competition or access to the market or constituting abuse of dominant position in a market, so that damages may result to the general economic interest. This section comprises, to the extent the conditions of the foregoing paragraph are met, the obtention of significant competitive advantages through the infringement of other rules, as declared by an administrative act or final judgment.*[10]

Section 1 of the Antitrust Law focuses on unilateral actions, as well as bilateral or multilateral actions.

The two basic offences under the Antitrust Law are the limitation, restriction, distortion of competition or accessing to the market, and the abuse of dominant position. To be illegal, the two offences have to be able[11] to cause damage to the 'general economic interest'; this concept, while included in the Antitrust Law, is not defined in the text of the Antitrust Law and has been interpreted, on several occasions, by courts and scholars in various ways. Currently, the undefined term 'general economic interest' is likened to 'consumer welfare', which may be damaged if a conduct, act or behaviour has the potential to cause or increase in price or reduction of the offer of the relevant product defined in the framework of an investigation.

10 Section 1 of the Antitrust Law.

11 This concept was confirmed by the Supreme Court of Justice *in re A Gas y Otros c/AGIP Argentina SA y Otros s/ Infracción Ley 22.262*.

Section 2 of the Antitrust Law details 14 practices that are, to the extent that they fit in any event described in Section 1, anticompetitive. It is important to state that this list is not taxative; any conduct shall be considered anticompetitive when actions of Section 1 are involved.

Chapter 2, Section 4 of the Antitrust Law is exclusively focused on dominant position. The definition of dominant position is stated in the Antitrust Law as follows:

> *For the purpose of this Act, one or more persons are understood to have a dominant position when for a certain type of product or service it is the only one to offer or ask in the national market or in one or more parts of the world or, when not being the only one, it is not exposed to a material competition or, when due to the degree of vertical or horizontal integration it is in a position to determine the economic viability of a competitor sharing the market, in detriment of the latter.*[12]

To establish the effective existence of dominant position, Section 5 details a number of circumstances that shall be taken into account at the moment of analysing the position:

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

*b* The existence of regulatory restrictions that limit access to products or the offer, or demand in the markets involved.

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

Dominant position is not forbidden by the Antitrust Law – the prohibition is only focused on the abuse of such dominant position. The abuse of dominant position is a unilateral conduct and, therefore, is not reliant on any kind of contract or agreement with competitors or third parties. According to the Antitrust Authorities, unilateral conduct 'stumbles upon the difficulty of determining to what extent such conducts are part of a valid or competitive behaviour or constitute or result manoeuvres whose meaning is simply to create impediments to entry or reside of competitors in a market'.[13]

**ii Exclusionary and exploitative abuse: price discrimination.**

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

Abuse of a dominant position based on exclusionary conduct, acts or behaviours triggers a concern for the Antitrust Authorities that is based principally on the exclusion of one or more competitors in the market involved. In cases of abuse of dominant position based on

12 Section 4 Antitrust Act No. 25,156.

13 Secretary of Trade, National Commission on Defense of Competition, 'Clorox Argentina S.A. s/ Infracción Ley 25.156 (C. 1122)'.

exploitative conduct, the concerns of the Antitrust Authorities include price discrimination, imposition of exploitative prices and any other conduct that tends to differentiate prices and commercial conditions between competitors in the same market.

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

In general terms, and considering the provisions established in Section 4 of the Argentine Antitrust Law, a company is considered to have a dominant position when it is the only supplier of certain goods or services, or when, as a consequence of the vertical or horizontal degree of integration, it is able to determine the economic feasibility of a competitor or participant on the market.

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

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

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

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

As said before, there is no specific prohibition in the Antitrust Law for having a position of dominance, just for the abuse of it. Therefore, companies that have a dominant position should avoid participating in what may be considered as abusive conduct. Such conduct may include, but is not limited to:

*a* refusing to accept orders without objective reasons that justify such refusals;

*b* selling at prices that are equal to or below cost;

*c* imposing abusive contractual conditions;

*d* lowering prices temporarily ('predatory pricing');

*e* applying temporary discounts or better conditions in specific areas with the aim of eliminating actual or potential competitors;

*f* applying different prices or sales conditions in similar scenarios (price discrimination); and

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

The most important case in Argentine competition history regarding the abuse of a dominant position involved exploitative conduct, specifically, price discrimination, in the 2002 case *National Commission for the Defence of Competition v. Yacimientos Petroliferos Fiscales*.

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

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

## V REMEDIES AND SANCTIONS

### i Sanctions

Infringements of the Antitrust Law regarding the abuse of a dominant position may result in harsh consequences for both the infringing company and its individual employees. Under the current legislation, fines for infringement of the Antitrust Law range from 10,000 pesos to 150 million pesos.

To determine the amount of the fine, the Antitrust Authorities take into account:

*a* the loss suffered by all individuals who were affected by the unlawful activity;

*b* the benefit obtained by all the individuals who were involved in such an activity; and

*c* the value of the assets involved, and which belonged to said individuals at the time of the infringement.

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

Further, the companies are liable for the acts of their employees (even those who are not in a managerial position) that are performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of the surveillance commission who contribute, encourage or permit an infringement are joint and severally liable regarding the imposition of the fine.

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

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

### ii Behavioural remedies

As mentioned above, the Antitrust Authorities may enforce conditions aimed at neutralising the distortionary aspects of competition or may ask the judge that the offending companies be dissolved, liquidated, deconcentrated or divided.

## VI PROCEDURE

Abuse of dominant position cases mostly occur through a filing made by any natural or legal person. Notwithstanding this, the investigation may also be initiated *ex officio* by the Antitrust Authorities.

The complaint must be filed before the Antitrust Authorities, detailing, among formal requirements, the complaint subject, the facts that found the complaint and the legal basis considered for filing the claim.

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

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

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

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

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

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

## VII PRIVATE ENFORCEMENT

Section 51 of the Antitrust Law states that individuals and companies that have been affected by anticompetitive conduct have the right to sue in judicial courts and claim for damages.[14] At the time of writing there are few private actions that have been initiated to claim damages.

14 Section 51, the Antitrust Law.

As occurs in other laws within the area of antitrust, the private individual or company that sues in judicial courts must reveal not only the infringement relating to the Antitrust Law but also demonstrate and quantify the damage suffered as a result of the alleged practice.

There is still much to do and explore in relation to such actions in Argentina. It is expected that new cases will be initiated in the coming years.

## VIII FUTURE DEVELOPMENTS

The current national government has declared that it intends to modify some of the sections of the Antitrust Law – mainly those regarding thresholds for mergers and acquisitions notification. Clemency programmes are also being analysed by the Antitrust Authorities.

# Chapter 2

# AUSTRALIA

*Nicolas J Taylor and Prudence J Smith*[1]

## I INTRODUCTION

In Australia, unilateral market conduct issues are primarily regulated by Section 46 of the national competition statute, the Competition and Consumer Act 2010 (Cth) (CCA). Section 46 prohibits a corporation with substantial market power from taking advantage of that market power for one of three proscribed purposes:

*a* eliminating or substantially damaging a competitor;
*b* preventing or deterring the entry of a person into that or any other market; or
*c* deterring or preventing a person from engaging in competitive conduct in that or any other market.[2]

While the prohibition is drafted with reference to competitors, consistent with the approach in Europe in abuse of dominance cases, Australian courts have made clear that the primary concern of the provision is to protect consumers and the competitive process itself, not particular competitors who may be affected by an exercise of market power.

The CCA also provides specific prohibitions in relation to predatory pricing[3] and exclusive dealing such as refusal to supply or to deal with rivals, bundling or anticompetitive litigation.[4]

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1 Nicolas J Taylor is a partner and Prudence J Smith is of counsel at Jones Day. The authors wish to thank Jason A Beer for his generous assistance in preparing this chapter.

2 Competition and Consumer Act 2010 (Cth) Section 46(1) (CCA), formerly known as the Trade Practices Act 1974 (Cth).

3 CCA Section 47.

4 CCA Section 46 (1AA).

### i Proposals for change

Recently, the Australian government released a comprehensive review of the CCA (the Harper Review), which recommended changes to Section 46 including:

*a* expanding the 'purpose' element to a 'purpose, effect or likely effect' test;

*b* removing the 'take advantage' element;

*c* providing the Australian competition regulator (ACCC) with the power to authorise conduct that may otherwise be prohibited by Section 46 where there is a net public benefit from the conduct; and

*d* shifting the legislative focus from damage to a specific competitor to damage to the competitive process itself.[5]

In March 2016,[6] the federal government announced that it intends to introduce legislation to adopt a 'purpose, effect or likely effect' test for Section 46. However, the amendments are not supported by the opposition and will not be introduced to Parliament before an election in mid-2016. These amendments are in part intended to remedy a significant perception that the ACCC has not been able to take enough Section 46 actions under the current prohibition, and of those that it has taken, it has had a relatively low success rate[7] (discussed further in Section VIII, *infra*).

## II YEAR IN REVIEW

The ACCC chair has recently restated that investigating potential cases of misuse of market power[8] continues to be a high priority, while confirming that the regulator has a number of in-depth investigations into potential breaches already underway.[9] The ACCC and private litigants have also taken a number of matters to court over the past year in relation to misuse of market power.

Of particular note, the ACCC is currently waiting on judgment in its appeal against findings by the Federal Court of Australia at first instance in the *Pfizer* matter. At first instance the Federal Court found that Pfizer did not pursue its course of conduct for the substantial purpose of deterring or preventing a person from engaging in competitive conduct, or to substantially lessen competition, but instead to remain competitive in the market.[10]

Two other significant misuse of market power matters were resolved with admissions from the respective parties. The first was in the *Visa Worldwide* matter, where the ACCC had alleged breaches of Sections 46 and 47 of the CCA. Visa had imposed conditions on

5 2015 Australian Competition Policy Review Final Report.

6 http://malcolmturnbull.com.au/media/joint-media-statement-prime-minister-treasurer-and-assistant-treasurer-comp.

7 C Coops, 'A fly in the ointment for the ACCC? Implications of the Cement Australia decision for the interpretation of Section 46' Australian Journal of Competition and Consumer Law (2015) 23 AJCCL 83.

8 Rod Sims, 'ACCC compliance and enforcement priorities for 2016' (Speech delivered at the Committee for Economic Development of Australia, Sydney, 23 February 2016).

9 Rod Sims, 'ACCC compliance and enforcement priorities for 2016' (Speech delivered at the Committee for Economic Development of Australia, Sydney, 23 February 2016).

10 *Australian Competition and Consumer Commission v. Pfizer Australia Pty Ltd* [2015] FCA 113.

financial institutions wishing to participate in its payment card network, which prevented them from using Dynamic Currency Conversion (DCC) services to process transactions involving currency conversions.[11] Prior to trial, the parties reached an agreement, whereby Visa admitted that its conduct in restraining the use of DCC in relation to point of sale payment transactions contravened Section 47(2), and the ACCC decided not to pursue the remaining allegations under Section 46.[12]

The maximum penalty that could have been imposed was 10 per cent of Visa's annual turnover, A$33.1 million. The Court ultimately accepted the parties' joint submission that the contravention was of 'mid-range seriousness', and determined that a pecuniary penalty of A$18 million, as well as A$2 million in costs, was appropriate.[13]

The second matter to be dealt with by admission was the *Little Company of Mary Health Care Ltd* (LCMHC) matter. LCMHC operated the Calvary Health Care Riverina Private Hospital, which provided a range of hospital services, including day surgery services. The LCMHC by-laws provided that medical practitioners wishing to use the day surgery services at Calvary Riverina Private Hospital required LCMHC accreditation.[14] From March 2011 to October 2015, the by-laws also included terms giving LCMHC the qualified ability to refuse to grant accreditation, or to revoke accreditation, where a practitioner owned or controlled an entity that was in competition with the services provided by the respondents.[15] The respondents admitted that this amounted to exclusive dealing in breach of Section 47, and the ACCC did not press any further allegations.[16] The Federal Court made a declaration of contravention, on an undertaking by LCMHC to remove the infringing terms from its by-laws.

There have also been two private actions under Section 46 that are of note. Ocean Dynamics Charter Pty Ltd brought a private enforcement action under Section 46 against Hamilton Island Enterprises Limited in 2015.[17] Hamilton Island Enterprises provided berthing facilities at the Hamilton Island Marina (the Marina) for yachts owned by Ocean Dynamics. In 2014, Hamilton Island Enterprises informed Ocean Dynamics that it would not renew the berthing agreement, then later advised Ocean Dynamics that it would be prohibited from berthing its yachts at the Marina without the agreement. Ocean Dynamics brought an application for an interlocutory application seeking to restrain Hamilton Island Enterprises from preventing Ocean Dynamics from berthing its yachts at the Marina, relying on Section 46 of the CCA. The substantive proceedings were dismissed by consent before trial in July 2015.[18]

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11 *Australian Competition and Consumer Commission v. Visa Inc* [2015] FCA 1020, [2].

12 *Australian Competition and Consumer Commission v. Visa Inc* [2015] FCA 1020, [3].

13 *Australian Competition and Consumer Commission v. Visa Inc* [2015] FCA 1020, [124]-[126].

14 *Australian Competition and Consumer Commission v. Little Company of Mary Health Care Limited* [2015] FCA 1144, [15]-[16].

15 *Australian Competition and Consumer Commission v. Little Company of Mary Health Care Limited* [2015] FCA 1144, [2], [20].

16 *Australian Competition and Consumer Commission v. Little Company of Mary Health Care Limited* [2015] FCA 1144, [30]-[31].

17 *Ocean Dynamics Charter Pty Ltd v. Hamilton Island Enterprises Limited* [2015] FCA 460.

18 Commonwealth Courts, Applications for file <www.comcourts.gov.au/file/Federal/P/QUD281/2015/actions>.

A second private enforcement action relating to Sections 46 and 47 was brought by Power Grid Cables Pty Ltd against Endeavour Energy. On 30 December 2015, Endeavour Energy removed Power Grid Cables' underground distribution cables from its Approved Materials List, which lists electrical products it approves for use in electrical works that are, or will be, connected to its network.[19] Power Grid Cables claimed that Endeavour Energy was effectively requiring customers to obtain cables from a single supplier, and this amounted to misuse of market power or third-line forcing in breach of Sections 46 and 47.[20] Final judgment in this matter has not been delivered.

***Table 1: Significant decisions of the authorities***

| *Sector* | *Investigating authority* | *Conduct* | *Case opened* | *Penalty* |
|---|---|---|---|---|
| Finance | ACCC | Exclusive dealing by Visa Worldwide by imposing conditions restricting financial institutions from using Dynamic Currency Conversion services. | February 2013 | Declaration of contravention.<br><br>Pecuniary penalty in the sum of A$18 million. |
| Health | ACCC | Exclusive dealing by Little Company of Mary Health Care Limited, and its subsidiary Calvary Health Care Riverina, by imposing by-laws regulating the use of Calvary day surgery facilities by medical practitioners. | December 2014 | Declaration of infringement on undertaking that the respondent will delete the infringing clauses. |
| Tourism | Private enforcement | Allegation by Ocean Dynamics that refusal by Hamilton Island Enterprises to allow Ocean Dynamics to berth its yachts in Hamilton Island Marina amounted to a misuse of market power. | May 2015 | Interlocutory injunction granted.<br><br>Matter discontinued before trial. |

***Table 2: Active competition authority cases***

| *Sector* | *Investigating authority* | *Conduct* | *Case opened* |
|---|---|---|---|
| Pharmaceuticals | ACCC | Alleged misuse of market power (through rebates and bundling) and exclusive dealing in relation to Pfizer's supply of Lipitor to community pharmacies before the expiry of its patent. | February 2014 |
| Energy | Private enforcement | Alleged misuse of market power and third-line forcing by Endeavour Energy by requiring customers to obtain cables from a single supplier. | February 2016 |

19 *Power Grid Cables Pty Ltd v. Endeavour Energy* [2016] NSWSC 34, [4], [11]-[13].

20 *Power Grid Cables Pty Ltd v. Endeavour Energy* [2016] NSWSC 34, [21].

## III MARKET DEFINITION AND MARKET POWER

The prohibition against misuse of market power contained in Section 46 of the CCA applies only to corporations that have a 'substantial degree of power in a market'.

Courts in Australia have tended to consider the analysis of market definition and market power together.

### i Market definition

Sections 46(4)(b) and 4E of the CCA provide that, for the purposes Section 46, a market is 'a market for goods or services' that:

*a* includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services; and

*b* is a market in Australia.

Given the definition of 'market' in the CCA, analysis focuses initially on identification of substitutes. Both the ACCC and Australian courts often commence analysis of the borders of a market using the hypothetical monopolist test (HMT).[21] The HMT examines the effect of a small but significant non-transitory increase in price (SSNIP) on a hypothetical monopolist in a market for the good or service in question.

Owing to the input-intensive nature of the HMT analysis, the ACCC limits its inquiry in most cases to examining a list of product and geographic characteristics that tend to satisfy the test.[22] This analysis consists of physical characteristics and portability, respectively, but also economic metrics such as cross-elasticity of demand.

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

### ii Market power

Unlike most other jurisdictions, there are no statutory or court-based market-share presumptions. Proof of market power in Australia always needs to proceed on the basis of a full economic analysis. Australian courts place significant focus on the existence and scale of barriers to entry in determining to what extent an entity possesses market power.[23] Courts have also placed weight on other evidence of related but distinct indications of market power, including:[24]

*a* the ability of the firm to raise prices above the supply cost without rivals taking away customers in due time;

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21 See, e.g., ACCC's Merger Guidelines (2008), 17–18 and *ACCC v. The Australian Medical Association Western Australia Branch Inc* [2003] FCA 686; 199 ALR 423 at [305].

22 ACCC's Merger Guidelines.

23 *ACCC v. Boral Ltd* [1999] FCA 1318 at [140]-[148]; See, also, *ACCC v. Pfizer Australia Pty Ltd* (CAN 008 422 348) [2015] FCA 113; 323 ALR 429.

24 *Eastern Express Pty Ltd v. General Newspapers Ltd* (1992) 35 FCR 43, 62-63.

*b* the extent to which the corporation's conduct in the market is constrained by that of competitors or potential competitors;
*c* the market share of the corporation (although not determinative by itself);[25] and
*d* the existence of vertical integration.

An important element of the analysis is determining whether market power is substantial in nature. For market power to be 'substantial', courts have held that it needs to be 'real and of substance rather than trivial or minimal',[26] or put another way, 'large or weighty' or 'considerable, solid or big'.[27]

The statute also makes clear that multiple entities may possess substantial market power simultaneously in any given market.[28] Further, amendments to the statute in 2007 sought to clarify that a corporation may be considered to have a substantial degree of market power by virtue of its ability to act in concert (whether as a result of formal agreement or understanding, or otherwise) with others.[29]

## IV ABUSE

### i Overview

The prohibition in Section 46 requires not only satisfaction of the three elements of market power, conduct and a proscribed purpose, but a connection between those elements such that the entity is taking advantage of its market power.[30]

Section 46(6A) provides the following non-exhaustive list of factors the court may consider to determine whether a corporation has taken advantage of market power:

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

25 A market share of 30 per cent has been of the referred to as indicative of market power in *Boral Besser Masonry Ltd v. ACCC* [2003] HCA 5; 215 CLR 374.
26 *Mark Lyons Pty Ltd v. Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581.
27 *Dowling v. Dalgety Australia Pty Ltd* (1992) 34 FCR 109.
28 CCA subsection 46(3D).
29 CCA subsection (3A); Explanatory Memorandum, Trade Practices Legislation Amendment Bill (No. 1) 2007.
30 *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) 205 CLR 1; [2001] HCA 13, [44].

Section 46(1) focuses on the purpose of the conduct, rather than the effect. Accordingly, it is necessary to show an intention to achieve a result,[31] rather than the fulfilment of that intention.[32]

While courts have taken a range of approaches to determining purpose, including assessing conduct on a subjective basis,[33] it appears likely that the position going forward is that while there are subjective elements to assessing purpose, the ultimate test is objective.[34] In the *Telstra Corporation* case, the Federal Court placed weight on Section 46(7), which provides that the court may find that the corporation has taken advantage of its market power for a proscribed purpose where that purpose is ascertainable only by inference from the corporation's conduct, the conduct of any other person, or from other relevant circumstances. The Court took the approach that if, upon consideration of the nature and substance of conduct, it can be said that the substantial purpose for that conduct was a proscribed purpose, or if such a purpose can be inferred under Section 46(7), it is not necessary to consider the subjective reasons for the conduct.[35]

It is important to note that to contravene Section 46(1), the proscribed purpose need not be the sole purpose for the conduct, merely a substantial purpose.[36] If the conduct was motivated by both a legitimate and a proscribed purpose, and both are substantial purposes, the corporation will have contravened Section 46(1).[37] However, Section 46(1) will not be contravened where a corporation was motivated entirely by a legitimate purpose, or dual purposes where the proscribed purpose was not substantial.[38] For example, in *Dowling v. Dalgety Australia Ltd*, the respondents' dominant purpose was to use their valuable asset without sharing it with a person who had no proprietary interest in it, and restricting competition was found to be a subsidiary purpose.[39]

### ii Exclusionary abuses

***Predatory pricing***

Predatory pricing may be dealt with under the general misuse of market power prohibition in Section 46(1) or the specific prohibition in Section 46(1AA) introduced with respect to predatory pricing in 2007. However, it is necessary under both provisions to establish that a corporation undertook predatory pricing behaviour for a proscribed purpose.

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

32 *Australian Competition & Consumer Commission v. Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339; [2003] FCAFC 149, [333]; *Australian Competition & Consumer Commission v. Baxter Healthcare Pty Ltd* (2008) 170 FCR 16; [2008] FCAFC 141, [171].

33 *ASX Operations Pty Ltd v. Pont Data Australia Pty Ltd* (No 1) (1990) 27 FCR 460; [1990] FCA 515, [39]-[47]; *Eastern Express Pty Limited v. General Newspapers Pty Limited* (1992) 35 FCR 43; [1992] FCA 138, [83]. *Dowling v. Dalgety Australia Ltd* (1992) 34 FCR 109; [1992] FCA 35, [106].

34 *General Newspapers Pty Ltd v. Telstra Corporation* (1993) 45 FCR 164; [1993] FCA 473, [67].

35 *General Newspapers Pty Ltd v. Telstra Corporation* (1993) 45 FCR 164; [1993] FCA 473, [71].

36 CCA Section 4F.

37 *Mark Lyons Pty Ltd v. Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581; [1987] FCA 282.

38 *Top Performance Motors Pty Ltd v. Ira Berk* (Queensland) Pty Ltd (1975) FLR 286; *Dowling v. Dalgety Australia Ltd* (1992) 34 FCR 109; [1992] FCA 35.

39 *Dowling v. Dalgety Australia Ltd* (1992) 34 FCR 109; [1992] FCA 35, [148].

Section 46(1AA) specifically provides that a corporation that has a substantial share of a market must not supply or offer to supply goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying them, for the purpose of:

*a* eliminating or substantially damaging a competitor or a related corporation;

*b* preventing the entry of a person into that or any other market; or

*c* deterring or preventing a person from engaging in competitive conduct in any market.[40]

Courts have not been required to consider the Section 46(1AA) prohibition and there is a great deal of uncertainty as to what would constitute a 'substantial share of a market' or a 'relevant cost'. The statute provides limited guidance identifying that the court may have regard to the number and size of competitors.[41]

The last significant predatory pricing matter taken to court by the ACCC was decided in 2003 before the introduction of Section 46(1AA). The decision of the High Court in Boral set a high bar for predatory pricing cases, essentially ruling out an ability to infer anticompetitive purposes from prolonged pricing below marginal cost, and instead requiring that a proscribed prohibited purpose be established.[42]

The lack of predatory pricing cases taken since the introduction of Section 46(1AA) in 2007 suggests that the legislative amendments have done little to lower the bar set by the High Court under the general prohibition.

***Margin squeeze***

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

***Exclusive dealing***

The CCA specifically prohibits all corporations from, in trade or commerce, engaging in the practice of exclusive dealing, where such conduct has the purpose, or would have the effect or likely effect, of substantially lessening competition.[43]

A refusal to supply may not substantially lessen competition if it does not alter the market structure by raising barriers to entry or reducing price competition, and is unlikely to substantially lessen competition if it is refusal to supply one of a number of competing retailers in a generally competitive market.[44]

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

40 CCA Section 46(1AA).

41 CCA Section 46(1AB).

42 *Boral Besser Masonry Ltd v. ACCC* [2003] HCA 5.

43 CCA Section 47(1).

44 *Outboard Marine Australia Pty Ltd v. Hecar Investments (No 6) Pty Ltd* (1982) 66 FLR 120; [1982] FCA 265.

*a* supplies, or offers to supply, goods or services at a particular price or at all, or gives or allows, or offers to give or allow, a discount, allowance, rebate or credit, on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services, (or a related corporation) will acquire goods or services directly or indirectly from another person (not being a related corporation);[45] or

*b* refuses to supply goods or services at a particular price or at all, or to give or allow a discount, allowance, rebate or credit, for the reason that the person (or a related corporation) has not acquired, or has not agreed to acquire, goods or services directly or indirectly from another person (not being a related corporation).[46]

Exclusive dealing conduct notified to the ACCC may be immunised unless the ACCC is of the opinion that the likely public benefit of the conduct will not outweigh the likely detriment.[47]

***Tying and bundling***

A tying scheme may fall within one of the exclusive dealing provisions discussed above if it has the purpose or likely effect of substantially lessening competition. If a corporation with market power grants a discount on condition that the purchaser acquires other goods from it or a third party, such a tying or forcing arrangement may contravene Section 46(1) or Section 47(1) of the CCA.

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

***Refusal to deal***

To contravene Section 46(1), there must be a connection between a refusal to deal and market power. A court may consider the business rationale for the refusal and whether the corporation would have refused to deal even if they were subject to competitive constraints in the market. In particular, where there was a cooperative relationship between parties and a party with substantial market power terminates the dealings, a court may require evidence of some change in circumstances justifying the refusal to continue.

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

Refusal to license intellectual property rights can also attract Section 46(1) if the criteria are met.[48]

**iii Discrimination**

Price discrimination was specifically prohibited by the former statutory regime if it was likely to have the effect of substantially lessening competition. This provision was repealed in

45 CCA Section 47(6).

46 CCA Section 47(7).

47 CCA Section 93.

48 *NT Power Generation Pty Ltd v. Power and Water Authority* (2004) 219 CLR 90; [2004] HCA 48, [84]-[85].

1995 following a government report concluding that price discrimination generally enhances economic efficiency except in cases otherwise falling within Section 46.[49] Price discrimination will only be prohibited if there is a misuse of market power for one of the prescribed purposes (e.g., market foreclosure). It will not constitute taking advantage of market power if it is justified by efficiency considerations.

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

### iv Exploitative abuses

Mere exploitation of market power by charging the maximum price the market will bear does not generally fall within Section 46(1), provided it does not take advantage of market power for a proscribed purpose such as to damage competitors.[50] Different considerations may apply where a monopoly input supplier competes in a downstream market and the high price charged has an exclusionary purpose and is associated with price discrimination or a price squeeze.

For example, BHP was held to have contravened Section 46(1) by offering to supply QWI with Y-bar at an 'excessively high' price, which would have made it impossible for QWI to compete with BHP in the downstream rural fencing products market.[51]

## V REMEDIES AND SANCTIONS

### i Sanctions

Section 76 of the CCA provides that a contravention of a provision of Part IV ('restrictive trade practices'), including Section 46, can lead to pecuniary penalties of the largest of the following:

*a* A$10 million;

*b* where the Court can determine the value of benefits that have been obtained that are reasonably attributable to the contravening act or omission, three times the total value of the benefits; or

*c* where the Court cannot determine the value of benefits that have been obtained, 10 per cent of the annual turnover of the offender over the previous 12 months.[52]

In addition, a person who suffers loss or damage as a result of a contravention of Section 46 can recover the amount of the loss or damage against the offender.[53]

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49 Repealed by the Competition Policy Reform Act 1995 (Cth) following recommendation of the 'Hilmer' Independent Committee of Inquiry, National Competition Policy (AGPS, Canberra, 1993) 79.

50 *Pont Data Australia Pty Ltd v. ASX Operations Pty Ltd* (1990) 21 FCR 385, 419.

51 *Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co Ltd* (1989) 167 CLR 177; [1989] HCA 6.

52 CCA Section 76(1A)(b).

53 CCA Section 82.

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

**ii Behavioural remedies**

The CCA also allows for the court to grant an injunction prohibiting a corporation from engaging in contravening conduct, or requiring a corporation to engage in particular conduct, where it is satisfied that the corporation has engaged in, or is proposing to engage in, conduct that constitutes or would constitute a contravention of the restrictive trade practices provisions.[54] In addition to imposing fines and injunctions, the court can also make the following orders:

*a* a declaration in relation to the operation of Section 46;[55]

*b* non-punitive orders, being community service orders, probation orders, orders for disclosure of information or orders requiring the offender to publish an advertisement on the terms specified in the order;[56]

*c* an adverse publicity order in relation to a person who has been ordered to pay a fine for a contravention of Section 76; and[57]

*d* a disqualification order preventing a person from managing corporations for a period the court considers appropriate.[58]

The court may also make such orders as it thinks appropriate against the offender pursuant to Section 87 of the CCA if the court considers that the orders will compensate the person who made the application or prevent or reduce the loss suffered, or likely to be suffered, by such a person.[59] These orders may include:

*a* voiding a contract or certain provisions of a contract;

*b* varying a contract;

*c* refusing to enforce any or all of the provisions of a contract; or

*d* an order directing the person who contravened Section 46 to refund money, return property, pay the person who suffered loss the amount of the loss or repair or provide services or parts for goods that had been supplied to the person who suffered the loss.[60]

**iii Structural remedies**

The CCA does not currently provide any structural remedies for contraventions of Section 46.[61]

54 CCA Section 80(1)(a)(i).

55 CCA Section 163A(1)(a).

56 CCA Section 86C.

57 CCA Section 86D.

58 CCA Section 86E.

59 CCA Section 87(1).

60 CCA Section 87(2).

61 CCA Section 81.

## VI PROCEDURE

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

### i Investigating and gathering evidence

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

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

### ii Power to obtain information, documents and evidence

Section 155 of the CCA is the ACCC's most widely used mandatory information-gathering power. It gives the ACCC the power to require a person to provide information, documents and give evidence relating to a possible contravention, where the ACCC has reason to believe that a person is capable of doing so. Failure to comply with a notice is an offence punishable by a fine or imprisonment,[62] and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

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

### iii Enforcement

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

### iv Undertakings

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

### v Court proceedings

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

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

62 CCA Section 155(7).

However, few cases concerning breaches of Section 46 have been fully litigated as commencement of legal proceedings often encourages parties to resolve the matter by negotiating and settling a statement of agreed facts and consent orders.[63]

## VII PRIVATE ENFORCEMENT

### i Overview

Notwithstanding that the CCA provides a ready means of enforcement for private litigants, private actions have historically been few in number.[64] Further, while it is increasingly common for high-profile ACCC proceedings to trigger subsequent private damages suits (in 'piggy-back' proceedings),[65] private enforcement remains underutilised: of the five court decisions handed down in the last year that invoke Section 46, only two have resulted from private actions.[66]

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

### ii Availability and remedies

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

Section 82 permits private litigants to seek damages for loss or damage suffered due to the conduct of another party in contravention of Section 46.[67] Section 80 also permits private litigants to seek an injunction restraining a party from engaging in certain conduct, or compelling a party to do a certain act or thing, so as to prevent or stop a breach of Section 46.[68] Injunctive relief may be appropriate where a litigant wishes to prevent another party from initiating or continuing on a course of conduct, or to compel the other party to engage in some positive action (like in the case of a refusal to deal) in response to conduct that may amount to a misuse of market power.[69]

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63 See, for example, *Australian Competition and Consumer Commission v. Ticketek Pty Ltd* [2011] FCA 1489.

64 Caron Beaton-Wells and Kathryn Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35 UNSW Law Journal 648, 648, 648.

65 Caron Beaton-Wells and Kathryn Tomasic, 'Private Enforcement of Competition Law: Time for an Australian Debate' (2012) 35 UNSW Law Journal 648, 649.

66 *Power Grid Cables Pty Ltd v. Endeavour Energy* [2016] NSWSC 34 (www.austlii.edu.au/au/cases/nsw/NSWSC/2016/34.html) and *Ocean Dynamics Charter Pty Ltd v. Hamilton Island Enterprises Limited* [2015] FCA 460 (www.austlii.edu.au/au/cases/cth/FCA/2015/460.html).

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

68 CCA Section 80(1).

69 Such as in the recent case of *Ocean Dynamics Charter Pty Ltd v. Hamilton Island Enterprises Limited* [2015] FCA 460 (www.austlii.edu.au/au/cases/cth/FCA/2015/460.html) in which

### iii Calculation of damages

Courts are largely guided by general common law principles in assessing damages.[70] In order to rely upon Section 82, the person must have suffered actual loss or damage (thus potential damage is not sufficient).[71] Secondly, there is a causal requirement that this loss or damage was sustained by the other party's contravention. If it is found that such loss or damage has been incurred, then the court must quantify the loss, even if this requires a degree of approximation or conjecture. Finally, in accordance with general principles governing damages, loss or damage under Section 82 encompasses economic or financial loss but may also extend to consequential loss that arises directly from the impugned conduct.[72]

### iv Availability of collective actions

There are no competition law-specific collective actions, but collective actions to enforce the CCA are available under the general provision for commencement of representative proceedings.[73] A collective action may be commenced only if:

*a* seven or more persons have claims against the same person; and

*b* the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

*c* all the claims give rise to a substantial common issue of law or fact.

In relation to standing, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a collective action.[74] Further, actions are subject to an opt-out regime, so that potential claimants who fall within a class definition will be members of that class unless they opt out. Though it should be noted that in some cases, class definitions will be sufficiently narrow that they in effect require claimants to opt in (by defining members as those who have made arrangements with a certain funder or engaged a particular law firm).

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

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the Federal Court granted an interlocutory injunction to restrain the respondent from preventing the applicant from using a marina (after the respondent decided not to renew a business licence agreement with the applicant). The applicant had a *prima facie* case on the basis that the respondent's refusal to deal constituted the taking advantage of market power (the marina services market) for a proscribed purpose (either eliminating or substantially damaging the applicant in the luxury yacht market or deterring them from competitive conduct in that market) (at [8]).

70 *Norcast SárL v. Bradken Limited* (No 2) (2013) 219 FCR 14, 89-90 [301]-[303] (www.austlii.edu.au/au/cases/cth/FCA/2013/235.html); *Marks v. GIO Australia Holdings Limited* (1998) 196 CLR 494, 526-527 [95] (www.austlii.edu.au/au/cases/cth/HCA/1998/69.html).

71 *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514, 526.

72 *Wardley Australia Ltd v. Western Australia* (1992) 175 CLR 514, 525-526, 544; *Frith v. Gold Coast Mineral Springs Pty Ltd* (1983) 65 FLR 213, 232 (www.austlii.edu.au/au/cases/cth/FCA/1983/28.html).

73 Section 33C of the Federal Court Act 1976 (Cth).

74 Section 33D of the Federal Court Act 1976 (Cth).

### v Interaction between government investigations and private enforcement

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

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

Further, where a party has engaged in an alleged contravention of the CCA, the ACCC has the discretion to accept a formal undertaking from the party under Section 87B of the CCA. Such undertakings are enforceable by a court and subject to monitoring for compliance (as well as being made a matter of public record). However, undertakings do not necessarily require an admission by the party that they have contravened the CCA. Further, undertakings cannot be relied upon in the same way as findings of fact under Section 83. Therefore, where the ACCC chooses to settle a matter administratively, rather than initiate proceedings, they may inadvertently discourage (or reduce the likely success of) a later private enforcement action.

## VIII FUTURE DEVELOPMENTS

In recent years there has been significant debate as to whether the current formulation in Section 46 should be amended to better distinguish between competitive and anticompetitive conduct.[75] This debate continued as a significant feature of the Australian government's Competition Policy Review chaired by Professor Ian Harper (known as the 'Harper Review').[76]

The Harper Review found that in relation to the misuse of market power prohibition, the 'take advantage' element is not a useful test for distinguishing between competitive and anticompetitive conduct, and the focus on purpose rather than effect is inconsistent with equivalent prohibitions in overseas jurisdictions.[77] The Harper Review recommended that Section 46 be reframed to remove the causal 'taking advantage' element and introduce an effects test. The amended provision would 'prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the

75 Such debate is canvassed in various commentary, including Rachel Trindade, Alexandra Merrett and Rhonda Smith, 'The grass is always greener? The effects vs purpose debate resumes' (2013) 14 The State of Competition 1; Professor Allan Fels AO, Nick Taylor and Prudence Smith, 'Simplifying Australia's competition law' (October 2014) Competition & Consumer Law News 94, 98.

76 Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, Competition Policy Review, Final Report (March 2015), http://competitionpolicyreview.gov.au/final-report.

77 Ibid. 337–340.

purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market'.[78] The Harper Review also recommended that courts should be able to take into account whether conduct increases competition, including by enhancing efficiency, innovation, product quality or price competitiveness.[79]

On 16 March 2016, the Australian government announced that it intends to implement the recommendations of the Harper Review in relation to Section 46. It will consult on draft legislation before introducing the final bill to Parliament later in 2016.[80] If the amendment is passed by Parliament, significant developments can be expected moving into 2017, which will likely generate transitional uncertainty in the application of Section 46, at least in the short term. The changes are expected to have far-reaching consequences and will possibly result in Section 46 capturing a broader range of unilateral conduct.

78 Ibid. 62 (Recommendation 30).

79 Ibid.

80 Prime Minister, Treasurer, Assistant Treasurer, Joint Media Statement: Fixing Competition Policy to Drive Economic Growth Jobs (16 March 2016), www.pm.gov.au/media/2016-03-16/joint-media-statement-fixing-competition-policy-drive-economic-growth-and-jobs.

# Chapter 3

# BELGIUM

*Damien MB Gerard and Thomas Woolfson*[1]

## I INTRODUCTION

Abuses of dominance are prohibited under Belgian law pursuant to Article IV.2 of the Code of Economic Law (CEL). Article IV.2 of the CEL is the domestic equivalent of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and its wording is almost identical to the EU provision. As expressly acknowledged by the Belgian legislature, Article IV.2 of the CEL is intended to be a 'carbon copy' of Article 102 of the TFEU to align the interpretation of the Belgian and EU rules on dominance.[2] In effect, such a legal transplant allows companies to rely on EU precedents before the Belgian Competition Authority (BCA) and the Belgian courts,[3] that is, on the European Commission's decisional practice and the case law of the EU General Court and the European Court of Justice.

In the same spirit, Article I.6 of the CEL defines the notion of dominant position in the same way as the European Court of Justice did in *Hoffmann-La Roche*, namely as a position enabling an undertaking to 'prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers'.[4] Again, that transplant was expressly intended by the Belgian legislature to ensure consistency with EU precedents in the application of dominance rules and, therefore, to bring as much legal certainty as possible in an area of competition law that is notoriously unstable.[5] References to EU case law are

1 Damien MB Gerard is a consultant and Thomas Woolfson is an associate with Cleary Gottlieb Steen & Hamilton LLP.

2 Draft Bill on the Protection of Economic Competition, Explanatory memorandum, Doc. Parl., Ch.repr., ord. sess. 2005–2006, No. 2180/001, page 19.

3 Ibid., page 10.

4 Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR p. 461, paragraph 38.

5 Draft Bill on the Protection of Economic Competition, Comments on Articles, Doc. Parl., Ch.repr., ord. sess. 2005–2006, No. 2180/001, page 36 (see discussion on Article 2, which

therefore very common before the BCA and the Belgian courts, which rely heavily on EU precedents in their decisions and judgments irrespective of whether Articles IV.2 of the CEL and 102 of the TFEU are applied jointly or not. In the absence of Belgium-specific guidelines or policy statements on the application of Article IV.2 of the CEL, the Commission Guidance Paper can also be used as a source of authority in the Belgian context,[6] at least as much as it can be relied upon in the EU context.

Moreover, Belgium has so far refrained from taking advantage of the flexibility afforded by Article 3(2) of Regulation 1/2003, that is, from 'adopting and applying on [its] territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'.[7] In particular, Belgian law does not know of notions such as abuses of economic dependency and does not contain specific provisions on unilateral practices applying to special sectors of the economy, such as the energy or telecommunications sectors.[8] However, as is the case at EU level, competition rules apply to state-owned enterprises and undertakings benefiting from special rights 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.[9] According to a theory known as the 'reflex effect' of competition law on the law of unfair trade practices (now included in Book XVII of the CEL),[10] a commercial practice implemented by a dominant company that is considered permissible under Article IV.2 of the CEL (and Article 102 of the TFEU) cannot be considered as an unfair trade practice insofar as the essence of the plaintiff's claim is one of impediment to the functioning of the free market. As a result, the law on unfair trade practice is not supposed to catch unilateral practices that are compliant with Article IV.2 of the CEL.[11]

In theory, Belgian and EU rules on dominance are therefore perfectly aligned.[12] However, in practice, Belgian law is characterised by the same tensions that have long affected the enforcement of dominance rules at EU level, notably between a more formal and a more effects-based approach to the assessment of abusive practices. In particular, Belgian courts

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became old Article 1 of the 2006 APEC).

6 Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJC 45/7 (Commission Guidance Paper).

7 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJEC, 4 January 2003, L 1/1-1/25.

8 As is the case at EU level, compliance with the applicable regulatory framework does not shelter dominant undertakings from the application of competition – including dominance – rules (see, for example, Competition Council, Case 2012-P/K-32, *Publimail, Link2Biz International and G3 Worldwide Belgium/bpost*, 10 December 2012, paragraph 281). See also the presumption of discriminatory abuse of dominance provided for at Article 23 *ter* of the 1999 Electricity Act (Official Gazette, 11 May 1999, page 16,264).

9 Article IV.12 of the CEL.

10 That theory was upheld by the Belgian Supreme Court in 2000 (see Cass., 7 January 2000, *Multipharma/Louis Widmer*, RCJB, 2001, page 255).

11 Some restrictions still apply to consumer sales in relation to, for example, product bundling.

12 For a recent restatement, see Court of Appeal of Brussels, *Bureau d'Assurances Desert/AXA*, 27 February 2014 (Case 2013/AR/1783), paragraph 6, as published in *TBM/RCB*, page 353.

sometimes rely on somewhat formalistic reasoning and tend to interpret Article IV.2 of the CEL in the light of perceived 'fairness' requirements (i.e., without assessing the existence of (likely) anticompetitive effects or the actual incentives of dominant undertakings to engage in foreclosure strategies).

## II YEAR IN REVIEW

Over the 2008–2015 period, approximately one-third of the decisions of the BCA were adopted on the basis of Articles IV.2 of the CEL and 102 of the TFEU. This high average hides a significant drop over the last couple of years, which may bring Belgium more in line with neighbouring jurisdictions and the EU level (independently of commitment decisions). Cases alleging abuses of dominance are also frequently litigated before the Belgian courts, although 2015 brought few developments.

### i Belgian Competition Authority (BCA)

In 2015, the BCA issued two significant decisions on the merits in abuse cases and two interim measure decisions. On 23 September 2015, the Auditorate (the investigative body in the BCA two-tier structure) adopted its first settlement decision in a dominance case involving the Belgian National Lottery (the National Lottery).[13] A number of competitors had complained to the BCA that the National Lottery had leveraged its legal monopoly over public lotteries when launching Scooore!, a new sports betting product. The Auditorate found that the National Lottery had abused its dominant position in two ways. Firstly, the National Lottery had made a one-off use of its public lotteries customers' contact details for promoting the launch of Scooore!. The contact details had been collected through its legal monopoly, whereas competitors were found unable to collect data of a similar scope and nature at reasonable costs and within a reasonable period of time. Secondly, the National Lottery had obtained commercially sensitive information about competitors (i.e., monthly turnover figures and commission level), both before and after the launch of Scooore!, from some of its retailers (for which the sale of lottery products represented a significant share of their turnover). The National Lottery acknowledged these two data-related claims and accepted to pay a fine of nearly €1.2 million.

On 26 March 2015, the Auditorate dismissed Lampiris' complaint alleging price-related abuses of dominance by Electrabel, the former incumbent electricity provider.[14] Lampiris alleged that Electrabel had engaged in excessive pricing, discriminatory pricing and a margin squeeze, by incorporating into its prices on the wholesale electricity market the value of gas emission allowance certificates, which it had received at no charge from Belgian authorities. The BCA dismissed all allegations. Firstly, the partial or full integration of the value of the gas emission allowance certificates did not in itself support a claim of excessive prices, since it was economically justified by the fact that Electrabel could have chosen to sell

13 Auditorate, 22 September 2015, Decision No. BMA-2015-P/K-27-AUD and Decision No. BMA-2015-P/K-28-AUD, *Stanleybet Belgium NV/Stanley International Betting Ltd* and *Sagevas SA/World Football Association SPRL/Samenwerkende Nevenmaatschappij Belgische PMU SCRL* (cases MEDE-P/K-13/0012 and CONC-P/K-13/0013).

14 Auditorate, 26 March 2015, Decision No. ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002).

the certificates under the EU emission trading system (EU ETS). Secondly, the differences between the prices charged by Electrabel on the wholesale electricity market and at retail level were not discriminatory because the services offered on each segment also differed. Thirdly, the BCA found no margin squeeze; applying the 'as efficient competitor test' on the basis of Electrabel's long-run average incremental costs (LRAIC), the BCA found that Electrabel's margins would have remained positive on the retail market, even when paying the prices charged to customers on the wholesale market. The BCA further noted that during the relevant period Lampiris' prices had been equal to or lower than Electrabel's prices, with positive margins, and that Lampiris had grown its market share.

In addition, the BCA College (the decisional body in the BCA's two-tier structure) imposed interim measures in two cases.[15] On 27 July 2015, the BCA provisionally suspended a clause in the General Regulations of the Fédération Equestre Internationale (FEI), the governing body for equestrian sports,[16] that prohibited athletes and horses from participating in non-FEI accredited events for six months prior to any FEI accredited event (the latter being the only events taken into account for ranking purposes). Because of the timing of FEI competitions, athletes were effectively barred from participating in non-FEI recognised competitions, the BCA found, thereby impeding the organisation of a new non-FEI accredited equestrian competition, the Global Champions League (GCL). To support its findings, the BCA considered that the FEI was dominant in the EU market for the organisation and promotion of show-jumping competitions, in light of the fact that it combined commercial activities, as promoter of competitions, with its role as regulator for equestrian sports. According to the BCA, the effect of the exclusivity clause in itself, combined with the lack of transparency of the accreditation procedure, aimed to strengthen the FEI's dominant position, so that it was not manifestly unreasonable to consider that the clause constituted a *prima facie* abuse of dominance.

On 5 November 2015, the BCA imposed interim measures on Telenet NV (Telenet) and Verenigde Veldritorganisatoren (VV) regarding VV's grant to Telenet of exclusive licensing rights for the Superprestige Cyclocross competition (i.e., bicycle races) for five years, without recourse to a bidding contest.[17] Proximus (the former telecommunications incumbent) filed a complaint alleging an abuse of dominance and requested interim measures. The BCA found that Telenet may *prima facie* have acquired a dominant position on the market for the acquisition of cyclocross races broadcasting rights in Flanders (Telenet's catchment area) since it had already acquired rights for the UCI Worldcup cyclocross races for seasons 2016–2017 to 2019–2020. Because of the popularity of Cyclocross races in Belgium and the resulting attractiveness of such broadcasting rights, it was not manifestly unreasonable, according to the BCA, to consider that entering into the Superprestige Cyclocross licensing agreement with VV entailed a strengthening of Telenet's dominant position on the downstream retail market for television services, in breach of Telenet's special responsibility as a dominant player.

15 Interim measures are adopted at the level of the College.

16 College, 27 July 2015, Decision No. ABC-2015-V/M-23, *Interim measures against FEI* (case CONC-V/M-15/0016).

17 College, 5 November 2015, Decision No. BMA-2015-V/M-65, *Interim measures against Telenet* (case MEDE-V/M-15/0024).

The above decisions confirm the BCA's willingness to resort to interim measure decisions, in contrast with neighbouring jurisdictions and the EU level, and in spite of the risk that such measures may disrupt commercial activities for a long period with the risk of a decision on the merits eventually not supporting the initial assessment.

**ii Courts**

Belgian courts also considered abuses of dominance claims in a few damages cases decided in 2015. In *NMBS/Electrabel*,[18] the Court of Appeal of Brussels upheld a lower court judgment finding that Electrabel did not abuse its dominant position on the Belgian wholesale market for electricity, in a case similar to the above-mentioned BCA dismissal decision. As noted, Electrabel incorporated the value of gas emission allowances, received at no cost from Belgian authorities, as opportunity costs in its wholesale electricity price. NMBS, Belgium's national railway company and a major client of Electrabel, claimed damages alleging that Electrabel had abused its dominance by passing on the value of the emission allowances it had received for free. The court rejected Electrabel's defence relying on the existence of the EU ETS as an objective justification, since it found no obligation imposed upon Electrabel by the EU ETS to pass the allowances' opportunity costs on to its customers. Nonetheless, the Court of Appeal of Brussels dismissed the claim, finding that Electrabel's wholesale prices were neither excessive nor unfair. The court held that pricing is abusively unfair and excessive where the pricing is unreasonable as such or compared to an adequate competitive benchmark. The court found that Electrabel had not applied high margins and that incorporating opportunity costs was an economically sensible profit-maximising strategy that could amount to a reasonable economic justification in itself. The court further noted that passing on the opportunity costs also had the potential of attracting international competition to Belgium.

In a long-running damages litigation opposing the former incumbent telecommunications operator, Belgacom, to mobile competitors Mobistar and Base, the Court of Appeal of Brussels ordered the appointment of an expert panel to assist in assessing alleged pricing abuses.[19] The abuses revolved around the different mobile termination rates (MTRs) charged by Belgacom depending on whether the calls were initiated and terminated on its network (on-net) or initiated from other networks and terminated on its network (off-net). Using EU precedents and Commission guidelines, the court defined the relevant market as that for retail mobile services and found that Belgacom was dominant. The court then commented on the alleged abuses and decided that experts were to assist in determining whether Belgacom: offered abusive fidelity rebates, based on abnormal on-net rates without objective economic justifications; engaged in predatory pricing, by incurring unjustified losses on on-net calls; squeezed competitors' margins by absorbing negative margins between its on-net revenues and the MTRs charged to Base and Mobistar; and encouraged abusive network effects, based on potential inconsistencies between the price of on-net and off-net calls compared to their costs. The parties eventually decided to settle their dispute in October 2015, with Belgacom paying a financial compensation to Base and Mobistar without acknowledging liability.

18 Court of Appeal of Brussels, *NMBS/Electrabel*, 14 January 2015 (case 2010/AR/3112), TBM/RCB, 2016/1, page 33.

19 Court of Appeal of Brussels, *Belgacom/Base & Mobistar*, 26 February 2015 (case 2012/AR/1).

| BCA Significant Decisions | | | | |
|---|---|---|---|---|
| *Sector* | *Conduct* | *Decision* | *Auditorate or College* | *Case opened* |
| Wholesale electricity | Pricing abuses by incumbent electricity producer | Dismissal decision | Auditorate | January 2009 |
| Sports betting | Conduct during launch of new sports betting product by monopoly holder on adjacent market | Settlement decision (€1.2 million) | Auditorate | July 2013 |
| Show jumping competitions | Exclusivity clause in federation regulations | Interim measures | College | June 2015 |
| Broadcasting of cycling competitions | Acquisition of long-term exclusive licensing rights without bidding procedure | Interim measures | College | September 2015 |

| BCA Active Cases | | |
|---|---|---|
| *Sector* | *Conduct* | *Case opened* |
| Show-jumping competitions | Exclusivity clause in federation regulations | June 2015 |
| Broadcasting of cycling competitions | Acquisition of long-term exclusive licensing rights without bidding procedure | September 2015 |

## III MARKET DEFINITION AND MARKET POWER

When it comes to market definition and the assessment of dominance, the BCA and the Belgian courts can be generally expected to use the same criteria as the European Commission, the General Court, and the European Court of Justice. As noted, the definition of 'dominance' provided by Article I.6 of the CEL is directly derived from the well-known formula expressed by the European Court of Justice in *Hoffmann-La Roche*. Likewise, as under EU law, it is essential under Belgian law to first define the relevant markets before assessing whether or not an undertaking holds a dominant position.

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

Practically, decisions by the BCA and judgments by the Belgian courts typically describe, first of all, the contentious commercial practice, to ascertain the competitive environment affecting the supply and demand of the affected products or services. Then market definitions previously adopted at European or Belgian level (but also by the competition authorities of

neighbouring countries) are generally considered a useful, if not decisive, starting point.[20] Potentially converging arguments of the parties involved are further likely to influence the market definition.[21] It is also common to consider several possible definitions and to test whether the defendant can be deemed to hold a dominant position under any of them. If this is not the case or is not such as to affect the outcome of the competitive analysis, it is also common practice to leave open the question of the exact definition of the relevant markets. Generally, even though somewhat dated, the Commission's guidance on the definition of relevant markets is frequently relied upon before both the BCA and the Belgian courts, so that arguments relying on such guidance will often carry particular weight.[22]

In line with practices at EU level, the assessment of dominance requires consideration for various factors, which, taken separately, are not necessarily determinative.[23] Among these factors, considerable importance is given to market shares. Although the CEL does not provide for a market-share threshold above which an undertaking would be deemed dominant, the BCA has considered in the past that a market share exceeding 50 per cent entailed a presumption of dominance.[24] Likewise, a market share exceeding 40 per cent, while not decisive in itself, has been viewed as a very important indication of the existence of a dominant position.[25] Conversely, the Authority has also proved that it is open to more sophisticated approaches whereby 'a considerable market share is not automatically considered as equivalent to a dominant position'.[26] Overall, Belgian practice recognises the need to assess the position of the allegedly dominant company in comparison with the

20 See, for example, Decision No. 2010-P/K-42-AUD, Freedom *CVBA/InBev Belgium NV*, paragraph 75. See also the 2014 judgments of Belgian courts summarised in Section II, *supra*.

21 For example, in *Base/Belgacom Mobile*, the Council found that, with regard to the geographical scope, all parties seemed to agree that the relevant market was the Belgian territory, and the Council subsequently adopted such a decision (Decision No. 2009-P/K-10, *Base/BMB*, paragraph 130).

22 Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJC 372/5.

23 Decision No. 2008-P/K-10-AUD, *FEGE/Idelux*, page 6; Decision No. 2009-P/K-10, *Base/BMB*, paragraph 139.

24 For a recent case, see decision ABC-2015-P/K-09-AUD of the Auditorate of 26 March 2015 in case CONC-P/K-09/0002, *Lampiris/Electrabel*, paragraphs 101–118.

25 In *Unie der Belgische Ambulancediensten/Belgische Rode Kruis* (Decision No. 2001-V/M-22), the BCA considered that a market share of above 40 per cent gives a 'strong indication' of dominance, whereas a market share below 30 per cent, in the absence of additional factors, is 'not indicative' of dominance. For a discussion relying on the Commission Dominance Paper, see also Decision No. BMA-2014-P/K-23-AUD of the Auditorate of 2 December 2014 in case MEDE-P/K-11/0027, *NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux)*, *Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros. Studios Leavesden Limited*. For a discussion by a Belgian Court, see, e.g., Court of Appeal of Brussels, Bureau d'Assurances *Desert/AXA Belgium*, 27 February 2014 (Case 2013/AR/1783), *TBM/RCB*, 2014/4, page 352.

26 Decision No. 2009-P/K-10, *Base/BMB*, paragraphs 150 and 154.

position of its competitors and, in particular, to consider the differences in market shares,[27] the evolution in time of market shares, the concentration index of the relevant markets, the existence of barriers to entry, the significance of potential competition, the existence of network effects, the vertically integrated structure of competing firms, their respective economic and financial power, and the nature of the contentious practices as a proxy for the ability to circumvent competitive constraints and as evidence of a possibility to behave independently of competition.[28] The BCA has also relied on earlier findings of dominance in its own decisions.[29]

Finally, there are only a couple of precedents in which the BCA has had recourse to the concept of collective dominance. The main one to date is the 2014 decision dismissing a complaint brought against various movie studios.[30] The complaint against the studios involved digital screening fees paid by major record companies (the majors) to certain theatre owners and 'incubators', but not to the complainant. The Auditorate summarily referred to the *Sony/BMG* criteria and found that they were inapplicable to the case at hand and thus rejected the allegation of collective dominance on the part of the majors. Moreover, it noted that the European Commission had already investigated the substance of the companies' contracts involving digital screening fees and had closed its investigation after the contracts in question were amended.

27 For example, the BCA has considered that a difference of 40 per cent between the market share of a dominant undertaking and its largest competitor constitutes in itself an indication of dominance (see Decision No. 2007-V/M-25-AUD, *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV* and *MSD Overseas Manufacturing Company*, paragraph 21).

28 Decision No. 2009-P/K-10, Base/BMB, paragraph 155 et seq.; Decision No. 2009-P/K-26-AUD, *vzw Federatie HoReCa Wallonie/Vlaanderen et al/InBev NV*, paragraphs 62–64; Decision No.2008-I/O-41-AUD, Electrabel NV, paragraphs 77–78 and Decision No. 2007-V/M-25-AUD, *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV and MSD Overseas Manufacturing Company*, paragraph 21.

29 In its decision of 26 March 2015 in case CONC-P/K-09/0002, *Lampiris/Electrabel*, paragraph 106, the Auditorate relied on a decision of the College of 18 July 2014, which had found Electrabel to be dominant on the wholesale electricity market, in case CONC-I/O-09-0015, *Electrabel/Wholesale Electricity Market* (Decision No. ABC-2014-I/O-15).

30 Auditorate, 2 December 2014, Decision No. BMA-2014-P/K-23-AUD, *NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros Studios Leavesden Limited* (case MEDE-P/K-11/0027). In a recent case, the BCA closed an investigation into potential collective dominance by cargo handling companies at Brussels airport, see Auditorate 17 February 2015, Decision No. BMA-2015-I/O-02-AUD, Cargo handling at Brussels National Airport (case MEDE-I/O-10/0009). For a case mixing concerted practices and collective dominance considerations, see judgment of the Court of Appeal of Liège of 5 February 2009 in case *AGIM/Oxycure*, TBM/RCB, 2009, page 60.

## IV ABUSE

Although the assessment of the abusive character of a specific commercial practice is inherently fact-specific, the BCA and the Belgian courts can generally be expected to use criteria or tests similar to those developed to that effect by the European Commission and the European Court of Justice, even though courts are more unpredictable in this respect. As noted, Article IV.2 of the CEL is modelled on Article 102 of the TFEU and therefore contains a non-exhaustive list of practices that may be considered abusive depending on the circumstances. Moreover, as at EU level, the BCA and courts take as a starting point that holding a dominant position is not problematic *per se*[31] and that 'the existence of a dominant position does not deprive an undertaking in this position from the right to protect its own interests when they are jeopardised',[32] but that it may not abuse its position to exploit consumers or foreclose competition. With respect to exclusionary conduct, the 'as efficient competitor test' is also used as a baseline.[33]

### i Overview

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

### ii Exclusionary abuses

*Exclusionary pricing*

The leading precedent on predation is *Electrabel*.[34] The case involved allegations of predatory pricing on the part of the incumbent gas operator at the time of the liberalisation of the sector. These allegations were dismissed for two main reasons: (1) the short duration of the alleged predation (six months) that was considered too short to implement a credible predatory strategy; and (2) the fact that no alternative operator had exited the market during that period. This case is interesting in three respects. First, it seems to require evidence of actual foreclosure effects, whereas the Commission does not consider that 'it is necessary to show that competitors have exited the market to show that there has been anticompetitive foreclosure.'[35] Second, it suggests that predation implies the possibility to recoup losses at a later stage, whereas the Commission and the European Court of Justice recently reiterated

31 Court of Appeal of Ghent, *Ducati/DDBikes*, 1 October 2014 (case 2010/AR/3351).

32 See, for example, Court of Appeal of Brussels, 3 November 2005, *SABAM v. Productions & Marketing*, TBM/RCB, 2006, No. 4, p. 320.

33 See, for example, Decision No. 2009-P/K-10, Base/BMB, paragraphs 190 and 275 *et seq.*

34 Decision No. 2008-I/0-41-AUD, *Electrabel NV*.

35 Commission Guidance Paper, paragraph 69.

that the prospect of such a recoupment was not a prerequisite for the establishment of an exclusionary strategy. Third, the BCA did not perform a cost analysis in this case but focused on the materiality of the foreclosure effects. Otherwise, it is generally acknowledged under Belgian law that temporary below-cost prices associated with the launch of a new product or the liquidation of stocks, is not abusive.[36]

With regard to margin squeeze, the practice of the BCA is generally in line with the EU case law. The *Lampiris/Electrabel* case discussed in Section II, *supra*, dismissed a margin squeeze claim based on the 'as efficient competitor test'. Besides the *Happy Time* case discussed in the 2013 edition of this chapter, the leading precedent is *Base/Belgacom Mobile* (*BMB*) in which the Authority established a margin squeeze on the basis of a comparison between the wholesale prices charged by BMB on the upstream market for call termination on its network (as charged to competitors) and the retail prices charged by BMB on the downstream market for mobile telephony services to business customers.[37] Considering that BMB is 'a vertically integrated undertaking offering termination services on the upstream market and telephony services on the downstream market' and that 'termination services are an essential input for BMB's competitors', the Authority endeavoured to 'verify whether BMB would be able to make a normal profit on its on-net calls if it had to bear the termination cost charged to its competitors'. Having found that this was not the case during the relevant period, it subsequently referred to EU case law to support the conclusion that: '[a] margin squeeze may, by its very nature, restrict competition.'[38]

***Exclusive dealing***

The offering of rebates characterised as exclusive tends to be treated somewhat strictly by the BCA and courts. Thus, on 27 September 2013, the Court of Appeal of Brussels upheld the BCA's decision of 30 July 2012 imposing a €245,530 fine on Presstalis,[39] a French media distributor, for providing French publishers an extra 2.5 per cent discount (BSC) on top of other volume-based discounts in exchange for the exclusive right to export their magazines to the Belgian, Swiss and Canadian markets for a period of 12 months.[40] The BCA found that the BSC discount had had a 'strong fidelity effect' and enabled Presstalis to foreclose competitors both on the market for the export of French magazines and, through its privileged relationship with Belgian distributor AMP, on the market for the distribution of these magazines in Belgium. While confirming that the proof of likely (and not actual) foreclosure effects on competitors that are at least as efficient as the dominant company was sufficient to establish an abuse, the Court adopted a strict view to the effect that loyalty discounts provided in exchange for exclusivity are as such in violation of Article 102 of the

36 See, for example, Commercial Court of Brussels, 20 November 2006, *Docpharma/Eli Lilly Benelux*, TBM/RCB, 20007, No. 1, page 90.

37 Decision No. 2009-P/K-10, Base/BMB, paragraph 260.

38 Ibid., *Base/BMB*, paragraph 313, which refers to Case COMP/38.734, *Telefonica*, paragraph 543, Case T-271/03, *Deutsche Telekom/Commission*, Section 236 and Case T-203/01, *Michelin*, paragraphs 239 and 241.

39 Competition Council, 30 July 2012, Decision No. 2012-P/K-20, *Tondeur Diffusion/AMP & Presstalis*.

40 Court of Appeal of Brussels, 27 September 2013, *Presstalis SAS*.

TFEU. The court concluded that the BCA correctly qualified the BSC discount as a loyalty discount and ruled that it was sufficient that the BSC discount placed competitors in a less favourable economic position than Presstalis.

With regard to loyalty rebates (not tied to an exclusivity requirement), the BCA adopted an effects-based approach in the *Base/BMB* case, which also involved individualised conditional rebates in the form of free subscriptions, reimbursements proportionate to spending, a reduction on certain types of calls or free calls and text messages. The Authority dismissed the existence of an abuse on the grounds that it was unclear: (1) how said rebates were 'likely to have a real influence on the customer's choice'; and (2) how 'the offers from the dominant undertaking on the one hand, and the competitors on the other hand' compared with each other.[41] Otherwise, volume rebates are generally unproblematic under Belgian law. The Court of Appeal of Brussels has considered, for instance, that 'the existence of a dominant position does not deprive such an undertaking of its right to grant volume-based rebates to its customers depending on the customer's volume of purchases, if there are objective reasons to believe that the conferral of a financial benefit to certain customers is justified by the business volume realised by these customers and the economies of scale to which they give rise'.[42]

***Leveraging***

Leveraging allegations have occasionally been made in Belgium. The *National Lottery* case discussed in Section II, *supra*, examines forms of leveraging by the National Lottery of its legal monopoly on public lotteries. Otherwise, Belgian case law does not contain other recent discussions of the principles applicable to tying and bundling practices so that reference can be made to the ones developed at EU level.[43]

***Refusal to deal***

The *Bofar* case, involving a company specialised in the export of pharmaceutical products, has enabled the BCA to provide some guidance regarding refusal to deal practices. As is the case at EU level, the starting point of the analysis is the basic free trade principle according to which 'each undertaking, irrespective of whether or not it holds a dominant position, should have the right to choose its business partners'.[44] Subsequently, the Authority appears to condition a finding of abuse on: (1) evidence of a clear intent to foreclose actual or potential competition; (2) the strengthening of the company's dominant position; and (3) the absence

41 Ibid., paragraphs 192–199.

42 Court of Appeal of Brussels, 3 November 2005, *SABAM v. Productions & Marketing*, TBM/RCB, 2006, No. 4, p. 320.

43 In the *Cargo handling* case, the Auditorate closed an investigation (for lack of evidence) into practices that would have entailed a review of potential bundling practices by Aviapartner and Flightcare on the reserved market for airside freight handling and the downstream non-reserved market for landside freight handling services, see Decision No. BMA-2015-I/O-02-AUD of 17 February 2015, *Cargo handling at Brussels National Airport* (case MEDE-I/O-10/0009).

44 Decision No. 2009-V/M-04, *Bofar NV*, paragraph 103.

of objective justification. In this case, the BCA dismissed the existence of an abusive refusal to deal, relied heavily on the Commission Guidance Paper and modelled its decision on the *GlaxoSmithKline* case law of the European Court of Justice.[45]

While the principle according to which dominant players should remain free to choose their trading parties is well understood by the Belgian courts, exceptions to this principle are sometimes found on the basis of *ad hoc* tests that are applied quite flexibly. This is well illustrated in the *Ducati/DD Bikes* case, in which the Court of Appeal of Ghent upheld a lower court judgment finding Ducati guilty of abusive refusal to supply spare parts and other repair equipment to a former dealer-repairer, following the (otherwise lawful) termination of the dealership agreement.[46] After finding that Ducati, through its official dealers, was dominant on a Ducati brand-specific market for maintenance and repair, it laid down its own test to appreciate the abusive character of the refusal to supply without any reference to EU or other precedent (very uncommon in Belgian case law) and dismissed, for example, free-riding arguments or the relevance of the fact that the repairer sold and serviced other brands of motorbikes. In addition to holding Ducati's refusal to supply as abusive, the court imposed on it a number of obligations aimed at ensuring that DD Bikes could effectively offer aftersales services for Ducati motorbikes in the future. This case should be understood in the context of long-term dealership agreements in Belgium and testifies to an historical tendency on the part of Belgian courts to protect the interests of dealership holders.

### iii Discrimination

Price discrimination under Article IV.2(2)(3) of the CEL is generally considered to require evidence of a difference in treatment, applied to equivalent transactions, with the effect of causing a material competitive disadvantage. In *Lampiris/Electrabel*, discussed in Section II, *supra*, the BCA considered that the services offered on the electricity wholesale market and on the retail market were not equivalent, and hence dismissed the discriminatory pricing claims.[47] In *InBev*, the on-trade (catering) and off-trade (wholesalers and retailers) segments for the distribution of beers and beverages were considered as separate markets, thereby justifying differences in pricing.[48] In the *bpost* case,[49] however, the Authority referred to a breach of equal treatment in relation to the grant of rebates, without reaching a formal finding of discrimination, thereby creating uncertainty as to the applicable standards. Likewise, Belgian courts sometimes fail to inquire into the existence of an actual competitive disadvantage resulting from the allegedly discriminatory practice, in contradiction with the principles prevailing at EU level since *Post Danmark*.[50] In *SABAM*, for example, the Court of Appeal of Brussels found that services offered to 'major customers' were equivalent to those offered

45 Joined Cases C-468 to 478/06, *GlaxoSmithKline AEVE* [2008] I-7139.

46 Court of Appeal of Ghent, *Ducati/DDBikes*, 1 October 2014 (case 2010/AR/3351).

47 Auditorate, 26 March 2015, Decision No. ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002), paragraph 142.

48 Decision No. 210-P/K-42-AUD, *Freedom CVBA/InBev Belgium NV*, paragraph 80.

49 Decision No. 2012-P/K-32, *Publimail, Link2Biz International and G3 Worldwide Belgium/ bpost*.

50 Case C-209/10, *Post Danmark* [2012] ECR I – not yet reported.

to other customers and that the application of different prices was therefore discriminatory, without inquiring into the actual existence of a competitive disadvantage resulting from that difference of treatment on the downstream market.[51]

### iv Exploitative abuses

As is well known, there is no clear standard to assess what is or makes a price 'excessive' and the comparative test proposed in some EU precedents leaves room for a significant margin of discretion. Excessive pricing claims are relatively frequent in Belgium but seldom established, with the notable – though quite specific – exception of the 2014 *Electrabel* electricity wholesale market case (distinct from the *Lampiris/Electrabel* and *NMBS/Electrabel* cases summarised in Section II, *supra*). In the 2014 *Electrabel* case, the BCA found the former incumbent electricity producer and supplier guilty of an abuse of dominance revolving around Electrabel's tertiary production reserve policy,[52] which was presented as an unjustified limitation of production.[53] Relying on EU precedents, the BCA defined the relevant markets as the production and wholesale trade of electricity in Belgium, on the one hand, and the supply of the tertiary reserve in Belgium, on the other hand, and found that Electrabel held a dominant position on both. The BCA then narrowed down the scope of the abuse to Electrabel's marketing of reserve capacities by means of the application of an excessive margin scale (qualified as a form of 'economic withholding'). Electrabel's scale governing the release of reserve capacity implied the realisation of margins 50 to 200 per cent above the average wholesale price per MWh achieved on the Beplex trading platform in 2008, which was found 'excessively disproportionate compared to the marginal cost of production'.[54]

Other cases involving Electrabel were dismissed. In the *Lampiris/Electrabel* and *NMBS/Electrabel* cases summarised in Section II, *supra*, the BCA and the Court of Appeal of Brussels both dismissed similar excessive pricing claims.[55] Both found that Electrabel's incorporation into its wholesale prices of the value of emission allowances obtained for free was economically justifiable, since the allowances could otherwise be traded. Beforehand, the leading precedent involved the allegedly excessive character of an increase in Electrabel's natural gas prices.[56] After comparing Electrabel's prices with a number of competitive price benchmarks, for example, prices of alternative operators, regulated prices and prices applied in other EU Member States, the BCA was not able to reach a finding of infringement.

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51 Court of Appeal of Brussels, 3 November 2005, *SABAM v. Productions & Marketing*, TBM/RCB, 2006, page 319.

52 The management of reserve capacities on the Belpex electricity exchange, for the electricity wholesale market.

53 College, 18 July 2014, Decision No. ABC-2014-I/O-15, *Electrabel/Wholesale Electricity Market* (case CONC-I/O-09-0015). As part of its reasoning, the College also repeated that, as a matter of principle, competition law is applicable to practices otherwise regulated by sector-specific rules.

54 College, 18 July 2014, Decision No. ABC-2014-I/O-15, *Electrabel/Wholesale Electricity Market* (case CONC-I/O-09-0015), paragraph 147.

55 Court of Appeal of Brussels, *NMBS/Electrabel*, 14 January 2015 (case 2010/AR/3112), TBM/RCB, 2016/1, page 33, and Auditorate, 26 March 2015, Decision No. ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002).

56 Decision No. 2008-I/O-41-AUD, *Electrabel NV*.

Loose findings of excessive prices are sometimes encountered in judgments of Belgian courts, however. This was the case in the *AMP* judgment,[57] where the Court of Appeal of Brussels considered excessive an increase in AMP's minimum distribution fee because of its lack of costs-based justification, as established by an expert report. Likewise, the Commercial Court of Antwerp is reported to have held Belgacom guilty of charging excessive prices as it failed to pass on to consumers a reduction in the mobile termination charges of competing operator Base, as mandated by the telecommunications regulator. By holding that prices 'were higher than those that should normally be applied', the court essentially sanctioned Belgacom's failure to comply with a regulatory decision and gave the concept of excessive pricing an interpretation driven by fairness considerations.[58]

In addition, it should be noted that the CEL grants the BCA the power to issue interim orders in case of 'price or margin problems', 'abnormal evolution in prices' or 'structural market failures' established by a report of the 'Price Observatory', with the view to preventing serious, actual and irreparable harm to companies, consumers or the general economic interest.[59] These orders, which can last for a maximum of six months, are adopted pursuant to summary proceedings during which parties are only heard orally and benefit from a mere five-day period for reviewing any submissions and supporting evidence. Orders are then notified to the Minister for Economic Affairs who shall submit a plan to the government within six months proposing a 'structural modification of the functioning of the market concerned'.[60] No such reports or orders have yet been issued. Thus, the scope of the causes of action, as well as the possible reach of these orders, remain largely unclear and therefore constitutes a source of concern for the business community.[61] This peculiar regime finds its origin in a frustration of political actors with the perceived limitations of dominance principles (notably with notions such as 'excessive prices') and of available remedies.[62]

## V REMEDIES AND SANCTIONS

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

57 Court of Appeal of Brussels, 29 May 2012, *Standaard Boekhandel, Prodipresse, VFP and Buurtsuper v. AMP*.

58 N Petit, 'L'application du droit de la concurrence par les juridictions belges – Une analyse tendancielle de la jurisprudence récente', in JF Bellis (ed.), *Concurrence en droit belge et européen*, Brussel, Larcier, pages 33–34.

59 Articles V.3–V.4 of the CEL.

60 Article V.6 of the CEL.

61 In a decision closing an investigation into alleged unfair prices (in light of available resources and priorities), the Auditorate mentioned that the Price Observatory may be better placed to investigate the price evolution identified by the complainant, see Decision No. BMA-2015-P/K-10-AUD of 31 March 2015, *[x]/Omega Pharma* (case MEDE-P/K-02/0073), paragraph 53.

62 Articles V.3–V.4 of the CEL.

abusive character thereof. As at EU level,[63] it is in a dominance case that the BCA imposed its highest penalty ever, of an amount of €66.3 million levied against Belgacom (BMB) in a margin-squeeze decision dated 26 May 2009.[64]

The Belgian remedial practice differs from the one observed at EU level in two notable respects. First, whereas the Commission relies heavily on commitment procedures to deal with dominance cases, the BCA has adopted very few commitment decisions to date.[65] However, as illustrated by the National Lottery case summarised in section II, *supra*, the BCA is empowered to adopt settlement decisions in dominance cases. Second, whereas this is extremely rare at EU level, the BCA commonly adopts interim measures in the course of dominance proceedings.

### i Sanctions

Fines are capped at 10 per cent of the turnover realised on the Belgian market (including the sale of goods for export) in the last full year preceding the adoption of the decision. Below that limit, fines are calculated according to new Fining Guidelines issued in 2014.[66] These Guidelines provide that the BCA applies the same methodology as the European Commission, with a limited number of exceptions.[67] Most importantly, the starting amount of the fine is based on Belgian sales (i.e., sales realised on the Belgian territory and for exports). Moreover, the Guidelines provide for specific rules in relation to the assessment of the aggravating factor of repeated infringement. The CEL also foresees the possibility of the BCA imposing administrative fines on individuals but that provision is not applicable to dominance cases (only to specific types of horizontal infringements).[68]

### ii Behavioural remedies

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

63 See the €1.06 billion fine imposed in Case COMP/C-3/37.990, *Intel* (13 May 2009).

64 Decision No. 2009-P/K-10, *BASE/Belgacom & Belgacom Mobile*.

65 The BCA has adopted commitment decisions in only two instances so far; see Decision No. 2005-I/O-52, *NV Distri-One/BVBA Coca-Cola Enterprises Belgium* and Decision No. 2006-I/O-12, *Banksys SA/FNUCM /Banksys SA*; *UNIZO/Banksys*). Both decisions ended seven-year investigations into alleged abusive conducts.

66 The Guidelines are available on the website of the BCA at: http://economie.fgov.be/fr/binaries/140826_lignes_directrices_amendes_tcm326-254555.pdf.

67 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Council Regulation (EC) No. 1/2003, OJ, 2006/C 210/02).

68 Article IV.70(2) of the CEL.

The powers of the BCA to impose interim measures in pending proceedings have been strengthened since the entry into force of the CEL. First, establishing a risk of 'irreparable harm' is no longer required.[69] Second, interim proceedings are subject to strict deadlines. In particular, the CEL provides that an oral hearing preceded by the submission of written briefs will be held within one month of the filing of the request for interim measures.[70] Subsequently, the BCA will have to render its decision within one month of the oral hearing, failure to do so amounting to a rejection of the request.[71]

In 2015, the BCA confirmed its willingness to make use of interim measures. In the *FEI* case discussed in Section II, *supra*, the BCA ordered the suspension of FEI's exclusivity clause, prohibited the FEI from suspending or otherwise sanctioning athletes or horses for participating in GCL competitions and requested the FEI to inform its members (national federations), athletes, officials and organisers, of these measures by 31 August 2015.[72] After finding that the FEI had not properly communicated the measures, the BCA actually determined the content of the messages to be published on the FEI's website and to be sent to national federations and other associations by 30 November 2015, subject to penalty payments.[73] In the *Telenet* case, also summarised in Section II, *supra*, the BCA ordered Telenet and VV on an interim basis to either suspend the exclusivity clause in their agreement and offer the broadcasting rights to interested parties on reasonable and non-discriminatory terms and conditions, or suspend the full exclusive agreement from the end of season 2015–2016 and re-allocate the VV broadcasting rights, on an exclusive basis or not, on the basis of a transparent and non-discriminatory tender procedure.[74]

### iii Structural remedies

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

## VI PROCEDURE

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

In a nutshell, a single BCA composed of two functionally distinct entities, namely the College in charge of deciding cases and the Auditorate in charge of investigations, replaced the dual structure previously in place. The Auditorate carries out investigations either on an *ex officio* basis, upon a complaint, at the request or injunction of the competent minister.

69 Article IV.64(1) of the CEL.

70 Article IV.64(3) of the CEL.

71 Article IV.64(6) of the CEL.

72 College, 27 July 2015, Decision No. ABC-2015-V/M-23, *Interim measures against FEI* (case CONC-V/M-15/0016), paragraphs 97–115. The FEI's appeal against the interim measures was dismissed by the Court of Appeal of Brussels, 22 October 2015, *FEI/BCA* (case 2015/MR/1, Official Gazette, 17 November 2015, pages 69 and 141).

73 College, 24 November 2015, Decision No. ABC-2015-V/M-68, *Interim measures against FEI* (case CONC-V/M-15/0016), pages 29–31.

74 College, 5 November 2015, Decision No. BMA-2015-V/M-65, *Interim measures against Telenet* (case MEDE-V/M-15/0024), paragraphs 72–81.

Upon completion of its investigation, the Auditorate has the choice between closing the case and issuing a formal statement of objections to which the parties are entitled to reply prior to the transmission of the case to the College for decision.[75] That transmission occurs by means of the issuance of a non-binding draft decision reflecting the replies to the statement of objections.[76] The College then hears the parties both in writing and orally before rendering its decision,[77] which can then be appealed before the Court of Appeal of Brussels. The procedure is controversial, however, primarily because it prevents the parties from submitting new factual evidence before the College (unless the draft decision raises points that were not addressed in the statement of objections). Moreover, the CEL sets strict time limits for the submission of written briefs by the parties, namely one month to reply to the statement of objections and two months to comment on the draft decision and review the case file.[78]

As far as complainants are concerned, they are entitled to appeal to the College any decision by the Auditorate dismissing their complaint and to review the evidence referred to in the Auditorate's decision. If the Auditorate acts upon their complaint, they may have access to a non-confidential version of the draft decision 'if the College deems it necessary'.[79] As a rule, they do not have access to the case file, unless the President decides otherwise and then only to a reduced version of the file containing only the evidence referred to in the draft decision (i.e., not to the entire case file).[80] Upon request, complainants can be heard orally by the College.[81]

The CEL provides for the possibility of closing cases by means of a commitment decision adopted by the College.[82] In addition, it contains formal and informal settlement procedures that are also applicable in dominance cases (i.e., not only in collusive cases). The formal settlement procedure can be initiated at any time prior to the issuance of the draft decision.[83] If the allegedly dominant company indicates its willingness to engage in formal settlement discussions, the Auditorate will provide it with a summary of the objections and of the relevant pieces of evidence, as well as a range of possible fines. The company in question is then required to recognise its liability and to accept the fine estimate. On that basis, the Auditorate will then issue a draft settlement decision proposing a fine, on which it 'may' (in practice, 'does') apply a 10 per cent reduction. Similarly, it 'may' reflect in the proposed fine commitments to compensate third parties for any harm suffered. Upon acceptance of the proposed fine, the Auditorate then issues a final settlement decision, which

75 Article IV.42(4) of the CEL.

76 Article IV.42(5) of the CEL.

77 Article IV.45(5) of the CEL.

78 These time limits can be extended if the President of the Authority 'deems it necessary'. The CEL also provides for various deadlines applicable to the Auditorate and the College but these are considered indicative. For example, the College is supposed to hold an oral hearing at the latest two months after the filing by the parties of their written comments on the draft decision, and to issue its decision within one month of the oral hearing (see Article IV.42(5) and Articles IV.45(3),(4) and (6) of the CEL).

79 Article IV.45(1) of the CEL.

80 Article IV.45(2) of the CEL.

81 Article IV.45(5) of the CEL.

82 Article IV.49 of the CEL.

83 Articles IV.51–IV.57 of the CEL.

cannot be appealed. As is the case at EU level, the settlement discussions can be interrupted at any time. The settlement discussions between the Auditorate and the relevant company are considered confidential. Uncertainty remains as to the rights of complainants and other interested parties in commitment and settlement procedures. The *National Lottery* case discussed in Section II, *supra*, represents the first settlement decision adopted in a dominance case. The Auditorate applied the 10 per cent reduction after having already reduced the fine for mitigating circumstances based on the absence of a proven anticompetitive effect of the practices in question and the National Lottery's full cooperation.[84]

The President of the BCA can also make use of an informal settlement procedure to resolve questions and disputes.[85] The informal settlement procedure does not entail the imposition of sanctions or binding conditions. In general, the President will only engage in an informal settlement procedure when the practice in question has not yet been implemented and raises a novel question, and when it is clear that the Auditorate does not have the intention to open a formal investigation.[86]

Generally, legal advice (and associated correspondence), as rendered by in-house counsel who are members of the Belgian Institute for Company Lawyers, benefits from a protection equivalent to legal privilege and therefore cannot be seized by the BCA during inspections (or by any other public authority).[87] However, a provision of the CEL unduly limits the effectiveness of that protection, for it allows parties to bring an appeal against the seizure of documents during inspections only after the issuance by the Auditorate of the statement of objections and 'only to the extent that the documents in question are invoked in support of the said objections'.[88]

Decisions of the BCA may be appealed before the Court of Appeal of Brussels. The court has shown willingness to rule against the BCA, in particular with respect to companies' rights in the context of inspections. It should be noted that settlements decisions may not be appealed by the settling parties under Belgian law.

Finally, the CEL contains an antitrust blocking statute, subject to exceptions to be set forth by Royal Decree.[89] The principle of primacy of EU law makes that provision unenforceable against requests from the Commission or from the competition authorities of other EU Member States addressed, pursuant to Regulation 1/2003.

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84 Decision No. BMA-2015-P/K-27-AUD of 22 September 2015; the Auditorate adopted a second decision on the same day, dismissing the complainants other allegations, see Decision No. BMA-2015-P/K-28-AUD, *Stanleybet Belgium NV/Stanley International Betting Ltd* and *Sagevas SA/World Football Association SPRL/Samenwerkende Nevenmaatschappij Belgische PMU* (cases MEDE-P/K-13/0012 and CONC-P/K-13/0013).

85 Article IV.20(2) of the CEL.

86 The applicable procedure has been spelled out in a BCA communication of 27 January 2015.

87 Court of Appeal of Brussels, 5 March 2013, case 2011/MR/3, Belgacom, as upheld by the Belgian Supreme Court in Cass. (Belgian Supreme Court), *Auditorate/Belgacom-HG*, 22 January 2015 (case C.13.0532.F).

88 Article IV.79(1) of the CEL. The compliance of that provision with the Belgian Constitution was confirmed by the Belgian Constitutional Court, subject to conditions, by a judgment of 10 December 2014 (Joined Cases 5733 and 5740).

89 Article IV.13 of the CEL.

## VII PRIVATE ENFORCEMENT

As noted, claims for abuse of dominance are frequently litigated before Belgian courts. The Belgian Act on Unfair Trade Practices (now included in the CEL), in particular, provides for a special and particularly effective procedure to obtain a cease-and-desist order at short notice from the President of the competent Commercial Court.[90] It is settled case law, indeed, that claimants alleging breaches of Article IV.2 of the CEL can also obtain redress pursuant to the CEL's Unfair Trade Practices provisions.[91] That procedure constitutes a credible alternative to proceedings before the BCA in those cases where plaintiffs have sufficient elements at their disposal to discharge the applicable burden of proof (or can readily identify the relevant pieces of evidence and request their production in court). However, at present, the Belgian Code of Civil Procedure does not contain discovery rules comparable to those existing in the United States or the United Kingdom.

Damage claims can also be filed to obtain compensation for the harm suffered as a result of an (alleged) abuse of dominant position, either on a stand-alone basis or as a follow-on action. Since the CEL does not include a specific statutory basis for that purpose, general tort law principles apply and require plaintiffs to establish: a fault imputable to the defendant; an injury suffered by the plaintiff; and a causal link between the fault and the injury.[92] Under Belgian tort law, damages are awarded according to the *restitutio in integrum* principle, whereby the victim must be compensated for the entire harm suffered (i.e., to restore the *status quo ante*) but only the actual harm suffered. Hence, Belgian law allows for the recovery of any direct losses and profits forgone (including losses of business opportunities) but does not know of treble or punitive damages. In spite of the lack of clear precedent in the antitrust field, it is commonly admitted among commentators that the passing-on defence can be invoked by defendants. Upon request, damage awards can also include (simple, not compound) interest from the date the injury occurred and be complemented by a fixed (and relatively modest) indemnity of procedure supposed to cover attorneys' fees and other costs and disbursements.

The settled *Belgacom/Base & Mobistar* case summarised in Section II, *supra*, addressed the question of Belgacom's fault. The Court of Appeal of Brussels held that Belgacom should have known, in light of established EU precedents, that its alleged practices would constitute breaches of Article 102 TFEU and therefore a fault on its part (if they were confirmed by experts). With respect to network effects in particular, the court noted that the fact that EU courts had not yet expressly decided on such practices did not mean that these could not amount to an anticompetitive conduct. In particular, the court held, the language of

90 Article XVII.10 et seq. of the CEL. That procedure is dealt with according to the rules applicable to interim proceedings but is not subject to the requirement of urgency.

91 Technically, infringements of Chapter IV of the CEL are considered to fall within the scope of the notion of 'unfair trade practice' pursuant to Article VI.104 of the CEL.

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

Article 102(a) TFEU,[93] existing EU case law and decisions, and Commission guidance made it reasonably predictable that an unjustified difference between the costs of on-net and off-net calls would not be defensible in courts.

In fact, but for a couple of unsuccessful cases,[94] recent practice appears extremely limited as one single case has been reported since 2004 of damages awarded based on a finding of abuse of dominance.[95] The case was peculiar for the abuse was found to arise from meritless actions brought by Kinepolis, an (allegedly dominant) operator of movie theatres, to stop or delay the anticipated construction of a new theatre complex in the Liège region by rival UGC, as well as from the pre-emptive purchase of land constraining the development of such project. By a judgment of 17 June 2010, the Brussels Commercial Court awarded damages compensating UGC for the legal fees incurred as a result of Kinepolis' abusive practices, as well as for the consultancy fees and costs associated with a bank guarantee contracted by UGC in association with its project. In contrast, the court refused to consider the loss of operating income that would have resulted from the construction of the complex for it was deemed too speculative. Interestingly, the court also clarified that damages claims can proceed (and do not have to be suspended) in spite of parallel proceedings pending before the Belgian Competition Authority.

Finally, Belgian law permits plaintiffs to seek collective redress. Interestingly, the Collective Actions Act provides that only consumer and other organisations satisfying certain legal conditions, as well as the Federal Ombudsman for Consumers, are entitled to file a claim on behalf of a group for collective recovery, and that they may do so only before the Brussels courts.[96] It is up to the court to decide whether to apply an opt-in or opt-out system. Likewise, the court must systematically require the parties to first explore the possibility of negotiating a settlement. It is only in the case of failure of such settlement that the court may hear and decide on the merits of the damages claim.

## VIII FUTURE DEVELOPMENTS

In its priority policy statement for 2016, the BCA identified liberalised sectors and network industries, and the digital and media landscape among the priority areas for enforcement in 2016.[97] Regarding the liberalised sectors and network industries, the BCA pointed in particular to postal and telecommunications sectors, and its scrutiny over barriers to entry by competitors and suppliers. As to the digital and media sector, the BCA shared concerns over consumer access to content and over the risk of anticompetitive conduct jeopardising innovative business models.

93 Prohibiting 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

94 See, for example, Court of Appeal of Brussels, 25 January 2005, Ann. prat. 2005, page 743 and Commercial Court of Brussels, 15 November 2006, RG 8069/02.

95 Brussels Commercial Court, 17 June 2010, *UGC Belgium v Kinepolis Group, SA Compagnie de Promotion Liégeoise, SA Compagnie de promotion Charlemagne and SA Wilhelm & Co*.

96 Articles XVII.35–XVII.69 of the CEL.

97 BCA, Priority Policy for 2016, 23 March 2016.

# Chapter 4

# BRAZIL

*Ana Paula Martinez*[1]

## I INTRODUCTION

At the administrative level,[2] antitrust law and practice in Brazil is governed by Law No. 12,529/11 (the Competition Law), which entered into force on 29 May 2012 and replaced Law No. 8,884/94.[3] The new Competition Law has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defence (CADE). CADE's structure includes an Administrative

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2 Brazil's antitrust system features both administrative and criminal enforcement. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. Private enforcement actions may also be initiated through the judicial courts by aggrieved competitors or damaged parties. At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/1990 (the Economic Crimes Law), as amended by Law No. 12,529/11, and Law No. 8,666/1993 (the Public Procurement Law). Federal or state public prosecutors have sole enforcement responsibility, and act independently of the administrative authorities. Also, the police (local or federal) may initiate investigations of anticompetitive conduct and report the results of their investigation to prosecutors, who may indict the reported individuals. In recent years, Brazil has developed a widely recognised programme for criminally prosecuting anticompetitive conduct – primarily cartels – and criminal and administrative authorities frequently cooperate in parallel cases.

3 Prior to Law No. 12,529/11, there were three competition agencies in Brazil: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defence (CADE). The SDE was the chief investigative body in matters related to anticompetitive practices, and issued non-binding opinions in connection with merger cases. The SEAE also issued non-binding opinions related to merger cases and issued opinions in connection with

Tribunal for Economic Defence (the Tribunal) composed of six Commissioners and a President, a Directorate-General for Competition (DG) and a Department of Economic Studies. The DG is the chief investigative body in matters related to anticompetitive practices. The Tribunal is responsible for adjudicating the cases investigated by the DG – all decisions are subject to judicial review.[4] There are also two independent offices within CADE: CADE's Attorney General's Office, which represents CADE in court and may render opinions in all cases pending before CADE; and the Federal Public Prosecutor's Office, which may also render legal opinions in connection with all cases pending before CADE.

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

The basic framework for abuse of dominance in Brazil is set by Article 36 of the Competition Law. CADE has not yet issued a regulation under the new Competition Law covering unilateral conduct, and has been resorting to legislation issued under the previous regime and precedents. The Anglo-American concept of binding judicial precedent (i.e., *stare decisis*) is virtually non-existent in Brazil, which means that CADE's Commissioners are under no obligation to follow past decisions in future cases. Under CADE's Internal Regulations, legal certainty is only achieved if CADE rules in the same way at least 10 times, after which a given statement is codified via the issuance of a binding statement. To date, CADE has issued nine binding statements, all related to merger review but one (Binding Statement No. 7), which provides that it is an antitrust infringement for a physicians' cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians' cooperatives and health plans.

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

## II YEAR IN REVIEW

In 2015, CADE adjudicated 52 administrative proceedings. Out of these 13 were dismissed, while in 39 cases CADE found an infringement in relation to at least one defendant. While the number of cases where sanctions were imposed is the same as the number that was registered

anticompetitive investigations. CADE was structured solely as an administrative tribunal, composed of six commissioners and a president, which made final rulings in connection with both merger reviews and anticompetitive practices.

4 On average, judicial courts confirm over 70 per cent of CADE's decisions.

in 2014, in 2015 CADE achieved a record in the amount of fines imposed and settlement sums collected (524 million reais against 169 million reais in 2014). Such an increase is certainly because of the fact that, under the new Competition Law, CADE's Tribunal has been able to focus on anticompetitive matters, rather than on simply reviewing competitively innocuous mergers, as well as because the authority established a more predictable procedure for settling ongoing investigations of antitrust violations.

Of all cases sanctioned by CADE in 2015, 10 made reference to hard-core cartels, 14 referred to anticompetitive practices in the health sector, nine were related to unions or trade associations influencing the adoption of uniform conduct and four discussed abuse of dominance, including sham litigation, raising rivals' costs, exclusionary practices, and resale price maintenance practices in the fuel retail market. Out of the investigations dismissed by the Tribunal, three referred to alleged hard-core cartels, five to abuse of dominance, one to influencing the adoption of uniform practices and abuse of dominance, and four were connected with influence of coordinated practices in the healthcare market. Regarding the 12 administrative proceedings adjudicated by CADE in 2015, two referred to abuse of dominance practised by port operators and one concerned influencing uniform practices in the healthcare market.

Specifically regarding abuse of dominance, in April 2015, CADE's DG issued an injunction to prevent the state-owned oil company Petrobras from supplying Gemini Consortium (a joint venture involving Petrobras, White Martins and GNL) with lower prices. The authority opened an investigation in 2013 on whether the consortium benefited from cross-subsidies or lower prices for gas supplied by its shareholder Petrobras, raising rivals' costs. Although the creation of Gemini was approved by CADE, some of the restrictions imposed were overruled by a federal court. According to the DG, the gas-supply agreement between Petrobras and Gemini risks placing the consortium at an unlawful advantage over competitors. CADE's Tribunal confirmed the injunction and White Martins challenged it before a federal court. The injunction was confirmed by the Brazilian Superior Tribunal of Justice (STJ) and the antitrust investigation is still ongoing.[5]

The issues that deserved special attention from Brazil's competition authority in 2015 in connection with unilateral practices are related to regulated industries, exclusivity clauses and sham litigation. Also, it is worth listing the investigations covering alleged abuse of dominance practices that were settled by the defendants in 2015.

### i Regulated industries

In 2015, CADE continued to be active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services and port services.

#### *Financial services*

*New investigations*

In June 2015, the DG opened six administrative proceedings against the following financial institutions: Itaú Unibanco, Caixa Econômica Federal, Santander, Bradesco, Banco do Estado do Rio Grande do Sul (Banrisul) and Banco de Brasília (BRB)[6] to investigate whether

5 Administrative Proceeding No. 08012.01181/2007-41.

6 Administrative Proceedings No. 08700.005770/2015-58, 08700.005766/2015-90,08700.005781/2015-38, 08700.005761/2015-67,

they violated the antitrust law by imposing exclusivity clauses for the provision of payroll loans to civil servants. The investigation started in 2012 after a settlement reached by CADE and Banco do Brasil, through which the defendant agreed to pay an amount of 65 million reais and committed to remove exclusivity arrangements from all contracts. During the investigation, Banco do Brasil stated that other banks were involved in the same practice. The investigations against the six mentioned banks are ongoing. CADE has been allowing third parties, such as Aneps (Associação Nacional das Empresas Promotoras de Crédito), to join the investigation as interested parties that could have had their interests affected by the alleged anticompetitive conduct.

In March 2016, CADE launched administrative inquiries against Itaú-Unibanco, Banco do Brasil, Bradesco, Rede and Cielo to investigate whether large-scale financial institutions and credit card providers limited competition through exclusivity arrangements and refusal to deal with competitors.

In all such cases, the defendants claim that CADE has no jurisdiction to investigate and sanction in the financial sector and that Brazil's Central Bank would be the agency in charge of enforcing competition provisions regarding financial institutions. This issue is not settled in the judicial courts and there are bills pending in Congress that aim to provide a definitive solution to this controversy.

*Dismissed investigations*

In May 2015, CADE dismissed an investigation targeting Bradesco, Banco do Brasil, Banco ABN, Banco Nossa Caixa and Companhia Brasileira de Soluções e Serviços (CBSS) – a joint venture involving the banks listed previously – for alleged tie-in practices and exclusive deals in the Brazilian market of meal vouchers. CADE found no evidence that the defendants required customers to acquire Visa Vale as a condition to access other financial services. With regards to the exclusivity clause, CADE concluded that such clause had already been accepted by the authority when the transaction was reviewed in the context of the merger review system.[7]

***Ports***

Ports operators and related parties have been under antitrust scrutiny for several years. The monopolistic situation of port operators and the complex regulation on prices and fees create a variety of disputes between port operators and service providers active in ports, which are subjected not only to administrative antitrust enforcement but also to judicial challenge. From a competition advocacy perspective, CADE usually recommends the Brazilian National Agency of Waterway Transportation (ANTAQ) to review its regulation to prevent abuse of market power and challenges involving market players.

*Recommendation by CADE's DG to impose sanctions*

In January 2016, the DG recommended the imposition of sanctions on Associação Comercial dos Transportadores Autônomos (ACTA) and Sindicato dos Transportadores Rodoviários de Cargas e Granel de Santos, Cubatão e Guarujá (SINDIGRAN) for several anticompetitive practices, including influence to adopt uniform practices and creation of barriers to rivals in

08700.005759/2015-98 and 08700.005755/2015-18.

7 Administrative Proceeding No. 08012.002096/2007-06.

the cargo road transportation to the Port of Santos. The alleged conducts consisted, among others, of charging competitors abusive fees, limiting the number of trucks operating in the market and requiring rivals to contract unnecessary intermediate services.[8]

*Dismissed investigations and recommendations to dismiss*

In October 2015, CADE dismissed an investigation against Tecon Suape and Suape – Complexo Industrial Portuário Governador Eraldo Gueiros for allegedly imposing anticompetitive clauses in their contract for operating the port in Pernambuco. CADE concluded that the conduct under investigation was compliant with the applicable regulatory framework and no sanction was imposed.[9]

In December 2015, the DG recommended CADE's Tribunal to dismiss an investigation against Marimex – Despachos, Transportes e Serviços for raising rivals' costs in the market of warehousing in ports. In its assessment, the DG concluded that the fees charged by the operator could be justified in view of the costs faced by port operators.[10]

*Sanctions imposed*

In December 2015, CADE fined four port operators in Porto Alegre and the port's personal management body, Órgão de Gestão de Mão de Obra do Trabalho Portuário Avulso do Porto Organizado de Porto Alegre/RS (OGMO), for imposing a disproportional fee to new players seeking to employ workers at the port. In its decision, CADE concluded that since dealing with OGMO was the only way to access that market, the unreasoned fees created a significant barrier to competition.[11] Fines imposed amounted to 10 per cent of the defendant's turnover in the year before the initiation of the investigation.

More recently, in February 2016, CADE imposed sanctions to port operators in Salvador and Rio Grande for abuse of dominance. In both cases, the operators charged competitors with disproportional port storage fees using their position of monopolists in the upstream market to harm competitors downstream. The total amount of fines exceeded 10 million reais[12] and both parties are challenging CADE's decision before the judicial courts.

*Settlements*

In August 2015, CADE signed a settlement with Rodrimar Transportes, Equipamentos Industriais e Armazéns Gerais in connection with an investigation on whether the company violated antitrust laws by charging customers with an additional fee to release cargo. In the settlement, Rodrimar committed to pay 150,000 reais, implement an antitrust compliance programme and adopt an open doors policy for antitrust authorities.[13]

In July 2015, CADE declined to settle a court case with Santos Brasil. The company was sanctioned by CADE in 2005 for imposing a fee known as Terminal Handling Charge 2.

8 Administrative Proceeding No. 08012.000504/2005-15 and 08012.008142/2011-59.

9 Administrative Proceeding No. 08012.006504/2005-29.

10 Administrative Proceeding No. 08012.005967/2000-69.

11 Administrative Proceeding No. 08700.005326/201370.

12 Administrative Proceedings No. 08012.003824/2002-84 and 08010.005422/2003-03.

13 Administrative Proceeding No. 08012.009690/2006-39.

The defendant challenged CADE's decision before a federal court and Santos Brasil proposed to pay the fine, but the company did not agree to cease the conduct, which is why CADE rejected the proposal.

*Judicial review*

In February 2015, a federal judge annulled a 2005 decision by CADE that sanctioned a logistics company for charging an allegedly illegal fee based on the argument that the antitrust authority lacked jurisdiction over the issue.[14]

### ii Exclusivity clauses

During 2015, CADE dealt with a series of cases involving exclusivity clauses. Besides the investigations into banking services mentioned above, CADE continued to scrutinise exclusivity clauses in different markets, such as soccer broadcasting contracts. In July 2015, CADE dismissed an investigation into how soccer broadcasting rights are negotiated in Brazil after finding no evidence of anticompetitive prices.[15] However, in February 2016, CADE opened a preliminary investigation for potential antitrust infringements in television broadcasting contracts for soccer games in 2019.

In November 2015, CADE dismissed an investigation against shopping centres and shopping administrators for radius clauses in lease contracts within São Paulo.[16] According to CADE, the probes had to be closed because of statute of limitation issues, given that between 2010 and April 2014, there was no investigative action capable to stop the clock (if there is government inaction for three years, the case is time-barred). On the other hand, in March 2016, CADE's DG recommended the Tribunal to sanction North Shopping Fortaleza shopping mall for imposing a radius clause that prevents retailers from opening other shops within a 5km distance of the shopping mall.

### iii Sham litigation

Sham litigation complaints have also set the tone for CADE's activity in 2015. In February 2015, CADE dismissed an investigation into nutritional supplement company CMW Saúde e Tecnologia Importação, accused by its rival Support of sham litigation practices. In its assessment, CADE concluded that the legal disputes between the companies show no evidence of anticompetitive conduct.[17]

In 2007, Pró-genericos filed a complaint against Eli Lilly do Brasil and Eli Lilly and Company for allegedly abusing their rights regarding Gemzar, a drug to treat cancer, to prevent generics entry.[18] Among other alleged practices, Eli Lilly filed six different claims before the judicial courts to enforce its rights and required one additional five-year period

14 Federal Court of the 3rd Region (TRF-3); Appeal No. 0014995-56.2005.4.03.6100/SP; Appellants: Santos Brasil Participações SA and Marimex Despachos Transportes e Serviços Ltda; adjudication date: 26 February 2015.

15 Administrative Inquiry No. 08700.009863/2014-70.

16 Administrative Proceeding No. 08012.012081/2007-48; Defendants: Multiplan Empreendimentos Imobiliários SA and others.

17 Administrative Inquiry No. 08012.007213/2011-04.

18 Case No. 08012.011508/2007-91. Defendants: Eli Lilly do Brasil Ltda, and Eli Lilly and Company. Reporting Commissioner: Ana Frazão.

of exclusive marketing rights given the discovery of a new use for the drug. An injunction ensured an additional protection for eight months, and for three months the pharmaceutical company Sandoz was not allowed to offer the competing drug Gemcit in the market. According to CADE, during this period the price offered by Eli Lilly in public bids was 540 reais – more than double the price offered by the same Eli Lilly following the reversal of the injunction (189 reais). In June 2015, CADE's Tribunal found that Eli Lilly abused its rights by presenting misleading information to courts, with 'serious harm to public health and economy'. According to the agency, the drug maker did not clearly explain before the courts that the request for a patent was never granted, an omission that was considered to be strategic and malicious, enabling the company to exclude competitors from the market. According to the Reporting-Commissioner, 'the company behaved in an anticompetitive manner by presenting multiple claims before several courts, omitting information to obtain artificially the monopoly in the sale of the medicine, besides unduly obtaining an exclusive right to sell the drug'. CADE imposed a fine of 36.6 million reais. When calculating the fine, CADE doubled the expected fine in view of recidivism considering Eli Lilly's sanction in the alleged cartel against generic drugs. In its decision, CADE stated that 'measuring market share is irrelevant in sham litigation cases, where the success of a judicial claim may be sufficient to exclude competitors from the market.'[19] This position might be stricter than the one adopted by foreign competition agencies.

In June 2015, CADE's DG recommended the imposition of sanctions against three media production companies, MC 3 Vídeo Produções, Léo Produções e Publicidade, Shop Tour International e Shop Tour TV and Luiz Antonio Cury Galebe, as it concluded that the defendants filed misleading and contradictory lawsuits against competitors to prevent them offering certain TV shows.[20]

In November, CADE initiated an administrative proceeding against taxi drivers' unions and individuals for the alleged use of unlawful strategies to exclude and block the entry of the online platform for ridesharing Uber in the market of paid individual transportation.[21] The investigation started based on complaints filed by students' associations in Brasilia and Uber. The DG stated that, despite current controversies about whether services offered by Uber are legal, the company should be seen as a regular competitor and, by filing lawsuits in different states and also pushing local lawmakers to prohibit Uber in different cities, taxi drivers' associations practised sham litigation. The DG also identified episodes of violence against Uber's drivers. Meanwhile, CADE's Department of Economic Studies issued a report on the market of paid individual transportation, concluding that Uber's entry in the market had limited effects on demand for taxi rides.

CADE also dismissed an investigation derived from complaints filed by Associação Boa Vista de Táxi against Uber.[22] According to the association, Uber practised unfair competition

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

20 Administrative Proceeding No. 08012.000778/2011-52.

21 Administrative Proceeding No. 08700.006964/2015-71.

22 Preliminary Inquiry No. 08700.004530/2015-36.

and did not follow regulatory provisions. When assessing the complaint, CADE stated that the association did not report any antitrust violation and legal and regulatory controversies were beyond CADE's jurisdiction. However, after a complaint filed by the Brazilian Chamber of Deputies, CADE opened a new investigation against Uber to assess whether the company adopted anticompetitive strategies to dominate the market.[23] Finally, CADE asked for its admission as *amicus curie* in lawsuits pending before São Paulo and Rio de Janeiro's courts questioning the constitutionality of local legislations.

Other companies remain under antitrust scrutiny for alleged sham litigation practices, such as Lundbeck, AstraZeneca, Brazil's national postal service provider, ECT, and a steel manufacturers' association.

### iv Settlements

CADE settled several important unilateral investigations in 2015. On 10 June 2015, CADE signed a settlement with Ambev, Brazil's largest beer manufacturer, through which the company committed to several changes in its policy of distribution, provision of points of sale displays (POS displays) and refrigeration practices. CADE investigated whether, through exclusivity deals and other commercial conditions, Ambev blocked competitors to access point of sales. The settlement imposes a variety of restrictions to ensure that competitors will have access to points of sale, including Ambev agreeing that up to 8 per cent of Ambev retailers in given regions would be allowed or required to exclusively stock an Ambev-branded refrigerator or exclusively sell Ambev brands. The settlement also establishes higher standards of transparency for Ambev's refrigeration policy.[24] Ambev was not required to pay a fine.

Ambev also signed with CADE a settlement to end a dispute pending before Brazilian Federal Courts over sanctions imposed by the authority for exclusionary practices in the context of loyalty programme 'Tô Contigo'. The company received a discount on the imposed fine for settling the case and agreed to pay 229.1 million reais as well as terminating the conduct.

### v Other

On 24 June 2015, CADE dismissed an investigation related to exclusionary practices by Intercement Brasil (previously Camargo Corrêa Cimentos), allegedly against Liz Cimentos (previously Soeicom). The authority investigated whether Intercement, through its exclusive deal with the steel producer Usiminas, unlawfully prevented Liz Cimentos from buying scoria – a by-product of steel production and an important input for cement manufacturing. Although CADE concluded that Intercement violated antitrust laws by unduly storing and destroying inputs to harm competitors, raising rivals' costs arbitrarily and refusing to deal, the authority concluded that all these conducts were part of the cartel practices in the cement industry – a case adjudicated by CADE in early 2014 – and Intercement has already been punished for these violations. CADE thus dismissed the investigation because of double jeopardy issues.[25]

In March 2015, CADE convicted Oi for abuse of dominance as a result of its practice of monitoring clients' phone calls to the call centre of its competitor Vésper, verifying their

23 Preliminary Inquiry No. 08700.010960/2015-97.

24 Administrative Proceeding No. 08012.002608/2007-26.

25 Administrative Proceeding No. 08012.010208/2005-22.

demands and offering specific plans to avoid the migration of its clients to its rival. The two-to-one decision imposed a fine of 26.5 million reais for antitrust violations, in addition to the 11.5 million reais fine previously imposed by the National Telecommunications Agency (ANATEL) for the same conduct. According to Commissioner Frazão, the existence of a previous sanction imposed by another agency was considered to reduce the applicable sanction.

Following complaints presented by Brazilian shopping comparison websites and Microsoft, in 2013 the DG launched three antitrust probes against Google, relating to Google's allegedly abusive behaviour in displaying its own specialist search services more favourably than competing services, Google's use of content from competing specialist search services in its own offerings and the portability of online search advertising campaigns from Google's AdWords to the platforms of competitors.[26] During 2015, the DG heard Google's arguments and sent questionnaires to several companies about the alleged misconduct. Some content providers, such as Catho and OLX, have already stated that they do not see negative effects arising from Google's AdWords. On the other hand, Microsoft sent CADE a long list of considerations pointing to the alleged anticompetitive effects of terms imposed by Google. All the investigations were still ongoing as of 29 April 2016.

## III MARKET DEFINITION AND MARKET POWER

Brazil's Competition Law provides that a dominant position is presumed when 'a company or group of companies' controls 20 per cent of a relevant market.[27] Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', but the agency has not formally done so to date. The 20 per cent threshold is relatively low compared with practices in other jurisdictions, especially the United States and the EU. CADE has traditionally interpreted the expression 'group of companies' to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

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

Annex II of CADE Resolution No. 20/99 sets criteria for the definition of the relevant market in terms of both product and geographic dimensions. The methodology is

26 (1) Administrative Proceeding No. 08012.010483/2011-94; Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda; Defendant: Google Brasil Internet Ltda; (2) Administrative Proceeding No. 08700.009082/2013-03; Plaintiff: E-Commerce Media Group Informação e Tecnologia Ltda.; Defendants: Google Inc and Google Brasil Internet Ltda; and (3) Administrative Proceeding No. 08700.005694/2013-19; Plaintiff: Microsoft Corporation; Defendant: Google Inc. The first complainants are part of a wider coalition, known as FairSearch, which has also promoted antitrust cases against Google in other jurisdictions.

27 Under the original wording of Brazil's previous competition law, the law presumed a market power to exist if the parties jointly held a share of at least 30 per cent of the market. In 1995, less than one year after the 1994 statute's entry into force, Congress amended the law to reduce the presumption to 20 per cent.

mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the 'SSNIP test', aiming to identify the smallest market within which a hypothetical monopolist could impose a small and significant non-transitory increase in price – usually taken as a price increase of 5 to 10 per cent for at least 12 months. Supply-side substitutability is also sometimes considered for market definition purposes. As for measures of concentration, reference is made to both the CRX index and the Herfindahl-Hirschman Index (HHI).

## IV ABUSE

### i Overview

Article 36 of Brazil's new Competition Law deals with all types of anticompetitive conduct other than mergers. The statute did not change the definition or the types of anticompetitive conduct that could be prosecuted in Brazil under the previous law. The Competition Law prohibits acts 'that have as [their] object or effect' (1) limitation, restraint or, in any way, harm to open competition or free enterprise; (2) control over a relevant market of a certain good or service; (3) an increase in profits on a discretionary basis; or (4) engagement in market abuse. Article 36 specifically excludes from potential violations, however, the achievement of market control by means of 'competitive efficiency'. Under Article 2 of the Competition Law, practices that take place outside the territory of Brazil are subject to CADE's jurisdiction, provided that they produce actual or potential effects in Brazil.

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

Annex II of CADE Resolution No. 20/99 generally provides for the review of unilateral conduct under the rule of reason, as it might have pro-competitive effects. In theory, the authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers. In practice, however, there has been no case in which the authorities have concluded that harmful conduct was legal in view of the efficiencies derived.

### ii Exclusionary abuses

*Exclusionary pricing*

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

***Exclusive dealing***

In recent years, CADE has investigated and imposed sanctions against numerous exclusive arrangements. Exclusive dealings and other contractual provisions can constitute violations of Article 36 of the Competition Law if they lead to the foreclosing of competitors from accessing the market. Most of the cases have involved Unimed, a physicians' cooperative with operations in 75 per cent of the country. Unimed affiliates contract with local physicians and hospitals for the provision of healthcare services, and often such providers are prohibited from affiliating with any other health plan. CADE prohibited such exclusivity arrangements and imposed sanctions against Unimed in all cases where it held a high market share (usually around 50 per cent). CADE has sanctioned more than 70 of these cases – including a fine of 2.9 million reais imposed in 2013 against a Unimed cooperative in the south of Brazil, doubled for recidivism[28] – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses.[29]

The most important exclusive dealing decision was issued by CADE in 2009. The investigation, initiated in 2004, concerned a loyalty programme instituted by AmBev, Brazil's largest beer producer, which accounts for 70 per cent of the beer market in Brazil. The programme, named 'Tô Contigo', awarded points to retailers for purchases of AmBev products, which could be then exchanged for gifts. CADE concluded that the programme was implemented in a way that created incentives for exclusive dealing, preventing competitors from accessing the market; there was no extensive discussion of the distinction between fidelity and volume rebates. The agency based its findings on documentary evidence seized in an inspection conducted at AmBev's premises. CADE imposed what is still the record fine in connection with an abuse of dominance case: 352 million reais. AmBev challenged CADE's decision before the judicial courts and, in July 2015, reached an agreement with CADE through which it agreed to pay 229.1 million reais and terminate the conduct.[30, 31]

28 Administrative Procedure no. 08012.010576/2009-02.

29 On 19 February 2014, CADE's Tribunal closed an investigation into whether a Unimed cooperative in the State of Bahia had prevented local physicians from affiliating with other health plans after concluding there was no evidence of such exclusivity. Administrative Proceeding No. 08012.008739/2007-17; Defendant: Unimed de Itabuna.

30 Administrative Proceeding No. 08012003805/2004-10; Defendant: Companhia de Bebidas das Américas – Ambev; adjudication date: 22 July 2009. The amount of the fine was equivalent to 2 per cent of the total turnover of the defendant in the year preceding the initiation of the investigations. AmBev has challenged the decision before the judicial courts and a final decision is still pending (Judicial Courts, 16th Circuit, 2009.34.00.028766-7).

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

***Tying and other leveraging practices***

Annex I of CADE Resolution No. 20/99 defines tying as the practice of selling one product or service as a mandatory addition to the purchase of a different product or service. Similarly to the European Commission's approach, CADE generally requires four conditions to find an infringement for tying: (1) dominance in the tying market; (2) the tying and the tied goods are two distinct products; (3) the tying practice is likely to have a market-distorting foreclosure effect; and (4) the tying practice does not generate overriding efficiencies.

CADE recently dismissed two probes related to allegations of tying arrangements in World Cup events due to lack of evidence. In December 2014, the DG closed an inquiry aimed at investigating whether Match Services – a Swiss company chosen by FIFA to provide 'hospitality' services in the 2014 World Cup – tied the sale of rooms to game tickets and inflated the price of accommodation.[32] More recently, in March 2015, the DG closed an inquiry into whether the Brazilian Soccer Confederacy and a tour operator tied the sales of tickets to packaged tours for the 2006 World Cup in Germany.[33]

***Refusal to deal***

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

In April 2014, the Tribunal dismissed an inquiry into elevator manufacturer Thyssenkrupp, which was under scrutiny for allegedly denying maintenance companies access to software to repair elevators.[34] In September, CADE closed an investigation into logistics companies controlled by Vale active in the Port of Itaguaí (Rio de Janeiro). The case was filed in 2005 by Brazilian National Water Transport Agency (ANTAQ) after the defendants allegedly refused to transport loads from exporters. The authority found, however, that exporters were able to contract with the defendants and that the transport restrictions were due to lack of idle capacity.[35] On 22 December 2014, CADE dismissed an inquiry concerning the alleged refusal of Rima Industrial to supply metallic magnesium to other companies that need it in order to operate. The authority reasoned that the fact that Rima asked companies to present an environmental licence as a condition to supply the ore was not enough for a refusal to deal finding, even though such licence was not required under Brazilian

32 Administrative Inquiry No. 08700.007338/2013-30.

33 Administrative Inquiry No. 08012.002019/2006-67. Defendants: Confederação Brasileira de Futebol, Irontour Agência de Viagens Ltda. – Planeta Brasil.

34 Administrative Inquiry No. 08700.004336/2007-41.

35 Administrative Proceeding No. 08012.004397/2005-02. Defendants: Companhia Portuária Baía de Sepetiba and MRS Logística SA; adjudication date: 3 September 2014.

law.[36] Finally, in January 2015, the DG recommended the dismissal of an investigation into Brazilian helicopter manufacturer Helibrás, which was accused of refusing to supply technical manuals and replacement parts to maintenance company Líder Signature.[37]

***Resale price maintenance***

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

In January 2013, in a landmark abuse-of-dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price.[38] Pursuant to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement will be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) and whether the distributors followed the minimum sales prices, as CADE considered such conduct to be *per se* illegal. Elaborating further, the reporting commissioner Vinícius Marques de Carvalho, who later became CADE's president, explicitly stated that a company having a low market share is not in itself sufficient reason for the authority to conclude that such conduct is legal. In its decision, the authority also notably disregarded the efficiency defence – in fact, there is no instance in CADE's case law clearing an anticompetitive merger or dismissing an anticompetitive practice on the basis of efficiency arguments. CADE imposed a fine equivalent to 1 per cent of SKF's total turnover in the year preceding the initiation of the investigation. This position, taken by the majority of the commissioners, departs from previous decisions issued by Brazilian authorities on RPM and makes it very hard for companies holding a stake of at least 20 per cent of the market to justify the setting of minimum sales prices.

**iii Discrimination**

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

CADE has recently initiated two investigations for alleged discriminatory practices. In November 2013, the DG launched a probe into Brazil's national postal service provider ECT for alleged abuse of dominance practices through discrimination in the market for express parcel.[39] In April 2014, the DG also started an investigation about Petrobras' alleged preferential discounts to its integrated natural gas distributor, harming the competing gas

36 Administrative Inquiry No. 08700.000671/2014-07.

37 Administrative Proceeding No. 08012.007505/2002-48.

38 Administrative Proceeding No. 08012.001271/2001-44; Defendant: SKF do Brasil Ltda; adjudication date: 30 January 2013.

39 Administrative Inquiry No. 08700.009588/2013-04. Defendant: Empresa Brasileira de Correios e Telégrafos – ECT.

distributor Comgás.[40] There is also an ongoing proceeding into an alleged abuse of dominance by Petrobras for ensuring favourable contractual terms to gas stations affiliated with a specific chain.[41]

### iv Exploitative abuses

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

## V REMEDIES AND SANCTIONS

### i Sanctions

Brazil's Competition Law applies to corporations, associations of corporations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company's or 'group of companies'[42] pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. CADE Resolution No. 3/2012 broadly defines 144 'sectors of activity', which includes, among others, beverages and agriculture. CADE may resort to the total turnover, whenever information on revenue derived from the relevant 'sector of activity' is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 10 per cent of the company's turnover in connection with abuse of dominance violations. On rare occasions (all related to cartel investigations), CADE has proceeded to calculate the harm resulting from the conduct.

The Competition Law further provides that directors and other executives found liable for anticompetitive behaviour may face sanctions of 1 to 20 per cent of the fine imposed against the company. Under the new Competition Law, individual liability for executives is dependent on proof of guilt or negligence, which makes it hard for CADE to find a violation on the part of the company's executives. Historically, while CADE has been investigating the involvement of individuals in cartel cases, it has rarely done so in abuse of dominance cases. In July 2014, CADE settled an investigation with six individuals who allegedly participated in

40 Administrative Inquiry No. 08700.002600/2014-30.

41 Administrative Proceeding No. 08012.005799/2003-54.

42 The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. CADE was expected to issue regulation defining the criteria that would be applied to distinguish when fines would be imposed against the company, the group of companies, or the conglomerate, but has not yet done so.

the development and implementation of the aforementioned Tô Contigo loyalty programme, created by AmBev, sanctioned by CADE in 2010. The joint settlement fine amounted to 2 million reais.[43]

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

Individuals and companies may also be fined for: (1) refusing or delaying the provision of information, or for providing misleading information; (2) obstructing an on-site inspection; or (3) failing to appear or failing to cooperate when summoned to provide oral clarification.

**ii Behavioural remedies**

At any stage of the investigation, CADE may adopt an interim order to preserve market conditions while a final decision on the case is pending.[44] An interim order may be adopted only if: (1) the facts and applicable law establish a *prima facie* likelihood that an infringement will be found (*fumus boni iuris*); and (2) in the absence of the order, irreparable damage may be caused to the market (*periculum in mora*). CADE has been adopting interim orders in connection with a significant number of solid abuse of dominance cases. Recently, in April 2015, following a request by the natural gas distributor Comgás, CADE adopted an interim measure ordering Petrobras to cease discriminatory treatment in the supply of gas to Gemini Consortium, which is run by Petrobras, White Martins and GásLocal.[45]

Apart from fines, CADE may also:

*a* order publication of the decision in a major newspaper at the wrongdoer's expense;

*b* prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;[46]

*c* include the wrongdoer's name in the Brazilian Consumer Protection List;

*d* recommend that the tax authorities block the wrongdoer from obtaining tax benefits;

*e* recommend that the IP authorities grant compulsory licences of patents held by the wrongdoer; and

*f* prohibit an individual from exercising market activities on its behalf or representing companies for five years.[47]

The new Competition Law also includes a broad provision allowing CADE to impose any 'sanctions necessary to terminate harmful anticompetitive effects', which allows CADE to

43 Administrative Proceeding No. 08012.010028/2009-74; Defendants: Felipe Szpigel, Bernardo Pinto, Paiva, Rodolfo Chung, Ricardo Tadeu, Marcelo Miranda and Marcelo Costa.

44 Article 87 of the Competition Law.

45 Administrative Proceeding No. 08012.011881/2007-41.

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

47 The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE's decision.

prohibit or require a specific conduct from the undertaking at issue. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provision may prompt judicial appeals.

### iii Structural remedies

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

## VI PROCEDURE

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

After an administrative investigation is initiated, the DG will analyse the defence arguments and continue with its own investigations, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even conducting inspections and dawn raids. Inspections do not depend upon court approval and are not generally used by the DG. As for dawn raids, as a rule, the courts allow the DG to seize both electronic and paper data. In 2009, a computer forensics unit was created by the Brazilian agencies for the purpose of analysing electronic information obtained in dawn raids and by other means. Over the past few years, the Brazilian authorities have served more than 300 search warrants (including for residential premises), mostly in connection with cartel investigations.

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

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

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

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies. In February 2009, Brazil's former administrative antitrust investigative agency (SDE) and Brazil's federal police launched the first simultaneous dawn raid in connection with an international cartel investigation, together with the US Department of Justice and the European Commission. Brazil's antitrust authorities have executed cooperation agreements with the US Department of Justice, the European Commission, and Canada, among others. CADE has in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of dawn raids, foreign authorities have become interested in evidence seized in Brazil. However, in most of the cases, cooperation takes place in relation to cartel investigations rather than in abuse of dominance cases.

## VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil[48] has been on the rise over the past five years. This may be due to reasons such as the global trend of antitrust authorities encouraging damage litigation by potential injured parties; the growing number of infringement decisions issued by Brazil's antitrust agency, CADE; as well as the increasing general awareness of competition law in Brazil.

Pursuant to Article 47 of Brazil's Competition Law, victims of anticompetitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazilian Civil Code also establishes that any party that causes losses to third parties shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation in the form of pecuniary damages (for actual damage and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damage, usually derived from losses related to their reputation in the market.[49]

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. As in other jurisdictions, both corporations and individuals may be sued individually (e.g., by competitors, suppliers, or direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations. The pass-on defence is not applicable to misconduct against consumers;[50] for other cases, there are no statutory provisions or case law issued to date.

Individual lawsuits are governed by the general rules set forth in the Brazilian Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country's collective redress system. Standing to file suits aiming at the protection of collective

48 A more detailed version of this section was published at CPI Antitrust Chronicle, 'Private Antitrust Enforcement in Brazil: New Perspectives and Interplay with Leniency', Mariana Tavares de Araujo, Ana Paula Martinez, 16 April 2013; www.competitionpolicyinternational.com/private-antitrust-enforcement-in-brazil-newperspectives-and-interplay-with-leniency.

49 Punitive damages are not expressly provided for in the Competition Law, but some plaintiffs have been awarded those as well.

50 See Brazil's Consumer Protection Code, Article 25.

rights is relatively restricted, and only governmental and publicly held entities are allowed to file. State and federal prosecutors' offices have been responsible for the majority of civil suits seeking collective redress, most of which related to consumers' rights complaints.

In 2010, CADE, Brazil's antitrust court, for the first time included in an infringement decision a recommendation for a copy of the decision to be sent to potential injured parties for them to recover losses.[51] Following that, a number of parties allegedly affected by the cartel sued for damages in courts throughout the country. As would be expected, follow-on litigation depends on the strength of CADE's case. CADE's decisions lack collateral estoppel effect, and even after a final ruling has been issued by the agency, all the evidence of the administrative investigation may be re-examined by the judicial courts, which could potentially lead to two opposite conclusions (administrative and judicial) regarding the same facts.[52]

## VIII FUTURE DEVELOPMENTS

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

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

It will be very interesting to follow future developments and see the interplay of those two undercurrents: it can be hoped that in the end they will balance out and we will have a CADE that is more proactive but still selective in the abuse of dominance arena.

Furthermore, intervention of rivals and customers as third parties in cases pending before CADE with more aggressive approaches, as well as the issuance of injunctions for ceasing potentially harmful practices before a final decision is issued by the agency, are expected to increase in the coming years.

51 Administrative Proceeding No. 08012.009888/2003-70; adjudication date: 1 September 2010.

52 In the generic drugs cartel case, for example, CADE found the companies guilty of price-fixing, and the alleged injured parties sought redress in court. The judge, however, concluded that there was no antitrust violation and therefore did not award any compensation to the plaintiffs. See the decision rendered by the 14th Chamber of the State Court of São Paulo in Public Civil Action No. 0029912-22.2001.403.6100.

# Chapter 5

# CANADA

*Arlan Gates and Eva Warden*[1]

## I INTRODUCTION

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

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

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

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1 Arlan Gates is a partner and Eva Warden is an associate at Baker & McKenzie LLP. The authors thank Yana Ermak, a senior associate at Baker & McKenzie LLP, for valuable contributions to the 2016 update of this chapter.

2 Competition Act, RSC 1985, c. C-34, as amended, online: www.laws.justice.gc.ca/eng/acts/C-34/index.html.

To provide guidance in this area, the Bureau has issued Enforcement Guidelines (the Guidelines)[3] describing its approach to the interpretation of the statutory provisions in light of case law. The current Guidelines were issued in September 2012 and explicitly supersede policy statements and several earlier guidelines, including the prior 2001 guidelines, as well as detailed enforcement guidelines on predatory pricing,[4] guidelines specific to the telecommunications and grocery sectors, and draft guidelines specific to the airline industry.[5]

The Guidelines do not have the force of law and are not binding on the Tribunal, Canadian courts or even the Bureau.[6] The Guidelines also emphasise that the Bureau's enforcement approach will 'depend on the particular circumstances of each case', and on the discretion of the Tribunal and Canadian courts in contested cases.[7] In practice, abuse of dominance in Canada turns significantly on fact-specific analysis and risk assessment. Firms that are likely to be, or to become, dominant may be subject to a higher level of potential scrutiny and exposure of their business activities if they do not adapt accordingly.

## II YEAR IN REVIEW

Several notable developments in the past year are in keeping with the Bureau's increasingly active approach to enforcement of the abuse of dominance provisions.[8] In 2015, following a successful appeal by the Commissioner of Competition (the Commissioner), the Tribunal reheard a long-running case involving the Toronto Real Estate Board (TREB) that concerned one of the prevailing tests for finding that an abuse of dominance has occurred, and, in April 2016, ruled that an abuse of dominance had in fact been established. Separately, the Bureau secured landmark AMPs in November 2014 and November 2015 in two related cases involving the water heater rental industry, in which it has also highlighted its heightened

3 Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (20 September 2012), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html.

4 The former predatory pricing guidelines also addressed the Bureau's approach to predatory pricing under Section 50 of the Act, which was repealed in 2009 together with the Act's former criminal prohibition against price discrimination.

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

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

7 Guidelines, Preface.

8 The Bureau does not currently publish up-to-date statistics on the number of abuse of dominance investigations commenced or discontinued. While several prominent cases were decided in the first two decades after 1986, more than a third of all cases ever to come before the Tribunal for decision or registration of a consent agreement have been since 2009.

focus on corporate compliance programmes. The Bureau also continued its investigation into the practices of the largest food retailer in Canada, closed its investigation into Google's search and search advertising practices, and released updated guidance on the interface of intellectual property (IP) and competition law that underlines its growing attention on the innovative and expanding pharmaceutical industry. Finally, a recent internal restructuring at the Bureau formalises a move towards increased collaboration within its own organisation, as it looks towards enhanced cooperation with its international counterparts.

**i Toronto Real Estate Board decision**

On 24 July 2014, the Supreme Court of Canada denied TREB's application for leave to appeal a decision of the Court of Appeal from earlier in the year.[9] The Bureau had sought to prohibit restrictions on TREB members' provision of direct access to multiple listing service (MLS) information such as sales inventory, selling price and broker compensation, arguing that they prevented the introduction of internet-based services such as 'virtual office websites' through which such information could be made available at low cost.[10] In an unusually short decision in April 2013, the Tribunal had determined that the Bureau's application did not meet the requirements of Section 79(1)(b) of the Act,[11] as interpreted in prior case law. The Court of Appeal allowed the Bureau's appeal in a decision of February 2014, in which it held that the circumstances of the relationship between TREB and its members did not preclude the application of the abuse of dominance provisions of the Act, and referred the matter back to the Tribunal for reconsideration.[12]

The Tribunal heard the case again throughout the remainder of 2015. In the new proceedings, the Commissioner maintained that the 'foundations' of the case remained the same as in 2012, but submitted updated evidence and market developments since the initial

9 *Toronto Real Estate Board v. Commissioner of Competition*, [2014] SCCA No 124.

10 Real estate boards and associations in other Canadian jurisdictions and the United States typically allow their members access to, and use of, their MLS information to provide internet-based services.

11 The Tribunal determined that based on its finding under Section 79(1)(b), the application would necessarily also fail the other statutory tests under Sections 79(1)(a) and 79(1)(c). The Tribunal noted *in obiter* that a case could potentially be brought instead under the civil horizontal agreement provisions in Section 90.1 of the Act.

12 The *TREB* case followed an earlier, successful challenge against the Canadian Real Estate Association (CREA) arising from allegations that CREA and its members had used their control of the MLS and related trademarks to impose exclusionary restrictions that inhibited or prevented fee-for-service, flat-fee and other 'reduced service' models from effectively competing in the residential real estate services market. The *CREA* case was resolved by way of a consent agreement filed with the Tribunal in 2010 that prohibits CREA from adopting, maintaining or enforcing discriminatory rules for a period of 10 years. (*The Commissioner of Competition v. The Canadian Real Estate Association*, Consent Agreement, CT-2010-002, online: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=325.)

hearing.[13] On 27 April 2016, the Tribunal ruled in favour of the Commissioner, having determined that the three elements of section 79 had been established on a balance of probabilities.[14]

As discussed in Section IV, *infra*, Section 79(1)(b) requires that a dominant firm or firms have engaged in 'a practice of anticompetitive acts', but in the leading case interpreting this requirement, *Canada Pipe*,[15] the Court of Appeal appeared to hold that the dominant firm must be a competitor of the firm or firms targeted by the practice. In its original decision, the Tribunal found on the facts that TREB does not compete with its members, and therefore could not satisfy this test.[16] However, in the *TREB* appeal, the Court of Appeal held that the abuse of dominance provisions could apply on the basis that TREB controls the market for residential real estate services in the Toronto metropolitan area, even though it is not technically a competitor in that market. More particularly, according to the Court of Appeal in *TREB*, *Canada Pipe* does not mean that 'a person who does not compete in a particular market can never be found to have committed an anticompetitive act against competitors in that market, or that [an] order can never be made against a person who controls a market other than as a competitor'.[17]

In its initial decision, the Tribunal had also disagreed with the Bureau's argument that certain acts could be seen to have an anticompetitive purpose even if not directed at a specific competitor, as the test in *Canada Pipe* arguably required. The Court of Appeal in *TREB* differed, holding that neither Parliament in enacting the provision nor the Court of Appeal in *Canada Pipe* intended to narrow the scope of Section 79(1) solely to acts targeted against one's own competitor. The Court of Appeal in *Canada Pipe* had itself acknowledged

13 See Closing Arguments of the Commissioner of Competition (12 November 2015). Among other updates, the Commissioner's case in 2015 included evidence that TREB continued to actively enforce prohibitions on members' sharing of historical MLS data, and that already high real estate prices in the Greater Toronto Area had continued to rise since 2012.

14 See Reasons for Order and Order (27 April 2016); Summary of Decision (published 28 April 2016) and Competition Bureau, 'Competition Tribunal rules in favour of the Commissioner in Toronto real estate case' (Announcement, 28 April 2016): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04071.html. At the time of publication, remedies have yet to be determined and are pending further submissions by the Bureau and TREB.

15 *Canada (Commissioner of Competition) v. Canada Pipe Co*, 2006 FCA 233 (Federal Court of Appeal). As leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied, the Court of Appeal decision is a binding precedent.

16 In the initial decision, the Tribunal pointed in part to the Court of Appeal's observation in *Canada Pipe* that eight of the nine examples of anticompetitive acts enumerated in Section 78 of the Act describe harms against competitors, and harm to a competitor could be implied in the ninth example. It also noted that a proviso in Section 79(4) implies that the dominant firm must compete in the market. These provisions are further discussed in Section IV, *infra*.

17 At paragraph 14. While the Tribunal in its original decision held that its finding with respect to Section 79(1)(b) (based on the fact that TREB does not compete with its members) alone was 'fatal' to the Application, the Court of Appeal's decision first considered Section 79(1)(a), which requires that one or more persons substantially or completely control a class or species of business.

that while most of the listed anticompetitive acts that may constitute an abuse of dominance under Section 78 of the Act have in common that they are targeted at one's own competitor, one of the listed acts is not necessarily one that would be taken against a competitor.[18] On this basis, and in the absence of any law specifically foreclosing this possibility, the Court of Appeal in *TREB* concluded that an abuse of dominance could occur through acts of a non-competitor.

In its subsequent ruling (upon reconsideration) in April 2016, the Tribunal followed the Court of Appeal's decision in *TREB*, stating that TREB was found to substantially or completely control the supply of MLS-based residential real estate brokerage services in the Toronto metropolitan area, owing to its control over the MLS, a key input for competitors in the market. The Tribunal also held that TREB had engaged in (and continued to engage in) a practice of anticompetitive acts for the purpose of Section 79, and that the restrictions imposed by TREB had and would continue to substantially prevent competition in the supply of residential real estate brokerage services.[19] This reduction in non-price competition, according to the Tribunal, included 'a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services that likely would be offered' in the area absent such restrictions.

While the Tribunal's ruling provides some closure to the *TREB* matter, the case has raised certain questions regarding the scope of Section 79. For example, the Tribunal's initial decision had been subject to some criticism that it relied on an artificial distinction between trade associations and their members, since association members who may be responsible for the rules and policies of the association do compete with other members, and with non-members. However, the subsequent decisions of the Court of Appeal and of the Tribunal (upon reconsideration) have created some uncertainty concerning the scope of Section 79(1) and whether its application will be limited to cases involving trade associations and similar bodies, or whether it may have implications for a wider range of parties that are not competitors in the relevant market.

The case has also renewed debate regarding the role of the Guidelines in interpreting the Act. Arguably, the Guidelines offer some support to the reasoning of the Court of Appeal and Tribunal (upon reconsideration) in *TREB* in suggesting that at least some acts not directed at competitors may still be considered to have an anticompetitive purpose.[20] However, the Court of Appeal's overt conclusion was that the Guidelines 'provide no useful guidance' on interpreting subsection 79(1) in the case.[21] This conclusion is consistent with the high-level,

18 At paragraph 19. Specifically, Section 78(1)(f) refers to 'buying up of products to prevent the erosion of existing price levels', which the Court of Appeal in *Canada Pipe* noted need not be conduct directed against a competitor.

19 Among other considerations, the Tribunal in its April 2016 decision found that the restrictions substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services, relative to the degree that otherwise would likely exist.

20 Guidelines, Section 3.2.

21 At paragraph 21. According to the Court of Appeal, the Guidelines 'indicate at most that the understanding of the scope of subsection 79(1) has changed over time'. The earlier decision of the Tribunal had noted that the Guidelines seem to reflect that the Commissioner 'is not

non-binding nature of the Guidelines, which in their latest version are markedly shorter and less instructive than prior guidance, and suggest a desire for enforcement flexibility at the expense of predictability.

While *TREB* may eventually be seen as a landmark in Canadian abuse of dominance analysis, its unusual facts make it an outlier in its approach to who is considered a competitor and suggest that further guidance and case law will be required to understand its full implications as the law continues to evolve.

### ii Reliance Comfort/Direct Energy Marketing

On 20 December 2012, the Bureau commenced proceedings under the abuse of dominance provisions against two Ontario companies in the residential market for rental water heaters and related services, Reliance Comfort Limited Partnership (Reliance) and Direct Energy Marketing Limited (Direct Energy).[22] The two companies were historically owned by the monopoly natural gas suppliers (Union Gas and Enbridge Inc, respectively) in different parts of Ontario.

The companies were each alleged to have implemented various policies and procedures for the return of rental water heaters aimed at preventing consumers from switching to competitors, including a requirement to call for a return authorisation, 'aggressive retention tactics' during calls, restrictions on the time and location of returns, and 'unwarranted' charges, which allegedly were 'intended to frustrate the return process'. According to the Notices of Application, at the time of filing Reliance and Direct Energy held more than 76 per cent and 70 per cent shares of their respective geographic markets for rental water heaters. According to arguments in the applications, the companies' 'exclusionary policies and procedures create significant artificial barriers to entry', which in the Bureau's view, 'would otherwise be characterised by ease of entry'.[23]

The Bureau initially sought an AMP of C$10 million against Reliance, the maximum penalty available for a first order. On 6 November 2014, Reliance entered into a consent agreement with the Bureau, in which it agreed to pay a C$5 million AMP in addition to a C$500,000 contribution to the Bureau's investigative costs, and to take steps to make it easier for customers to terminate their rental agreements and return water heaters.

The application against Direct Energy came only months after the end of a 10-year consent order entered into by a predecessor firm in 2002, in which it was required to suspend restrictions on disconnection and returns performed by competitors, and buyout arrangements that discouraged switching. The Bureau subsequently alleged that Direct

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happy with the decision in *Canada Pipe* to the extent that it limits anticompetitive acts to those intended to harm a competitor' (at paragraph 19), but that in any event they do 'not clearly state that the dominant party need not compete in the market'.

22 *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, Notice of Application, CT-2012-002, online: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=355; *The Commissioner of Competition v. Direct Energy Marketing Limited*, Notice of Application, CT-2012-003, online: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=356.

23 Reliance Notice of Application at paragraph 34; *Direct Energy* Notice of Application at paragraph 35.

Energy 're-engaged in similar conduct' following the expiry of that order, seeking an AMP of C$15 million, the maximum penalty available for a 'subsequent order', as well as an order prohibiting the company from engaging in similar conduct in the future.

Direct Energy entered into a consent agreement with the Bureau on 30 October 2015, following a Tribunal decision in March 2015 that it could rule on the matter, notwithstanding the fact that Direct Energy by then was no longer active in the Ontario water heater rental industry.[24] In this agreement, Direct Energy agreed to pay a C$1 million AMP. The consent agreement also requires the company to establish and maintain a corporate compliance programme in the event it re-enters the residential water heater market in Ontario in the next 10 years, and that this programme be consistent with the Bureau's updated Bulletin on Corporate Compliance Programs (Compliance Bulletin) published in 2015.[25]

The maximum AMPs sought and the penalties ultimately imposed – the first for abuse of dominance – against Reliance and Direct Energy represent unprecedented remedies in a Canadian abuse of dominance case. While the Bureau ultimately obtained significantly lower penalties than those initially sought in its settlements with Reliance and Direct Energy, both proceedings reflect a marked shift from past cases in which AMPs were not sought. The case of *Direct Energy* in particular demonstrates the Bureau's willingness to persist with rigorous and continued enforcement in cases involving parties with a history of non-compliance and, together with the release of the Bureau's updated Compliance Bulletin, its heightened emphasis on the importance of implementing credible and effective corporate compliance programmes in Canada.

### iii Loblaw and Google investigations

The Bureau's investigation of Loblaw Companies Limited (Loblaw) targets the grocery retailer's pricing strategies and programmes in the context of its relationship with its suppliers.[26] The investigation reflects the Bureau's focus on vertical agreements and arrangements that reference competitors, such as 'meet-or-release' and 'most favoured nation' clauses.[27] The

24 *Direct Energy*, Reasons for Order and Order Regarding the Commissioner's Motion for the Determination of Questions of Law and the Respondent's Motion for Summary Disposition (26 March 2015). Direct Energy's exit was the result of the acquisition by EnerCare Inc. (EnerCare) of Direct Energy's home and small commercial services business, including its residential water heater business in Ontario, in a transaction that closed in October 2014. The terms of the transaction included a non-competition and non-solicitation agreement that precluded Direct Energy from re-entering the market in Ontario for eight years. The Bureau reached a separate resolution with EnerCare in November, in which it obtained written commitments from EnerCare relating to its future conduct in light of Direct Energy's alleged anticompetitive behaviour.

25 Competition Bureau, Bulletin on Corporate Compliance Programs (3 June 2015), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html. The 2015 Bulletin updates and replaces an earlier version dated 27 September 2010.

26 Competition Bureau, 'Competition Bureau Reaches Consent Agreement in Loblaw/Shoppers deal' (Announcement, 21 March 2014), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03705.html.

27 In the case of the *Loblaw* investigation, the Bureau has indicated that it is considering in particular Loblaw's programmes and policies with suppliers that reference rivals' prices.

Bureau obtained 12 orders to compel production of records and other information from major grocery suppliers in December 2014 to further its investigation, which reportedly continued through 2015, despite an announcement by Loblaw that it would be changing some of its trade practices.[28] The Bureau has not commenced formal proceedings against Loblaw under the abuse of dominance or other provisions of the Act, but has alluded to the potential anticompetitive effects of Loblaw's exercise of market power. It is expected that any enforcement action arising from the investigation is likely to be based primarily on dominance grounds.

In April 2016, the Bureau announced that it was closing its investigation into alleged anticompetitive conduct by Google in relation to the company's online search, search advertising and display advertising services in Canada.[29] While the Bureau found evidence to support an allegation that Google used anticompetitive clauses in certain types of contracts that negatively affected advertisers with an intent to exclude its competitors, this concern was addressed when Google changed the relevant terms in response to similar concerns raised by the US Federal Trade Commission and through an agreement (in response to the Bureau) not to reintroduce such clauses in Canada. In a position statement regarding the investigation, the Bureau indicated that the complaint-driven inquiry, opened in 2013, involved extensive consultations with industry and economic experts, and interviews with a range of market participants, as well as a 'Section 11' order (see Section VI, *infra*) compelling Google to provide documents and information.[30]

The *Google* investigation reflects the Bureau's intensifying focus on the digital economy, and its stated interest in strengthening cooperative ties with its international counterparts; in addition to consulting with the US Federal Trade Commission and European Commission, the Bureau has indicated that it will continue to closely follow the outstanding international investigations and other developments with respect to Google's conduct, as well as monitor the digital marketplace more generally.[31]

### iv Intellectual Property Enforcement Guidelines

On 31 March 2016, the Bureau released its final updated Intellectual Property Enforcement Guidelines (IPEGs).[32] The guidance, which outlines the interface between IP law and competition law in Canada and the Bureau's approach to dealing with competition issues

28 As reported in Canada's national newspaper: Marina Strauss, 'Competition watchdog continues probe into Loblaw's pricing practices', *The Globe* and *Mail* (5 October 2015).

29 Competition Bureau, 'Competition Bureau completes extensive investigation of Google' (Announcement, 19 April 2016), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04068.html.

30 Competition Bureau, 'Competition Bureau Statement Regarding its Investigation into Alleged Anticompetitive Conduct by Google' (Position Statement, 19 April 2016), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

31 The Bureau's 2015–2018 Strategic Vision (2 June 2015) indicates that the Bureau will work to deter or prevent anticompetitive conduct that hinders the emergence of innovation (online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03934.html).

32 Online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04031.html.

involving IP, reflects the Bureau's intensifying focus on pharmaceuticals, with specific commentary on potential abuse of dominance through industry-specific conduct such as 'product switching' (or 'product hopping') and patent litigation settlements.

The updated IPEGs follow the Bureau's announcement, in May 2014, that it had ended its investigation of a pharmaceutical company that allegedly held a dominant position in the supply of certain prescription drugs and had allegedly 'disrupted' the supply of a drug soon to be off-patent in favour of a successor drug for which there was no generic substitute (i.e., product switching).[33] In September 2014, the Bureau also released a white paper discussing patent-related settlement agreements and the potential concerns associated with arrangements such as 'pay-for-delay' settlements under various provisions of the Act, including abuse of dominance.[34] In clarifying the Bureau's approach to the interface between IP and competition law, the updated IPEGs crystallise these recent developments towards a sharper focus on potential concerns associated with market power, in the pharmaceutical industry in particular, while setting the stage for the possibility of increased enforcement in that industry going forward.[35]

### v Restructuring of the Competition Bureau

Following an internal restructuring within the Bureau that became formally effective on 1 April 2015, the 'Mergers and Monopolistic Practices Branch' now combines the 'Mergers Directorate', responsible for merger review, and the 'Monopolistic Practices Directorate', which investigates potentially anticompetitive business practices, such as abuse of dominance and restrictive vertical trade practices, as well as certain types of anticompetitive agreements or arrangements.[36] This and other recent developments reflect the Bureau's emphasis on increasing adaptability and internal synergies in the administration and enforcement of the Act.

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33 An application by the Bureau for an *ex parte* order to compel document production and written responses was filed with the Federal Court on 13 December 2012. According to the Bureau, the firm had ceased the conduct that raised concerns shortly after the Bureau began its investigation, causing competitive market dynamics to be restored.

34 Competition Bureau, 'Patent Litigation Settlement Agreements: A Canadian Perspective', 23 September 2014, online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03816.html.

35 The Bureau also announced in March 2015 that it had reached an agreement with Canada's largest supplier of insulin pumps for diabetic patients, Medtronic of Canada Ltd, after the Bureau raised concerns about the company's warranty terms further to an investigation. Competition Bureau, 'Competition Bureau Reaches Agreement with Insulin Pump Manufacturer to Resolve Competition Concerns' (Announcement, 13 March 2015), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03887.html.

36 Competition Bureau, 'Competition Bureau restructures to maximise its contribution to a more effective marketplace' (Announcement, 25 March 2015), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03897.html. The Mergers Directorate and Monopolistic Practices Directorate were formerly known as the Mergers Branch and Civil Matters Branch respectively.

For example, concurrently with the *Reliance* and *Direct Energy* cases, the Bureau reviewed an acquisition by Reliance of National Energy Corporation (National),[37] and also secured penalties against National for misleading door-to-door promotions.[38] In remarks of 9 June 2015, the Commissioner observed that the Bureau's work to protect competition in the provincial water heater industry 'provides an excellent example of the collaboration and benefits that can be achieved through our internal realignment exercise'.[39]

With respect to the *Loblaw* investigation, the Bureau's inquiry was first publicly disclosed at the time of its approval (in March 2014) of Loblaw's acquisition of Canada's largest drug store retailer.

In the pharmaceutical space, the Bureau has been reviewing an increasing number of merger transactions.[40] This industry consolidation will likely continue to hold the Bureau's attention on pharmaceuticals (most recently demonstrated in the updated IPEGs) and further intensify its focus on potential competition concerns, including abuse of dominance specifically.[41]

The Bureau's formal restructuring, which is intended to enhance collaboration and resource allocation within the Bureau, is likely to facilitate its vigorous pursuit of abuse of dominance in the Canadian marketplace.

### vi Summary of recent developments

The following table summarises significant recent decisions and developments.

| *Sector* | *Investigating authority* | *Conduct* | *Case opened** | *Status* |
|---|---|---|---|---|
| Real estate services | Competition Bureau | Restriction by the Toronto Real Estate Board of members' access to multiple listing service information (sales inventory, selling price, broker compensation, etc.) | Initial application filed with the Tribunal May 2011 | Rehearing held in 2015. The Tribunal ruled in April 2016 that abuse of dominance was established; remedies are yet to be determined. |

37 Competition Bureau, 'Competition Bureau clears Reliance's acquisition of National' (Announcement, 17 November 2014), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03841.html.

38 Competition Bureau, 'National Home Services to pay $7 million for misleading door-to-door water heater promotions' (Announcement, 24 November 2014), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03849.html.

39 Competition Bureau, 'Remarks by John Pecman, Commissioner of Competition' (Speech, 9 June 2015), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html.

40 According to the Bureau, in 2014–2015, pharmaceutical transactions represented 3.3 per cent of its mergers case load and ranked among the top five industry sectors for merger review in Canada, representing a shift from the previous year.

41 The updated IPEGs include extensive commentary on mergers and contemplate the assessment of potentially anticompetitive conduct under both the merger control provisions and other provisions (including those relating to abuse of dominance as well as horizontal agreements between competitors), depending on the circumstances.

| | | | | |
|---|---|---|---|---|
| Residential water heaters | Competition Bureau | Alleged 'aggressive retention tactics' during customer calls by Reliance Comfort Limited Partnership and Direct Energy Marketing Limited, as well as other policies and procedures aimed at hindering switching to competitors | Initial applications filed with the Tribunal in December 2012 | Consent agreement with Reliance registered November 2014, including C$5 million penalty and C$500,000 investigation costs.<br><br>Consent agreement with Direct Energy registered October 2015 including C$1 million penalty and commitment to implement a corporate compliance programme in the event of re-entry into the market.<br><br>Commitments by EnerCare Inc not to continue Direct Energy's alleged anticompetitive policies and practices obtained by Bureau November 2014, following acquisition of Direct Energy by EnerCare. |
| Pharmaceuticals | Competition Bureau | Alleged 'product hopping' by Alcon through intentional disruption of the supply of a branded prescription anti-allergy drug in order to limit or prevent meaningful competition from generic drug companies | Investigation commenced November 2012 | Closure of investigation announced May 2014 following cessation of the alleged conduct. |
| Insulin pumps for diabetic patients | Competition Bureau | Imposition of warranty terms relating to use of Medtronic insulin pumps with non-Medtronic equipment, which allegedly limited competition and restricted consumer choice | Date investigation commenced not publicly disclosed but appeared to follow acquisition by Medtronic Holdings Limited of Covidien plc, which was subject to a consent agreement registered 26 November 2014 | Agreement with Bureau to revise warranty terms announced March 2015. |
| Digital economy – online search and search advertising | Competition Bureau | Alleged conduct by Google intended to exclude or disadvantage competitors, including through imposition of conditions and demands on customers preventing rivals from competing | Investigation commenced in 2013 | Subject to ongoing monitoring. |

The Bureau does not currently publish up-to-date statistics on the number of ongoing abuse of dominance investigations, although it is estimated that currently there are between 20 and 30 ongoing investigations and that the Bureau receives some 400 complaints yearly.

## III MARKET DEFINITION AND MARKET POWER

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

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

### i Market definition

A 'class or species of business' and the words 'Canada or any area thereof' have been interpreted by the Tribunal to refer to the relevant product and geographical market or markets.[42] Market definition focuses conceptually on the existence of substitutes for the product and geographical territory in question. It is usually determined on the basis of a 'hypothetical monopolist' test that looks at the smallest market in which a 'small but significant and non-transitory increase in price' could be profitably imposed, beginning with the product of the firm in question and the area in which it operates and expanding the relevant market to include other products or supplier locations likely to be substituted.[43]

This is generally consistent with the approach taken by the Bureau in defining markets for purposes of merger analysis.[44] As in the case of mergers, market definition may depend significantly on the particular features of the product and geographical markets in question. A market need not be conclusively defined to find that a firm or firms exercise market power.[45]

In addition to considering actual price and supply data where available, the Bureau may take into account a range of other factors in its assessment of market definition, including consumer behaviour, past product or location substitution, product functional interchangeability, unique product characteristics, transportation costs and shipping patterns, switching costs, the role of distant sellers and foreign competition, and past price correlation among substitute products.[46]

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42 *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co* (1990), 32 CPR (3d) 1 at 9 and 20.

43 The benchmark for 'significant' and 'non-transitory' is a 5 per cent increase in price, sustained over a one-year period. The relevant price is that which would exist in the absence of the anti-competitive acts (often not the current price). The 'price' can include not only the nominal price, but also qualitative factors such as product quality, choice, service, support or innovation.

44 See Competition Bureau, Merger Enforcement Guidelines (2011), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

45 One distinction between the two approaches is the Bureau's acknowledgment, in the abuse of dominance analysis, of a potential 'overly broad product market definition' if current prices – that is, price levels where market power has already been exercised – are taken into account (the so-called 'cellophane fallacy'). See Guidelines, Section 2.1.

46 Guidelines, Sections 2.1 and 2.2.

### ii Market power

The words 'substantially or completely control' in the context of the abuse of dominance provisions have been held by the Tribunal to be synonymous with market power.[47] The focus of the Bureau's concern is the 'creation, enhancement or preservation of market power' resulting from a practice of anticompetitive acts. The Bureau's approach to assessing market power therefore takes into account both pre-existing market power and market power derived from practices alleged to be anticompetitive.[48]

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

### iii Market share

There is no statutory threshold for market share that will necessarily give rise to market power, nor a statutory safe harbour below which a firm will not be considered dominant. However, market share is 'usually a necessary, but not sufficient'[49] condition of finding market power, and will ordinarily be considered together with other factors. Market share may be measured on the basis of revenues, unit sales, sales or production capacity or natural resource reserves, depending on which 'best reflects the future competitive significance of competitors'.[50] In addition to the actual share, the Bureau will consider the distribution of market share among a firm's competitors, as well as market share fluctuations.

The Bureau has historically taken the position that only a single firm market share below 35 per cent will be considered unlikely to give rise to a finding of market power. The revised Guidelines maintain this safe harbour but now go further to say that a market share of up to 50 per cent will 'generally' not lead to further examination by the Bureau unless it is believed that the anticompetitive conduct is likely to result in increased market share in a reasonable period. This change is now consistent with the long-standing finding of the Tribunal in the *Laidlaw* case that a market share below 50 per cent would not lead to a *prima facie* finding of dominance.[51]

On the other hand, the Guidelines go further than the Tribunal in stating the corollary that a single firm market share above 50 per cent (or a combined share above 65 per cent, in the case of joint dominance) will 'generally prompt further examination'. In the *Tele-Direct*

47 *NutraSweet* at 28.

48 Market power is most often associated with sellers that possess the ability to maintain prices or impose restrictions on non-price aspects of competition without effective discipline from competitors in the market, but can also arise among a buyer or buyers that exercise market power in lowering price paid to a seller below a competitive level.

49 Guidelines, Section 2,3,1,

50 Guidelines, Section 2.3.1.

51 *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289.

case, the Tribunal held that where market share is 80 per cent or greater, it will look for 'extenuating circumstances' and 'generally, ease of entry' to outweigh a *prima facie* finding of market power.[52] In practice, contested abuse of dominance cases both before and after *Tele-Direct* have involved market shares of 80 to 100 per cent, usually in highly concentrated markets.

### iv Barriers to entry; other factors

As market share is not determinative of market power, the Bureau will also consider the barriers to entry that may be present in the market, including: sunk investments (e.g., in equipment, infrastructure or research and development); government approval requirements; whether the market is mature or depends on economies of scale or scope; network effects; availability of scarce resources or inputs; and the prevalence of long-term contracts. Market entry despite barriers to entry must be likely, timely and sufficient to prevent or discourage the exercise of market power.

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

### v Joint dominance

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

For purposes of the criminal conspiracy provisions of the Act, 'conscious parallelism', in itself, does not constitute an agreement, and the Bureau adopted this position in the prior (2001) abuse of dominance enforcement guidelines, which also described factors that could be used to infer joint action in the civil context. The revised Guidelines simply state that '[s]imilar or parallel conduct by firms is insufficient' to establish joint dominance, and offer no further insight into the extent of joint conduct – or maximum level of intra-group competition – required to find joint control of the market. The threshold test for joint dominance has never been considered by the Tribunal as, although the Bureau has commenced three significant joint dominance cases, all have settled prior to a contested hearing.[53]

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52 *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc* (1997), 73 CPR (3d) 1. Separately, in a case involving a sole supplier, the Tribunal presumed market power in the absence of 'evidence that there [were] no barriers to entry'; *Director of Investigation and Research v. D&B Companies of Canada Ltd* (1995), 64 CPR (3d) 216.

53 *Canada (Director of Investigation & Research) v. Bank of Montreal* (1996), 68 CPR (3d) 527; *Canada (Director of Investigation & Research) v. AGT Directory Ltd* [1994] CCTD No. 24; *Canada (Commissioner of Competition) v. Waste Services (CA) Inc and Waste Management of Canada Corporation*, Consent Agreement, CT-2009-003. However, in the 2009 *Waste Services* case, the Bureau's allegations against two commercial waste firms appear to have been based on parallel conduct combined with high combined market share of greater than 80 per cent.

In addition to the application of the abuse of dominance provisions to joint dominance, since 2010 it has been possible to address coordinated conduct under Section 90.1, a civil provision that applies to agreements between competitors that substantially lessen or prevent competition.[54]

### vi Attempted monopolisation

In contrast to the US Sherman Act, attempted monopolisation is not caught by the abuse of dominance provisions in Canada. The existence of market power at the time anti-competitive conduct is engaged in is implicit in the formulation of the statutory test, and would prohibit an application to the Tribunal on the basis of anticipated market power. The revised Guidelines nonetheless suggest that the Bureau may investigate the conduct of a firm that does not presently hold market power but that is expected to acquire it as a result of the allegedly anticompetitive conduct, 'within a reasonable period of time'.[55]

## IV ABUSE

### i Overview

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

***Practice of anticompetitive acts***

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

Whether an act will be considered 'anticompetitive' depends on the limiting principle of whether it has an intended negative effect on a competitor that is 'predatory, exclusionary

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The firms in question both used long-term contracts that imposed highly restrictive terms on customers such as automatic renewal clauses and severe penalties for early termination; the Bureau did not suggest that the challenged conduct involved any coordination or agreement.

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

55 Guidelines, Section 2.3.

or disciplinary'.[56] This does not necessarily require subjective intent, and the Tribunal has held that intent can be inferred from the reasonably foreseeable consequences of the conduct or the circumstances in which it is undertaken.[57]

The requirement that an anticompetitive act be intended to harm a competitor, not competition in general, which is assessed under the separate test in Section 79(1)(c) of the Act, was an essential part of the test in *Canada Pipe*. The revised Guidelines, however, take the position that 'certain acts not specifically directed at competitors could still be considered to have an anticompetitive purpose'.[58] This broader interpretation – which would encompass 'facilitating practices' that do not themselves harm a competitor but permit coordination – was arguably foreclosed by the Tribunal's decision in the *TREB* case. However, as discussed above, the subsequent decision of the Court of Appeal leaves open the possibility that a range of acts not specifically directed at a competitor (or at least not one's own competitor) may qualify as 'anticompetitive acts' for the purpose of these provisions.

Where anticompetitive intent has been inferred, it is possible to rebut a presumption that the purpose of conduct is anticompetitive by establishing that the conduct had a valid business purpose or justification. In *Canada Pipe*, it was held that a business justification must have a 'credible efficiency or pro-competitive rationale' and be one that 'relates to and counterbalances the anticompetitive effects or subjective intent of the acts'.[59] However, the Guidelines take a broader view that a business justification, while not a defence, could be anything that provides an 'alternative explanation for the overriding purpose of the conduct'.[60]

A 'practice' of anticompetitive acts under the abuse provisions generally requires more than a single act but could be met by a single act that has an ongoing or systemic effect or a 'lasting impact' in a market.[61] A practice may also consist of different forms of anticompetitive conduct,[62] not only repeated use of the same conduct, and can therefore in theory include otherwise innocuous conduct, if used in an anticompetitive manner in combination with other anticompetitive practices.

***Substantial lessening or prevention of competition***

An abuse of dominance will be subject to a remedy under the Act only if there is an actual or likely substantial lessening or prevention of competition.

56 *Canada Pipe* at paragraph 66.

57 *NutraSweet* at 35.

58 Guidelines, Section 3.2.

59 *Canada Pipe* at paragraph 73.

60 Guidelines, Section 3.2.

61 Guidelines, Section 3.1.

62 *NutraSweet* at 59.

The prevailing test was formulated in *Canada Pipe*, and recently affirmed in the context of the evaluation of mergers under the Act.[63] It is a 'but for' test that seeks to determine if it is likely that there would be substantially greater competition (past, present or future) in the absence of the impugned conduct.[64]

As was the case prior to *Canada Pipe*, the test considers whether a practice contributes to the creation, preservation or enhancement of market power, which will be assessed in terms of whether there is substantial effect on market entry or expansion by new or existing competitors. However, in contrast to the test prior to *Canada Pipe*, it is a comparative, relative assessment, rather than a consideration of whether the absolute level of competition is substantial or sufficient,[65] The Guidelines indicate that the Bureau will also consider factors such as whether, but for the practice, there would likely be substantially lower consumer prices, substantially greater product selection, quality or innovation, or substantially more frequent switching.[66]

In contrast to the test for anticompetitive acts under Section 79(1)(b), the above test concerns competition rather than individual competitors. The Act requires, however, that the analysis take into account whether an impugned practice results from a market participant's 'superior competitive performance', which could be a legitimate cause of a relative decrease in competition.[67]

**ii Exclusionary abuses**

The Act enumerates several practices in Section 78 that relate to the exclusion of a competitor, including margin squeezing by a vertically integrated supplier, acquisition by a supplier of a customer, pre-emption of scarce facilities or resources, adoption of non-compatible product specifications, and exclusive dealing.[68] The Guidelines also reference tying and bundling, activities that increase customer switching costs, or in general, activities that increase a rival's costs.[69]

The Tribunal and Canadian courts have also recognised numerous other exclusivity abuses in case law, including: meet-or-release and most-favoured nation clauses;[70] rights of first refusal;[71] automatic price increases;[72] long-term contracts;[73] negative option automatic

63 *Tervita Corporation v. Canada (Commissioner of Competition)*, 2015 SCC 3. In its decision of 22 January 2015, the Supreme Court of Canada considered whether, but for the merger, the acquired party would likely have entered the relevant market as a competitor.

64 The Court of Appeal held that the Tribunal had erred in considering whether there continued to be a substantial level of competition in the market.

65 Guidelines, Section 4.

66 Confusion around the application of the test following the *Canada Pipe* decision has, however, arguably led to imperfect application of the principle of relative competitiveness in practice.

67 Act, Section 79(4).

68 Sections 78(a), (b), (e), (j), and (h).

69 Guidelines, Section 3.2.1.

70 *NutraSweet*; *D&B* regarding most favoured nation clauses.

71 *Laidlaw*.

72 Id.

73 *D&B*.

renewal provisions;[74] costs or penalties, such as liquidated damages or excessive fees to switch suppliers, return goods or otherwise terminate contracts early;[75] the acquisition of competitors and inclusion of non-compete clauses in the acquisition agreements;[76] various kinds of loyalty or fidelity rebates,[77] including discounts and allowances in exchange for the use of the supplier's logo and name;[78] exclusive networks;[79] market allocation[80] and, in the real estate services cases, the use of a database in a way that could be exclusionary.[81]

### iii Discrimination

The Act formerly contained *per se* criminal prohibitions against price discrimination and predatory pricing. When price maintenance was decriminalised with the repeal of those provisions in 2009, it was acknowledged that this conduct would remain subject to review under the abuse of dominance provisions where the conditions of Section 79 were met.[82]

The Act enumerates several examples of discriminatory or predatory conduct, including freight equalisation, introducing fighting brands selectively and temporarily, buying up product to prevent price erosion, and selling articles below acquisition cost.[83] Prior cases have also considered the intimidation of competitors and customers through spurious or threatened litigation,[84] cross-subsidisation[85] and predatory pricing generally.[86]

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

### iv Exploitative abuses

The Act does not prohibit excessive pricing or similar exploitative abuses, except to the extent that they have an exclusionary, disciplinary or predatory purpose and likely effect. The revised Guidelines explicitly state that higher prices or lower levels of service than would be expected in a market characterised by greater competition will not, in themselves, constitute an abuse of dominance.[87]

74 *Laidlaw*.
75 *Direct Energy* and *Reliance*; *Laidlaw*; *D&B*; *Waste Services*.
76 *Canada Pipe*; *Laidlaw*.
77 *Canada Pipe*; *NutraSweet*.
78 *NutraSweet*.
79 *Bank of Montreal*.
80 *AGT* regarding allocation of national advertisers.
81 CREA; *TREB*.
82 For example, see Competition Policy Review Panel, Compete to Win (27 June 2008) at 58, online: www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/00050.html.
83 Sections 78(c), (d), (f), and (i).
84 *Laidlaw*.
85 *NutraSweet*; *Tele-Direct*.
86 *Commissioner of Competition v. Air Canada*, 2003 Comp Trib 13; *Tele-Direct*.
87 Guidelines, Section 1.

## V REMEDIES AND SANCTIONS

### i Sanctions

Since 2009, the Tribunal has had the discretion, in addition to ordering behavioural or structural remedies, to impose AMPs of up to C$10 million in the first instance or C$15 million for a 'subsequent order'.[88]

Pursuant to the Act, the Tribunal is required to consider various factors in determining the amount of an AMP, including the affected sales, actual or anticipated profits, the dominant firm's financial position, its history of compliance and 'any other relevant factor'.[89] An unpaid AMP is a debt owed to the Crown and recoverable in any court of competent jurisdiction.

Although the stated purpose of AMPs in the Act is compliance and not punishment,[90] the constitutionality of AMPs has been challenged in other contexts on the basis that they are punitive and therefore warrant the same procedural protections as criminal penalties.[91] To date, the *Reliance* and *Direct Energy* cases discussed in Section II, *supra*, are the only cases in which AMPs have been sought by the Bureau and ultimately imposed.[92]

### ii Behavioural remedies

The most basic remedy under Section 79 is an order prohibiting the continuation of a practice of anticompetitive acts. In addition or as an alternative, the Tribunal has broad discretion to make any other order required to restore competition, where a prohibition order alone is not likely to be sufficient to restore competition in the market.[93] Both consent agreements and prohibition orders can theoretically be imposed for an indefinite period.[94]

An interim order may be issued, on application by the Bureau on an *ex parte* basis, where the Tribunal finds that injury to competition that cannot be adequately remedied by a later order, or in certain other specific circumstances, is likely to occur in the absence of the order.[95]

### iii Structural remedies

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

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88 AMPs had previously been available in the domestic airline industry only.

89 Act, Section 79(3.2).

90 Act, Section 79(3.3).

91 Constitutional arguments challenging AMPs under the civil misleading advertising provisions of the Act, for which the same level of AMPs is available as for abuse of dominance, were made but effectively rejected in *Canada (Competition Bureau) v. Chatr Wireless Inc*, 2013 ONSC 5315 (Ont. Sup. Ct.), online: http://canlii.ca/t/g04cv.

92 As explained in Section II, *Reliance* was not a fully contested case. The C$5 million penalty obtained by the Bureau was the result of a consent agreement.

93 Act, Section 79(2).

94 In contrast, criminal prohibition orders and orders regarding civil deceptive marketing practices are subject to a statutory maximum limitation period of 10 years.

95 Act, Section 103.3. Interim orders are issued for an initial term of 10 days but may be extended up to twice for 35 days each.

## VI PROCEDURE

Obtaining an order for a remedy under the abuse of dominance provisions in principle requires an application by the Commissioner of Competition to the Tribunal, a specialised competition court with judicial and lay members that hears and decides non-criminal matters under the Act.[96] Cases before the Tribunal are subject to rules of procedural practice, which, *inter alia*, provide for documentary, written and oral discovery on a relevance standard.[97] Decisions of the Tribunal may be appealed to the Federal Court of Appeal, and ultimately to the Supreme Court of Canada. Courts may refer matters back to the Tribunal for redetermination.

However, it is increasingly common for alleged abuses of dominance to be investigated and initially challenged outside the formal Tribunal process with a view to seeking a negotiated resolution. Negotiated settlements are then recorded in a 'consent agreement', which is registered with the Tribunal and, once registered, carries the legal force of an order of the Tribunal.[98] Firms that volunteer to make changes in their businesses practices are generally required to formalise these commitments in a consent agreement.[99]

Consent agreements must be 'based on terms that could be the subject of an order of the Tribunal', but consent agreements filed with the Tribunal are not subject to its substantive oversight, nor are full details of the conduct leading to the agreement made public. Given the availability of consent agreements, abuse of dominance investigations often settle before reaching the contested hearing stage. On the other hand, this framework has been observed to be one in which respondents may '"dig in", or at least protract settlement discussions, to avoid a restrictive consent agreement'.[100]

The Act provides the Bureau with numerous tools to investigate alleged abuses of dominance, including the ability to obtain a judicial order under Section 11 of the Act to compel oral examination, document production, or a written response to questions, where the Bureau believes grounds may exist for an order. The Bureau has increasingly made use of this tool to compel production in recent activity such as the *Loblaw* investigation. The Bureau can also obtain a warrant to enter and search premises and seize documents, or in 'exigent' circumstances, exercise these rights without a warrant.[101] Section 11 orders can extend to affiliates outside Canada of a Canadian corporation that is subject to the order, and can also be used to obtain information from third-party customers, suppliers and competitors.

Various procedural limitations are set forth in statute. Applications for remedies must be brought to the Tribunal no later than three years after a practice has ceased.[102] The Commissioner may not bring an application under both the abuse of dominance provisions and either the criminal conspiracy provisions or the civil price maintenance, competitor

96 See www.ct-tc.gc.ca.

97 Competition Tribunal Rules, SOR/2008-141, online: http://laws-lois.justice.gc.ca/eng/regulations/SOR-2008-141.

98 Act, Section 105.

99 Guidelines, Section 1.

100 G Addy, J Bodrug and C Tingley, 'Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement', *Canadian Competition Law Review*, Vol. 25, No. 2 (2012), at 308.

101 Act, Section 15.

102 Act, Section 79(6).

collaboration or substantive merger provisions.[103] However, the Bureau may and often does bring applications under both the abuse of dominance provisions and provisions relating to other vertical trade practices, as discussed in Section VII, *infra*.

## VII PRIVATE ENFORCEMENT

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

There is also no statutory right to obtain damages as a result of a finding of an abuse of dominance, although under Section 36 of the Act a private right of action is available where an order of the Tribunal has been violated.[104]

Attempts by private litigants to bring cases on the basis of civil conspiracy or torts alleging an abuse of dominant position have not been recognised, for the reason that unlike the criminal provisions, the civil provisions of the Act are presumptively lawful unless and until an order has been granted by the Tribunal.[105]

However, Section 103.1 of the Act does allow private parties to apply for leave to bring applications before the Tribunal under the refusal to deal (Section 75), price maintenance (Section 76), and exclusive dealing, tied selling and market restriction (Section 77) provisions of the Act, where the underlying requirements of those sections are met. While the remedies available under those provisions do not include AMPs or damages, and while actions are costly to bring, private litigants could in theory use Section 103.1 to prohibit certain conduct that might otherwise be pursued as an abuse of dominance, or to draw attention to related abuse of dominance concerns, providing private parties with a 'back door' method of privately challenging abuse of dominance.[106]

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

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103 Act, Sections 45 or 49, 76, 90.1 or 92 respectively.

104 Section 36 of the Act applies to breaches of the criminal provisions of the Act; a breach of an order of the Tribunal is a criminal offence.

105 For example, *Chadha v. Bayer Inc* (1998), 82 CPR (3d) 202 (Ont. Gen. Div.). However, in an action against TREB, CREA and their directors and officers alleging in part that they had breached the terms of CREA's consent agreement, the Court of Appeal in refusing a motion to strike the statement of claim found that a reasonable cause of action was disclosed (*Dale v. Toronto Real Estate Board*, 2012 ONSC 512).

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

## VIII FUTURE DEVELOPMENTS

It is likely that considerable attention will continue to be focused on abuse of dominance in Canada in the coming year, with the following expected developments being of particular relevance:

*a* the outcome of a further hearing to determine a remedy following the Tribunal's ruling in the *TREB* case;

*b* the outcome of the Bureau's investigation into Loblaw's pricing strategies in the context of the grocery retailer's supplier relationships, and a potential intensification of the Bureau's focus on agreements that reference rivals in general;

*c* a potential increase in scrutiny of alleged anticompetitive conduct in the pharmaceutical industry, following the release of the updated IPEGs and in light of a growing number of pharmaceutical transactions subject to merger review under the Act;

*d* increased emphasis on the implementation of effective corporate compliance programmes, further to the release of the Bureau's updated Bulletin on Corporate Compliance Programs;

*e* enhanced international cooperation between the Bureau and its counterparts in other jurisdictions on dominance matters, following the *Google* investigation and in tandem with the Bureau's growing interest in the digital economy as it relates to dominance; and

*f* closer alignment between the assessment of possible abuses of dominance and other areas of the Bureau's mandate, in light of the recent reorganisation at the Bureau.

# Chapter 6

# CHINA

*Zhan Hao and Song Ying*[1]

## I INTRODUCTION

Article 17 of the Chinese Antimonopoly Law (AML) prohibits undertakings with a dominant position in the relevant market from abusing their market dominance. According to Article 17, subject to the rule of reason, undertakings are banned from conducting the following seven kinds of abusive activities:

*a* selling commodities at unfairly high prices or buying commodities at unfairly low prices;

*b* without justifiable reasons, selling commodities at prices below cost;

*c* without justifiable reasons, refusing to enter into transactions with their trading counterparties;

*d* without justifiable reasons, requiring trading counterparties to make transactions exclusively with themselves or with the undertakings designated by them;

*e* without justifiable reasons, conducting tie-in sales of commodities or imposing other unreasonable trading conditions on transactions;

*f* without justifiable reasons, applying differential prices and other transaction terms among trading counterparties on an equal footing; or

*g* other acts of abuse of a dominant market position confirmed as such by the AML enforcement authorities under the State Council.

Public enforcement of the AML is carried out by three authorities: the Ministry of Commerce (MOFCOM), which is in charge of merger review; the National Development and Reform Commission (NDRC), which is responsible for combating price-related anticompetitive activities; and the State Administration for Industry and Commerce (SAIC), which regulates non-price-related anticompetitive activities.

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In accordance with Article 17 of the AML, abusive activities involve both price and non-price-related anticompetitive activities. For example, 'selling commodities at unfairly high prices' is price-related, while 'refusing to enter into transactions with trading counterparties' is deemed non price-related. NDRC (and its local branches) and SAIC (and its local branches) are the two agencies in charge of antitrust enforcement against abuse of market dominance.

NDRC, SAIC, and the Antimonopoly Commission of the State Council (the Commission)[2] have released a series of regulations and guidelines in relation to enforcing Article 17 of the AML.

The Guide of the Antimonopoly Commission of the State Council for the Definition of the Relevant Market (the Relevant Market Definition Guide), which was released on 24 May 2009, provides the framework and methodologies to define the relevant product market and the relevant geographical market.

To date, the NDRC has released two sets of rules. The first is the 'Provisions of Anti-Price Monopoly', which came into force on 1 February 2011. The value of this rule is that it lays out: (1) five kinds of price-related abusive activities, (2) the definition of abuse of dominance, (3) the factors that need to be considered when deciding whether an undertaking has a dominant position, and (4) the market shares under which an undertaking may be assumed to possess market dominance. The second is the 'Provisions on Administrative Enforcement Procedures of Anti-Price Monopoly', which came into force on the same date as the Provisions of Anti-Price Monopoly, and which provides for the procedures dealing with price-related antitrust cases.

The SAIC has also released three provisions regarding non-price-related monopolistic activities: 'the Industry and Commerce Administration's Provisions on Prohibiting Abuse of Dominant Market Position' (ICA's Provisions on Prohibiting Abuse of Dominant Market Position), 'the Industry and Commerce Administration's Provisions on Enforcement Procedures of Monopolistic Agreements and Abuse of Dominant Market Position' (ICA's Provisions on Enforcement Procedure), and Measures of the State Administrations for Industry and Commerce on the Prohibition of Abuse of Intellectual Property Rights for the Purpose of Eliminating or Restricting Competition (SAIC IPR Abuse Rules).

Furthermore, more efforts regarding legislation of soft law have been made in 2015. Specifically, the NDRC, SAIC, MOFCOM and the State Intellectual Property Office drafted the IPR antitrust guidelines based on their respective enforcement areas, and submitted their respective versions to the State Council's Antimonopoly Commission (AMC). The AMC will eventually come up with the final, unified guidelines (the IPR Antitrust Guidelines). In addition to the IPR Antitrust Guidelines, the NDRC also drafted five other antitrust

2 In accordance with Article 9 of the AML, the State Council shall establish an antimonopoly commission in charge of organising, coordinating and guiding antimonopoly work and performing the following duties:

*a* studying and drafting policies on competition;

*b* organising studies and assessment of the general competition condition on the market and publishing assessment reports;

*c* formulating and releasing antimonopoly guidelines;

*d* coordinating administrative enforcement of the AML; and

*e* other duties as prescribed by the State Council.

guidelines in 2015: the Auto Industry Antitrust Guidelines, Guidelines on Leniency Policy, Guidelines on Commitment of Undertakings, Guidelines on Calculating the Illegal Gains and Fines for Monopoly Conducts and Guidelines on Procedures of Monopolistic Agreement Exemption. It is expected that the release of these guidelines will help normalise and guide the enforcement activities to a large degree.

## II YEAR IN REVIEW

The year 2015 has witnessed a decent increase on abuse of market dominance cases, both in public enforcement and private litigation. However, the authorities responsible for public enforcement generally find it difficult to pursue investigations against abuse of market dominance cases. Two main reasons are usually cited to explain this standoff: first, it is usually hard for the authorities to define the relevant markets and prove the concerned undertakings' dominant market position through economic approaches; second, it is usually hard to acquire evidence regarding abusive practices.[3]

### ii Public enforcement

***Cases pursued by the NDRC***

After closing the *Qualcomm* case, the NDRC switched its enforcement focus to cartels and administrative abuses. In the last year, the NDRC handed over blank paper with respect to enforcement against abuse of dominance.

***Cases pursued by the SAIC and its provincial branches***

*Investigation against Hainan Dongfang Water Company*

In January 2015, Hainan AIC closed an investigation against Hainan Dongfang Water Company and publicised the official decision on the SAIC's website. This case concerned a suspected abuse of dominance of the water company by requiring users to pay a deposit without legal basis or justifiable reasons. Hainan AIC levied a fine of 593,208 yuan, a lighter penalty equivalent to 2 per cent of the company's annual sales for the previous year, and confiscated illicit gains of 38,521 yuan for abuse of market dominance.

*Investigation against three state-owned telecoms companies (suspended)*

In May 2015, Ningxia AIC closed an investigation against three major state-owned telecommunications operators, namely China Tietong, China Unicom and China Telecom, on the basis of tie-in sales. The three state-owned companies were suspected of abuse of dominance in the telecommunications market by bundling fixed-line phone services with subscribers' internet services.

During the investigation, all three telecommunications companies admitted the tie-in practice and promised to undertake internal rectification timely and eliminate the anticompetitive effects resulting from the practice. The corrective measures committed to by the parties include:

3 See *Report on Competition Law and Policy of China 2013*, edited by ZQ Cen (chief editor), Law Press, (2013, Beijing), at pp. 84–85.

*a* Making internal rectifications: implementing staff training about antitrust laws and stopping tie-in sales practices;
*b* Making public commitments to allow subscribers a free choice of services and disclosing the details of these commitments to customers in the business premises and through other business channels; and
*c* Unbundling fixed-line phone services upon request of subscribers.

In the end, Ningxia AIC decided to suspend the probe on the grounds that the three companies had actively cooperated with the investigation and proposed workable remedy plans.

*Investigation against a branch of Liaoning Tobacco Company*

In August 2015, Liaoning AIC closed an investigation against Fushun Branch of Liaoning Tobacco Company and publicised the official decision on the SAIC's website. In the investigation, Liaoning AIC found that the tobacco company abused its dominant position by bundling non-high-demand cigarette brands with high-demand cigarette brands. The company was imposed a fine of approximately 4.33 million yuan and was ordered to stop its illegal behaviour.

*Investigation against Chongqing Qingyang Pharmaceutical Company*

In December 2015, Chongqing AIC closed an investigation against Chongqing Qingyang Pharmaceutical Company and publicised its decision on the SAIC's website. Chongqing AIC found that the pharmaceutical company reached an exclusive distribution agreement with one of its distributors on 25 September 2015. As a result of performing the distribution agreement, the company refused to supply the concerned products to others, even including the distributors. Chongqing AIC concluded that the pharmaceutical company abused its dominant position in the relevant market by refusing to deal with potential buyers, and imposed a fine of 439,308 yuan on the company.

*Investigation against Tetra Pak (pending)*

In August 2013, the SAIC launched an abuse of market dominance investigation against Swedish food processing and packaging company Tetra Pak.[4]

By making use of its advantages in the market for liquid beverage packaging equipment and maintenance services, Tetra Pak had allegedly tied the sale of packaging materials with its equipment, and practised differential policies among co-contractors.

In September 2014, the director of the antimonopoly and anti-unfair competition enforcement bureau of the SAIC disclosed that they had been investigating in four sectors including liquid product, packaging equipment, packaging materials, and raw materials. Legal experts, economists and technical experts in the relevant industries had also been invited to make further analyses. The case has now reached the decision-making stage.[5] The final decision is expected to be issued in 2016.

4 See [Tetra Pak, suspected of abusing market dominance, is under investigation], saic.gov.cn, 10 July 2013, www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201307/t20130714_136373.html.

5 See [China's State Council Information Office (SCIO) briefing on antitrust enforcement work], china.com.cn, 11 September 2014, www.china.com.cn/zhibo/2014-09/11/content_33487367.htm.

*Investigation against Microsoft (pending)*

An investigation against Microsoft commenced in June 2014. In July of the same year, the SAIC conducted large-scale dawn raids at four of Microsoft's offices, in Beijing, Shanghai, Guangzhou and Chengdu, at the same time, with the cooperation of nearly 100 enforcement officers from nine SAIC branches.

In August 2014, the SAIC published a short announcement and warned Microsoft to comply with Chinese laws and not disturb the investigation in any way. Microsoft promised to fully cooperate with the SAIC's investigation.

On 6 August 2014, the SAIC raided Microsoft's office in Beijing for the second time. Accenture Information Technology (Dalian) Ltd, Co, which is responsible for Microsoft's financial outsourcing, was also visited without prior notice.

In September 2014, the SAIC interviewed the vice president of Microsoft, Chenshi, and requested Microsoft to submit a written report about compatibility and other issues related to the incomplete disclosure of information within 20 days.

On 25 September 2014, Microsoft's CEO, Satya Nadella, visited the SAIC and promised to abide by Chinese laws and regulations and fully cooperate with the investigation.

In March 2016, the SAIC collected a large amount of digital data from two raids on Microsoft.

At the current stage, the SAIC has publicised limited details of the case. After Qualcomm, Microsoft is another IT giant investigated by China's antitrust agencies. Currently the case is ongoing.

The cases dealt with by the antitrust authorities in 2015 are summarised below:

| *Investigated party* | *Sector* | *Investigating authority* | *Conduct* | *Case opened* | *Status* |
|---|---|---|---|---|---|
| Hainan Dongfang Water Company | Water supply | SAIC (Hainan AIC) | Adding unreasonable conditions | 2014 | Completed |
| Ningxia branches of China Tietong, China Unicom and China Telecom | Telecommunications | SAIC (Ningxia AIC) | Bundling | 2013 | Suspended |
| Fushun branch of Liaoning Tobacco Company | Tobacco | SAIC (Liaoning AIC) | Bundling | 2015 | Completed |
| Chongqing Qingyang Pharmaceutical Company | Pharmaceutical | SAIC (Chongqing AIC) | Refusal to deal | 2014 | Completed |
| Tetra Pak | Food processing and packaging | SAIC | Tying and discriminatory treatment | 2013 | Pending |
| Microsoft | Software | SAIC (Guangdong AIC) | Bundling | 2014 | Pending |

### iii Private enforcement

***Yunnan Yingding v. Sinopec***[6]

Sinopec is a large petroleum and petrochemical enterprise group established in July 1998 and is a wholly state-owned company, functioning as a state-authorised investment organisation in which the state holds control. Sinopec and the Yunnan branch of Sinopec's trading

6 See this case at http://cnews.chinadaily.com.cn/2014-12/19/content_19129117.htm, and http://finance.chinanews.com/ny/2015/04-22/7227129.shtml.

company allegedly abused their market-dominant position by refusing to incorporate biodiesel produced from waste cooking oil by Yingding, a bio-energy manufacturer, into Sinopec's distribution system without justifiable reasons. The lawsuit was filed with the Kunming Intermediate People's Court (the Kunming Court) in China's Yunnan province in January 2014.

The Kunming Court ruled against Sinopec despite not clearly addressing some issues, such as the definition of the relevant market, whether the conduct constituted refusal to deal in the sense of the AML, and whether any justifiable reason existed. Sinopec was ordered to incorporate Yingding's biodiesel within 30 days of the ruling dated 8 December 2014, in accordance with the Renewable Energy Law and the AML. Yingding and Sinopec have both appealed to the High People's Court of Yunnan Province.

With regard to the foregoing issues, the lawyer representing Sinopec, in the second instance, pointed out that the distribution channels for biodiesel were not the same as those for petroleum products, and oil sales were not the sole channels to which biodiesel manufacturers could resort. Thus, the relevant product market in this case should be defined as the market for fatty acid methyl ester. Specifically, Sinopec itself did not produce biodiesel and therefore was not Yingding's competitor. From this perspective, it was also hard to gauge whether the purpose of Sinopec's refusal to purchase Yingding's biodiesel constituted elimination or restriction of competition. Also, apparent problems with the quality of the biodiesel produced by Yingding also formed a significant argument for justifiable reasons for Sinopec.

This antimonopoly lawsuit – the first filed against a state-owned oil company in China – attracted the attention of the whole industry. The drafter of the national standard for biodiesel blend stock for diesel engine fuels and an expert in economics were also brought in as expert witnesses to assist in clarifying facts before the court.

On 13 August 2015, Yunnan High People's Court reversed the first instance ruling and remanded the case on account of unclear facts and procedural errors, and now this case has been sent back to the Kunming Court for retrial.

***Four Chinese Rare Earth Companies v. Hitachi Metals[7] (Pending)***

Four Chinese rare earth companies, Ningbo Ketian Magnet, Ningbo Permanent Magnetics, Ningbo Tongchuang Strong Magnet Material and Ningbo Huahui Magnetic Industry, filed antitrust lawsuits against Hitachi Metals, a Japanese company, over alleged abuse of dominant position in patent licensing market regarding rare earth magnets on 11 December 2014 with the Ningbo Intermediate People's Court (Ningbo Court) in Zhejiang province. The four Chinese rare earth companies claimed Hitachi Metals abused its market dominance and harmed the industry competition by refusing to license the patents to them. The patents in this case are used in the manufacturing of sintered neodymium iron boron (NdFeB) magnets, a rare-earth magnet alloy widely used in parts for aeroplanes, automobiles and other products. The cases were heard in the middle of December 2015 before Ningbo Court and the final decision is pending.

7 See this case at www.zbmag.com/news_view.php?id=80, and http://www.hitachi.com.cn/about/press/2015/10-12/1118_a.html.

***Gu Fang v. China Southern Airlines***[8]

On 24 July 2013, Gu Fang (Gu) filed an antitrust lawsuit with the Guangzhou Intermediate People's Court (Guangzhou Court) against China Southern Airlines (CSA). He alleged that CSA abused its market dominance by refusing to deal with him because CSA cancelled his flight from Mianyang to Shenzhen temporarily and thus damaged his interests.

In the first instance judgment, the Guangzhou Court found that Gu had failed to prove CSA's market dominance. In addition, the conduct of flight cancellation could not constitute an abuse of market dominance according to the AML as Gu was not a competitor of CSA.

Gu appealed to the Guangdong High People's Court (Guangdong Court) and the Guangdong Court issued the written judgment on 5 May 2015. According to the written judgment, the Guangdong Court dismissed Gu's appeal and affirmed the first instance judgment.

In sum, the most high-profile litigations of 2015 are listed below:

| *Plaintiff* | *Defendant* | *Sector* | *Courts* | *Conduct* | *Case opened* | *Result* |
|---|---|---|---|---|---|---|
| Yingding | Sinopec | Bio-energy | Kunming Intermediate People's Court; Yunnan High People's Court | Refusal to deal | 2014 | Sending back to the first instance court for retrial |
| Four Chinese rare earth companies | Hitachi Metals | Rare earth magnets | Ningbo Intermediate People's Court | Refusal to deal | 2014 | Pending |
| Gu Fang | China Southern Airlines | Airlines | Guangzhou Intermediate People's Court | Refusal to deal | 2014 | The plaintiff lost the case |

## III RELEVANT MARKET DEFINITION AND MARKET POWER

The approaches to defining relevant market and assessing market power presented in the black letter law of China are consistent with other major antitrust regimes.

### i Relevant market definition

The basic AML principles of the abuse of dominance are similar to Article 102 of the Treaty on the Functioning of the European Union and Section 2 of the Sherman Act. The specification of market definition is stipulated in the Relevant Market Definition Guide (the Guide). In accordance with the Guide, the basic approaches for defining the relevant market are demand-side substitutability and supply-side substitutability.

Article 8 of the Guide provides that the following factors should be considered when defining the relevant market from the demand side:

8 See the ruling of the case at www.court.gov.cn/zgcpwsw/content/content?DocID=c23553f7-f57b-4797-9380-c1488b2480fe.

*a* the evidence of turning to other products when the price or other factors of the product concerned are changed;
*b* the appearance, characteristics, quality and technical features, and functionality of the product;
*c* price variance between products;
*d* the distribution channel; and
*e* other factors.

Article 9 of the Guide provides the following factors to be considered when defining the relevant geographical market from the demand side:
*a* the evidence of turning to other regional products when the price or other factors of the product concerned are changed;
*b* the transportation cost and the characteristics of transportation;
*c* the region in which the majority of the demanders purchase the product in practice, and the regional distribution of major business operators' products;
*d* trade barriers such as tariff, regulations, and environmental and technical factors; and
*e* other factors.

The Guide also mentions the 'small but significant and non-transitory increase in price' method (the SSNIP test or hypothetical monopolist test), a tool frequently used by both EU and US antitrust regimes. So far, this tool has not been used by NDRC or SAIC, but the courts have taken a lead in this regard.

**ii Market dominance**

The market dominance under the Chinese antitrust regime is defined in Article 17 of the AML and further clarified by implementing rules. It refers to a market dominant position held by one or multiple undertakings that enables the undertakings to:
*a* control the price, volume or other trading terms[9] in the relevant market; and
*b* block or affect the ability of other undertakings to enter the relevant market, by impeding or delaying other undertakings' entry into the market, or substantially increasing other undertakings' entry costs, so that the competitors cannot compete effectively post-entry.

**iii Market share presumption**

As illustrated in the table below, Article 19 of the AML specifies the market-share thresholds that are regarded as preliminary evidence of market dominance:

| *Number of undertakings* | *Aggregated share in the relevant market* |
|---|---|
| 1 | One-half |
| 2 | Two-thirds |
| 3 | Three-quarters |

9 According to Article 17 of the Provisions of Anti-Price Monopoly, 'other trading terms' include the factors that can have substantial impact on a market, such as grade of commodity, payment terms, method of delivery, aftersales service, trading options or technical constraints.

The preliminary evidence of market dominance can be rebutted by proof showing lack of sufficient market power despite high market share.[10] In addition, under the preliminary evidence, if any of the undertakings has a market share of less than 10 per cent, this undertaking shall not be deemed to have a dominant position.[11]

## IV ABUSE

### i Overview

Article 17 of the AML sets out a non-exhaustive list of seven types of behaviour that may be regarded as abuse of market dominance and are therefore prohibited. These behaviours are:

*a* excessive pricing or buying at an unfairly low price;
*b* selling below cost;
*c* refusal to deal;
*d* requiring a party to trade exclusively with the undertaking or other designated undertakings;
*e* tie-in or bundling, or imposing other unreasonable trading terms;
*f* price discrimination or imposing other discretionary trading terms; and
*g* other behaviours defined as abuse of dominance by antitrust regulators.

Because of the limited number of cases, it is difficult to confidently predict the kind of abuse practice that is most likely to be investigated by the NDRC or the SAIC. Nonetheless, most of the cases investigated belong to excessive pricing, tying and discriminatory treatment.

### ii Exclusionary abuses

'Exclusionary abuses' means the dominant undertaking abuses its market dominance by excluding its competitors, for example, by selling below cost, refusing to deal, tying or bundling.

The closed cases suggest that both the SAIC and NDRC seem to have interest in exclusionary abuses. The more recent decision in the pharmaceutical company case is worth noting in that it demonstrates the SAIC's willingness and capacity to deal with exclusionary practices.

### iii Discrimination (including discriminatory pricing)

The NDRC's investigations against Qualcomm and IDC in 2014 focus on whether the two companies have abused their market dominance by charging excessive royalties and discriminatory licences.

The Guangdong Court has wrapped up a market dominance abuse case in relation to price discrimination (the *Huawei/IDC* case). The Court states in the decision that IDC had a dominant position in the SEP licensing market and the royalty rate offered by IDC to Huawei was disproportionately higher than those offered to foreign handset manufacturers such as Apple.

10 See Article 19 of the AML.
11 Ibid.

### iv Exploitative abuses (including excessive pricing)

'Exploitative abuses' means the dominant undertaking abuses its position by exploiting its customers or suppliers, for example, by selling at an unfairly high price or buying at an unfairly low price.

Excessive pricing is a typical exploitative abuse. In the Shun Tong and Hua Xin case,[12] the two pharmaceutical companies, Weifang Shuntong Pharmaceutical Co Ltd and Weifang Huaxin Pharmaceutical Trading Co Ltd, were fined nearly 7 million yuan for excessive pricing. According to the NDRC, the two companies had gained full control of the domestic supply of promethazine hydrochloride and then raised the sale price from less than 200 yuan per kilo to between 300 and 1,350 yuan per kilo.

## V REMEDIES AND SANCTIONS

### i Sanctions

In accordance with Article 47 of the AML, an undertaking that has abused a dominant position may be fined between 1 per cent and 10 per cent of its turnover in the previous business year. In addition, the regulator may confiscate its illegal gains. Article 49 further states that when calculating the amount of the fine, the regulator shall consider factors such as the nature, gravity and the duration of the illegal conduct. Though more detailed guidance on the calculation of the fine is not prescribed by the AML or its enforcement regulations, there has been a growing number of penalty decisions publicised by the NDRC and SAIC in recent years. With the accumulation of these decisions and expected Guidelines on Calculating the Illegal Gains and Fines for Monopoly Conducts being drafted by the NDRC, a clearer picture of the fine calculation can be anticipated in the near future.

### ii Behavioural remedies (including interim measures)

Along with sanctions, Article 47 of the AML provides that the regulator may impose cease-and-desist orders to stop illegal abusive conduct, but there is no explicit legal basis regarding whether and how the regulator may impose interim measures for abusive conduct. The previous cases provide little clue in this regard given their lack of transparency.

### iii Structural remedies

To date, there are no antitrust-related laws, regulations or rules in China explicitly authorising the SAIC or the NDRC to impose structural remedies upon undertakings for violation of Article 17 of the AML. Accordingly, all previous cases suggest that the regulators never adopt structural remedies for abuse of dominance.

Article 45 of the AML does not delineate the scope of the commitment that the undertakings under investigation may make, so it remains to be seen whether a dominance investigation can be closed on the basis of structural commitments.

12 For the original press release on the NDRC's website (in Chinese), see http://xwzx.ndrc.gov.cn/mtfy/dfmt/201112/t20111207_449565.html, last visited on 19 April 2015.

## VI PROCEDURE

Although the SAIC and the NDRC have their respective procedural rules, they are consistent with each other.

The stages of an SAIC or NDRC investigation are as follows:

*a* An antitrust investigation can be triggered largely from four possible sources: report, transference from other government agencies, *ex officio* discovery and assignment by superior entities.

*b* The SAIC delegates antitrust enforcement to its provincial branches on a case-by-case basis, while the NDRC grants a general authorisation to local branches; the two authorities still maintain control at central government level of cases that have a potential nationwide impact.

*c* It falls within the regulators' discretion to determine whether to open a formal investigation after receiving the leads.

*d* Investigative measures include:

- conducting the inspection by entering the business premises or other relevant place;
- interviewing the business operators under investigation, interested parties or other relevant entities or individuals;
- checking and duplicating relevant documents, agreements, account books, business correspondence and electronic data, etc., of the business operators under investigation, interested parties, and other relevant entities or individuals;
- seizing and detaining relevant evidence; and
- checking the bank accounts of the business operators under investigation.

*e* The undertakings under investigation can offer commitments at any stage of an investigation. The regulators are entitled to decide whether to accept the commitment.

*f* The antitrust regulators may issue an exemption when the undertaking concerned fulfils the conditions set out by Article 15 of the AML; the authorities may also issue punishment decisions when they consider that the undertaking concerned has violated Article 17 of the AML. The regulators may publish the decisions but are not obliged to do so.

*g* If unsatisfied with the decision, the undertakings under investigation may apply for an administrative review or file an administrative lawsuit with a court for judicial review.

The SAIC and the NDRC's investigations vary significantly in terms of duration, and no statutory deadlines apply. Theoretically speaking, the investigations may last for years, and this is reflected in the fact that many market dominance abuse cases are still pending.

## VII FUTURE DEVELOPMENTS

Abuse of market dominance is a difficult area for antitrust enforcement because of the difficulties in defining relevant markets and proving market dominance. However, we may still draw the following conclusions from the limited number of cases.

First, the industries related to livelihoods have been the main targets of Chinese antitrust authorities. It is reported that the NDRC will focus its investigation and enforcement efforts on six areas: aviation, household chemicals, automobiles, telecommunications, pharmaceuticals and home appliances. In particular, the automobile sector has consistently

attracted considerable attention. Apart from continuous enforcement activities, in March 2016 the NDRC publicised the draft of the Auto Industry Antitrust Guidelines for soliciting public comments, which are the only antitrust guidelines specialised for a particular industry. This suggests that China's antitrust enforcement authorities have gone into more depth and detail with legislation than in previous years.

Second, it seems, as suggested by the *Qualcomm* and *Microsoft* cases, that the authorities have attached more importance to the high-tech industries involving complex intellectual property rights issues. Intellectual property rights-related antitrust issues have become a hot topic.

Both the SAIC and the NDRC have expressed their willingness to strengthen the enforcement of the AML.[13] In particular, the NDRC stated that it would keep a close eye on abuses of dominance. Therefore, it is fair to predict that there will be more active enforcement directed towards the abuse of dominance in the foreseeable future. In addition, the recent pharmaceutical company case indicated that the SAIC and its provincial branches have improved their capacities in dealing with intricate abuse of market dominance cases.

These facts suggest that the abuse of dominant position may be the next focus of the AML. Meanwhile, we anticipate that the SAIC and the NDRC will issue detailed guidelines with regard to the calculation of the amount of illegal gains and fines. Moreover, transparency is expected to be further improved in future by the regular publishing of decisions.

Private enforcement is expected to remain active in the years to come given the scarcity of public enforcement resources.

Undertakings' awareness of the antitrust laws is increasing thanks to seven years of promising enforcement. Chinese courts' experience in dealing with complicated antitrust actions is accumulating as well. These encouraging facts may lead to more active private enforcement combating abuse of dominance.

However, it is still hard for the plaintiff to prove the defendant's dominant position in courts. Mr Kong Xiangjun, the former Judge of the Supreme Court, said the plaintiff's burden of proof is 'too heavy' because in an antitrust-related civil lawsuit, the plaintiff, unlike the government agencies, is in a weak position in terms of gathering sufficient evidence.[14] Therefore, it can also be anticipated that the Supreme Court may issue judicial interpretations or guidelines to further relieve the plaintiff's burden of proof, although this may not happen as soon as people would like.

13 See [Director General of the Department of Price Supervision of NDRC, Xu Kunlin, talks about anti-price monopoly], Xinhua, 4 August 2013, http://news.xinhuanet.com/fortune/2013-08/04/c_116803701.htm; [SAIC: strengthen antimonopoly and anti-unfair competition enforcement], People.cn, 17 April 2013, http://politics.people.com.cn/BIG5/n/2013/0417/c70731-21173829.html.

14 See [Kong Xiangjun talks about antitrust lawsuits: several issues need to be clarified], Tencent, http://tech.qq.com/a/20120612/000236.htm.

# Chapter 7

# COSTA RICA

*Edgar Odio*[1]

## I INTRODUCTION

The Law for the Promotion of Competition and Consumer Protection No. 7492 (the Competition Law) was enacted in Costa Rica in 1994 and came into effect in January 1995. The Law contains provisions related to deregulation, competition, unfair competition, consumer protection, comparative advertisement and strict liability. It also created the competition enforcement agency and the consumer protection enforcement agency, by creating two separate bodies under the Ministry of Economy, Industry and Commerce: the Commission for the Promotion of Competition (COPROCOM) and the National Consumer Commission. These two bodies are part of the Ministry, but they are independent on technical matters. This means that the decisions of COPROCOM cannot be appealed, and cannot be revoked by the Minister. The Competition Law is based on Article 46 of the Constitution. COPROCOM has five commissioners and another five reserve commissioners, who meet once a week to discuss cases and issue resolutions, but they are not regular employees of the agency. The agency has its own staff.

The telecommunications industry has its own competition regulations (similar to those discussed herein regarding vertical restraints), which are enforced by SUTEL, the regulator. Competition regulations and opinions issued by SUTEL are not discussed in this chapter for reasons of space constraints.

The Competition Law was based on the Federal Competition Law of Mexico. It includes provisions regarding horizontal practices, which are deemed *per se* illegal and vertical practices, which are subject to the rule of reason, as discussed below. Horizontal practices are called 'absolute monopolistic practices', and vertical practices are called 'relative monopolistic practices'. The Competition Law also contains merger control provisions.

In 2005 the United Nations Conference on Trade and Development (UNCTAD) sponsored a project presented by COPROCOM under the Competition and Consumer

1 Edgar Odio is a founding partner of Pragma Legal.

Protection for Latin America (COMPAL) programme to draft an amendment to the Competition Law. The proposed amendment covered both competition and consumer protection sections of the Law and was finally presented to Congress by the government in 2008. This proposal ran in parallel with another initiative presented by a congressman that only covered the competition section of the Competition Law, and that was very concerned with the presence and expansion of large retailers, and the potential impact on local suppliers. Ultimately, of the two proposals, the latter moved faster in Congress and therefore COPROCOM tried to incorporate in it most of the changes contemplated in its proposed amendment, and to make it more technically sound.

In 2012 the legislature passed the amendment to the Competition Law initiated by the congressman; in the end, however, the amendment was the result of an extensive review and discussion during the procedure before Congress, in which COPROCOM played a key role offering technical support, seeking to modify the bid to reflect the government's proposal. The consumer protection section was not modified and the amendment did not exactly match that proposed by the government. It is not necessary to consider in detail which sections of the current law stem from the congressman's initiative and which from the above-mentioned procedure; we will only refer to that briefly in relation to Section 12 and the vertical restraints contemplated therein.

The amendment reduced the scope of application of the exceptions contemplated in the Competition Law, modified the sections related to horizontal and vertical practices, and incorporated provisions related to dawn raids, settlement agreements and pre-merger notification.

The amendment modified Section 12 of the Competition Law, which refers to vertical restraints. This Section already included:

*a* exclusivity agreements and vertical market segmentation;[2]

*b* resale price maintenance (RPM) and the imposition of other conditions on the reseller;[3]

*c* tying and reciprocity;[4]

*d* exclusive dealing;[5]

*e* vertical boycott;[6]

*f* predatory pricing;[7] and

*g* any other conduct intentionally implemented to drive competitors out of the market or prevent their entrance.[8]

Some anticompetitive practices were not included in Section 12 and therefore COPROCOM had to investigate them under Subsection (g), such as abuse of dominance. The authority did investigate and ruled on a number of refusal-to-deal cases under this Subsection, in which the incumbent refused competitors access to essential facilities. But the lack of regulation was

2 Subsection (a).

3 Subsection (b).

4 Subsection (c).

5 Subsection (d).

6 Subsection (e).

7 Subsection (f).

8 Formerly Subsection (g), now Subsection (k).

clearly a limitation to the authority. So, based on the proposed amendment, the authority managed to incorporate in the final amendment the following practices: refusal to deal;[9] price discrimination or discriminatory treatment;[10] unjustified increases of competitors' costs;[11] and to modify Subsection (f) to specify that predatory pricing will take place when the incumbent sells below the average cost for long periods, and when there are indicators that losses may be recovered by future price increases (except in the case of sales promotions and the introduction of products to the market).

The amendment also included additional vertical restraints that were part of the congressman's original initiative. Subsection (j) includes the request to, or the obligation of the supplier to, change, modify or substitute its trademark as a condition to sell its goods or services; or to request from the supplier the production of similar goods or services for a private trademark. Subsection (l) includes additional obligations that, according to established business practices, are not part of the object of the transaction; and Subsection (m) includes the threat of termination of the business relationship to obtain payment, or other business conditions different from the generally accepted business conditions. No case has yet been brought under these Subsections.

The other components of the amendment relevant for this topic are the incorporation of dawn raids, which require judicial authorisation; settlement agreements to terminate cases before the private hearing phase of the proceeding; and the amendment to the penalties sections, which now clearly establishes that penalties can be as high as the equivalent of 10 per cent of the economic agent's sales.

## II YEAR IN REVIEW

The past year has been somewhat unusual in terms of opinions regarding vertical restraints and abuse of dominance cases. During 2015, COPROCOM did not condemn any conduct under Article 12 of the Competition Law. COPROCOM dismissed a number of cases that targeted large players in some important markets. At this time, the most important case under review by COPROCOM is a case filed against the largest drugstore company and drugs distributor in the country. The complaint for exclusionary vertical restraints was filed in 2013, but the case is still under investigation and the private hearing is still pending. Horizontal conduct cases have not been on the agenda either. Therefore, it seems the Commission has devoted most of its resources to merger control. Thus, the following is a summary of the cases dismissed by COPROCOM, all of which were at the preliminary investigation phase.

COPROCOM dismissed a complaint following a preliminary investigation of a case filed by an insurer company against the Instituto Nacional de Seguros (INS), which is a state-owned insurance company that remains the largest player in the market since the market became open to competition a few years ago. The complainant alleged that INS introduced contractual provisions in its policies, according to which, cars insured by INS can only be repaired in certain repair shops managed by the original brand dealer, and the repairs can only be made with original parts sold by said dealers. The policies, however, were

9 Subsection (g).

10 Subsection (h).

11 Subsection (i).

collective policies contracted by the car dealers, not by the car owners; and the car dealers granted larger discounts to the insurer on the original parts used in the repairs, as part of their post-sale services.

COPROCOM dismissed the complaint because INS had already obeyed an order from the insurance regulator to amend the contracts and eliminate the exclusivity provision that benefited the dealers' repair shops. COPROCOM found that the provision that required the use of original parts and the provision that granted discounts on these parts were beneficial to consumers and did not object to them.

COPROCOM also dismissed a complaint filed against a state-owned bank, Banco de Costa Rica, because in a bid to buy safe deposit boxes, the bank requested that all participants present a letter from the manufacturer of the boxes' locks stating the participant was authorised by the manufacturer. According to COPROCOM, such a request is not a violation of the competition law. Nonetheless, the Commission completed the analysis of the bid requirements and stated that the bank can introduce technical requirements in the bid to ensure the security elements of the safety boxes. COPROCOM concluded that the letter from the manufacturer was not essential to accomplish that purpose, and constituted a barrier to entry and issued a recommendation to the bank to avoid anticompetitive provisions in the bids. It is not clear why COPROCOM did not open a formal case against the bank.

In another case, COPROCOM completed a preliminary investigation after three years, based on a complaint filed by the Association of Pork Producers, for predatory pricing against the largest retail chain in the market. COPROCOM defined the relevant market as the San Carlos county in the northern area of the country. The retailer had six shops in the market but faced competition from many other players and no entry barriers were identified. Therefore, COPROCOM concluded the retailer did not have market power. Furthermore, COPROCOM said that because in a previous case it was found that the retailer had market power on a different market on a national level, it does not necessarily follow that it has market power in all relevant markets. COPROCOM also determined that the retailer lowering its prices was a valid competitive reaction to low prices from a competitor. COPROCOM dismissed the complaint.

With regard to regulated markets, the most relevant opinions were issued at the request of SUTEL, the telecommunications regulator. SUTEL requested COPROCOM provide an opinion with regard to a possible vertical restraint case against Televisora de Costa Rica, SA, based on complaints filed by to two consumers who argued that Televisora was tying an internet service to their cable TV service. In the opinion, the COPROCOM defined the geographic relevant market as the 53 counties in which Televisora operates. Televisora's market share is above 40 per cent in only four counties. In all counties, it faces competition from ICE, the largest provider in the country. COPROCOM concluded Televisora did not have market power, and recommended that SUTEL dismiss the complaints because it found evidence that Televisora was offering the internet service on a stand-alone basis.

In another opinion requested by SUTEL, based on a complaint filed by a competitor against Millicom de Costa Rica, SA for predatory pricing, COPROCOM also defined the geographic relevant market as the counties in which Millicom operates. Even though there are many competitors in all counties, Millicom has market shares above 40 per cent in at least six counties. Millicom had been involved in other cases before, including a merger with Telecable Económico SA that was not authorised by SUTEL. Therefore, COPROCOM recommended SUTEL to study this case, but SUTEL has not issued an opinion yet.

## III MARKET DEFINITION AND MARKET POWER

According to Section 12 of the Competition Law, vertical restraints are illegal when an economic agent that has market power in the relevant market embarks on a practice listed in Section 12, with the object or effect of displacing competitors from the market, substantially preventing their access to the market, or to establish exclusive benefits in favour of one or more persons.

The rules for defining the relevant market in each competition case and for determining whether or not market power exists are established in Sections 14 and 15 respectively.

Section 14 refers to demand substitution as the first criterion for defining the relevant market. It also contemplates distribution costs from other places in the country and from abroad, including freight, insurance, taxes and other kind of restriction, as well as the time required to supply the market from elsewhere. The cost of consumers having to move to other markets is also considered, as well as national and international regulations that might limit consumers' access to suppliers, or suppliers' access to alternative customers.

When defining the relevant market COPROCOM has to define both the product and the geographical market; and it usually makes reference to demand and supply substitutability explaining the logic of the hypothetical monopolist test (SSNIP test). Even though some opinions include references to cross-elasticity as a way of measuring demand substitution, in practice this is rarely an economics-based analysis because of the lack of quantitative information. Required data for this sort of analysis is rarely available and COPROCOM does not have the resources to collect it. Thus, in practice this has become a legal analysis, sometimes simply based on common sense. Surprisingly, the lack of proper evidence to define the market has not yet been brought to court.

The concept used in the Competition Law is substantial power, instead of market power, but COPROCOM has not established any difference. It has defined the concept as the ability of an economic agent (or a group of agents) to unilaterally determine the price or impose conditions upon suppliers or customers, that cannot be resisted or overcome in the present or in the near future by other economic agents.

The criteria established in Section 15 of the Competition Law to determine whether market power exists include market share, barriers to entry, existence and power of competitors in the relevant market, access to inputs and raw materials, and recent behaviour.

Although collective dominance is not a concept expressly contemplated or defined in the Competition Law, COPROCOM has ruled that it is possible for an economic agent to have market power when acting in concert with other economic agents, even though it might not have such power when acting alone.

In the discussion of this concept, COPROCOM has indicated that market power is a matter of degree, but it has not developed any guidelines as to, for instance, what percentage of the market would be considered as an indicator of market power; although on some occasions, reference has been made to US or EU guidelines in this regard. It has also made clear that market share is a strong indicator of market power, but it is not the only one. In a case involving a large bottled water company that had been in the market for many years, and had around 90 per cent of the market, COPROCOM held that it did not have market power because the company was facing very hard financial conditions; two very strong and dynamic competitors had also entered the market, each of which had a large portfolio of consumer products, and a very sophisticated distribution system that could easily reach more customers than the incumbent.

## IV ABUSE

### i Overview

Under Sections 12 and 13, COPROCOM repeatedly indicates in its opinions that a vertical restraint exists and has to be declared illegal when three elements exist:

*a* the economic agent has market power in the relevant market;

*b* the conduct is contemplated in the list of restraints of Section 12 (see the list in Section I, *supra*); and

*c* the conduct has the object or effect of causing anticompetitive effects by unduly displacing economic agents from the market, substantially preventing access to the market, or establishing exclusive benefits for one or more persons.

Based on this, COPROCOM has further indicated that vertical restraints can create efficiencies and therefore must be presumed legal. Accordingly, they are subject to the rule of reason.

The amendment of the Competition Law added a final paragraph to Section 12, according to which COPROCOM must analyse and rule on the evidence presented by the parties to probe the pro-competitive effects or the efficiencies in the market caused by the conduct being investigated.

In spite of these indications, COPROCOM's analysis does not always include the discussion of the effects of the conduct; and when it does, it is rarely based on quantitative data. The introduction of the final paragraph of Section 12 seeks to force COPROCOM to carefully include and review this sort of evidence.

Based on a recent precedent, it can now be said that COPROCOM will rule on abuse of dominance cases based on Subsection 12(k), particularly when the conduct is not listed in any other paragraph of that Section.

### ii Exclusionary abuses

There have not been many cases on predatory pricing. In addition to the difficulties that this practice typically presents to the authorities, the previous wording of Subsection 12(f) defined the conduct as the commercialisation of goods or services below their normal value. COPROCOM interpreted this as average cost. But following the amendment of the Competition Law, the wording now clearly states that predatory pricing is pricing below average cost, and that the practice must take place for long periods of time, with indicators that the losses may be recovered by future prices increases.

Exclusivity, exclusive dealing and loyalty rebates have been a concern for COPROCOM. COPROCOM has looked at these restraints in investigations and cases in markets such as beverages, beans, banking insurance, credit cards, etc. The concerns are focused on limitations on the freedom of trade and on market foreclosure. With regard to the former COPROCOM is apparently more willing to consider justifications for the restraint but has considered as excessive an exclusivity provision that is in effect for a term longer than the time required for the manufacturer to recover the investment. With regard to market foreclosure, the problem is that COPROCOM is concerned about the potential impact of the conduct, with little or no reference at all to actual evidence with regard to the portion of the market that is being foreclosed. In one case, against Costa Rica's largest beverage bottler, COPROCOM ruled that the problem with the contractual exclusivity provisions was that

the term was too long and that there were heavy penalties for termination. In other cases, however, it has found a violation even if the contract was short term and there was no penalty for termination.

The refusal-to-deal cases concerned economic agents denying access to an essential facility (lamp posts) to carry TV cable or broadband cable for internet services. The rationale of the opinions was correct both on economic and legal terms, but there was little or no evidence of the anticompetitive effects of the conduct.

### iii Discrimination

As explained above discriminatory treatment was not expressly included in the Competition Law prior to the amendment. Subsection 12(h) includes as a vertical restraint agreeing different terms and conditions with parties that are in the same situation. COPROCOM has not yet ruled on a discrimination case. Whether COPROCOM will consider the effect on competition when analysing these cases or whether it will treat them more as a *per se* rule, is still an open question. On the basis of how RPM has been treated, it is possible that similar treatment will be given to discrimination.

### iv Exploitative abuses

Excessive pricing is not illegal in Costa Rica, but COPROCOM may recommend that the government (the government may also take the initiative but COPROCOM's opinion is required) implement price regulations and additional restrictions on commerce in exceptional circumstances, and on a temporary basis (i.e., to be reviewed every six months). In oligopolistic and monopolistic markets, the government may regulate prices.

## V REMEDIES AND SANCTIONS

### i Sanctions

Section 28 of the Competition Law lists the type of sanctions COPROCOM may impose, most of which are fines. Subsections (a) and (b) include cease-and-desist orders, correction of practices and actions needed to counteract anticompetitive effects. The latter refers to structural and behavioural remedies for merger cases. Subsection (a) will be discussed below (see Section V.iii, *infra*).

Subsections (c) to (k) contain fines for different events. These fines are indexed to the minimum salary (approximately US$550); thus, the amount of the fine is equivalent to a number of minimum salaries. For vertical restraints infringements, Subsection (f) contains a fine of up to 410 times the minimum salary. According to Subsection (h) individuals can also be fined an amount up to 75 times the minimum salary.

However, Section 28 also stipulates that if an economic agent has repeated the same type of infringement, or if the first infringement is particularly serious, the amount of the fine may be up to 10 per cent of the annual sales of the economic agent during the past fiscal year prior to the date in which COPROCOM issues the final opinion in that particular case.

To determine the amount of the fine, COPROCOM must consider the seriousness of the infringement, the damage caused by the infringement, the intent, the market share, the size of the relevant market, the duration of the infringement, whether the economic agent has committed the same infringement before and the payment capacity of the economic agent.

### ii Behavioural remedies

Subsection 28(a) grants COPROCOM the capacity to suspend, correct or suppress anticompetitive conduct as well as to order the actions required to counteract the anticompetitive effects caused by the anticompetitive conduct.

Thus, when COPROCOM finds an infringement of the Competition Law, it usually orders the suppression of the conduct and the payment of the fine. In a couple of cases where COPROCOM found that the incumbent had denied a competitor access to an essential facility to provide an additional service (a cable TV company wanted to expand business and asked the owner of the posts infrastructure to allow the use of the infrastructure to provide internet service), COPROCOM ordered the incumbent to allow the competitor access to the facility on reasonable and non-discriminatory terms. The parties did agree on terms and conditions, and access was finally granted. If the parties had not reached such an agreement, it is an open question whether COPROCOM would have moved to fix a price and to determine the terms and conditions of access.

In one of these cases, the owner of the infrastructure decided to terminate the existing agreement with the cable TV company. As a pre-emptive measure COPROCOM ordered it to keep the agreement in place during the investigation and until final resolution of the case.

### iii Structural remedies

COPROCOM may use structural remedies in merger control because Subsection 16.3 specifically contemplates that possibility, but the application of structural remedies to vertical restraints is far from clear.

The statutory basis for structural remedies for vertical restrains would be Subsection 28 (a), referred to above: 'and to order the actions required to counteract the anticompetitive effects caused by the anticompetitive conduct'.

The position that this provisions allows for structural remedies seems to have little support; first, because there is no specific reference to structural remedies, and the word 'actions' seems to refer to conduct or behaviour; and second, because COPROCOM has never tried to impose a structural remedy in a vertical restraint case.

## VI PROCEDURE

A case may start from a complaint filed by a third party or *ex officio* by the authority. Depending on the merits of the complaint, COPROCOM may dismiss it, open a formal case against the economic agent that allegedly committed the anticompetitive practice, or open a preliminary investigation. The preliminary investigation usually consists of a review of the market conditions to determine the possibility of the existence of an anticompetitive behaviour. Even though, at that point, a case has not been formally opened against an economic agent, it is usually possible to anticipate the direction of the investigation. Therefore, information requests from the authority should be responded to accordingly, and sometimes it is also convenient to anticipate arguments and justifications for the conduct under investigation to avoid the formal opening of a case. This seems to have been the case in the complaints dismissed this year by COPROOCM.

When a case is formally open, COPROCOM issues a resolution indicating the economic agents and the conduct that will be investigated. The resolution should also indicate what provision of Section 12 has allegedly been breached, what the penalties may be if the violation is found, what documents are in the file, whether there is a confidential file,

etc. COPROCOM will also appoint three people from its staff who will be responsible for the procedure and who will write a final report to the commissioners, so that they can issue the final resolution.

During the investigation process the authority can request information from any economic agent. The Competition Law also authorises dawn raids provided there is a court authorisation. During dawn raids the party and its lawyers can be present.

The parties have access to the records of the investigation, except to confidential information presented by other economic agents, and they can present all kind of evidence up to the day of the hearing.

When the authority collects all the information, it will set a date for the private hearing, where the parties have to present their arguments and the evidence, including witness testimonies, is presented. The hearing ends with the closing statements of the parties and then the directors of the procedure will write their final report for the commissioners. The commissioners have access to the file, but they do not attend the hearing. This lack of access to the administrative judges is the subject of some criticism, as the parties tend to feel that the authority acts as both prosecutor and judge. Another criticism of COPROCOM concerns the length of time it takes to reach a final resolution. This varies from two to four or five years, but there have been cases where final resolution has taken up to 10 years.

Settlement agreements to terminate the procedure are allowed at any time before the private hearing takes place.

The parties can request the authority to issue interim measures at any time during the procedure. The party must alert the authority where it is necessary to maintain a certain situation or conditions that might otherwise deteriorate during the procedure, where the party has good legal grounds for the request, and where no superior interests would be affected by the measure. But as discussed above, there has only been one case in which COPROCOM has issued an interim measure.

## VII PRIVATE ENFORCEMENT

Although there is a constitutional principle according to which any person or entity that has been damaged or has suffered an injury has the right to receive proper compensation, no private action has yet been filed to claim civil damages derived from a competition infringement.

COPROCOM may initiate an investigation and open a case based on a third-party complaint, but such a complaint cannot include a civil compensation claim as COPROCOM cannot award civil damages in its rulings.

Section 21 of the Competition Law contains a provision according to which the administrative procedure before COPROCOM has to be completed prior to the judicial hearing. Some may consider this an obstacle to filing a civil complaint before court, which may be unconstitutional.

## VIII FUTURE DEVELOPMENTS

The new centre-left government elected in 2014 took more direct control of COPROCOM, and the Minister of the Economy ordered an administrative organisation of the authority's staff, which was seen by many as a breach of the independence of the authority. This has obviously created some tension between COPROCOM and the Ministry.

Costa Rica is seeking to be accepted by the Organization for Economic Cooperation and Development (OECD), and therefore it is being evaluated in many aspects by the OECD's experts. Competition is one of the areas undergoing this evaluation and the OECD has conducted two peer reviews. The first one was published in 2014[12] and the second one was conducted this year, the publication of which is expected for the end of the year.

The conclusions of the experts point towards, among other things, a lack of independence of COPROCOM, and recommend that the Commission becomes independent of the Ministry and establishes full-time commissioners to promote specialisation and avoid conflicts of interests. As a result of the OECD recommendations, the government has recently published a bid that intends to eliminate COPROCOM and to create an Administrative Competition Tribunal. It also includes leniency provisions and the elimination of the possibility to notify mergers after closing (the law allows no notifications five days after closing). No changes to Section 12 are being proposed. There is already some criticism to the proposal and contributions from local experts. The government is expected to file a final bid to Congress by the end of the year. With regard to pending cases, the most significant one concerns the distribution of pharmaceutical products, but the proceeding is still moving very slowly.

In the medium term, more development on a regional basis should be expected as the competition authorities of Central American countries increase their communication and collaboration, and advance towards the implementation of the agreements incorporated in the European Union–Central American Association Agreement, according to which there will be one competition regulation and one authority for the region.[13] Thus, we may see investigation of cross-border practices sometime in the future.

12 www.oecd.org/competition/competition-law-and-policy-in-costa-rica-2014.htm

13 Title VII of the European Union–Central American Association Agreement.

# Chapter 8

# EUROPEAN UNION

*Thomas Graf and Henry Mostyn*[1]

## I INTRODUCTION

The statutory provision that governs abuses of dominance in the European Union (EU) is Article 102 of the Treaty of the Functioning of the EU (TFEU).[2] The regulatory body with the power to investigate and sanction abuses is the Competition Directorate-General of the European Commission (the Commission). National competition authorities of individual Member States (NCAs) are competent to apply Article 102 of the TFEU as long as the Commission has not opened a formal investigation on the same matter.

The procedure for the Commission's enforcement and application of EU competition rules is set out in Regulation 1/2003.[3] There are a series of implementing regulations, notices and guidance papers, the most important of which for the purposes of Article 102 of the TFEU is the Commission's Guidance Paper on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.[4]

In broad terms, four conditions must be met for Article 102 of the TFEU to apply:

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2 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty became Article 101 and Article 102 of the TFEU. The two sets of provisions are, in substance, identical, and references in this paper to Article 102 of the TFEU should be understood as a reference to Article 82 of the EC Treaty.

3 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Regulation 1/2003), OJ L 1, 04.01.2003.

4 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Guidance Paper), OJ 2009 C 45/7.

*a* the entity under investigation must qualify as an 'undertaking';[5]
*b* the undertaking must hold a dominant position on a relevant market;
*c* the conduct at issue must qualify as an abuse; and
*d* the conduct must affect trade between Member States.

In most cases, the debate focuses on whether a company holds a dominant position and whether there has been an abuse. This is discussed below.

## II YEAR IN REVIEW

The year 2015 saw the Commission opening and advancing a number of cases.

As in previous years, the Commission activity that attracted most headlines was its ongoing investigation of Google's practices. In April 2015, the Commission served Google a statement of objections (SO) alleging that Google favours its own comparison shopping service. On the same date, the Commission formally opened an investigation into the Android mobile operating system. On 27 August, Google responded to the Commission's Shopping SO. Commissioner Vestager has publicly noted that Google's response was a 'quite data-intensive answer',[6] and that the Commission is 'in the process of analysing that'.[7] She made clear that 'at this time it's still open as to how it will end. It can take different routes.'[8] In the meantime, on 20 April 2016, the Commission issued a separate SO in its *Android* investigation.[9]

April 2015 also saw the Commission serve Gazprom an SO alleging that territorial restrictions in the Russian gas company's supply agreements negatively affected competition by partitioning markets, charging unfairly high prices, and maintaining control over gas infrastructure.[10]

In December 2015, the Commission issued two separate SOs to Qualcomm. Qualcomm produces and sells mobile phone baseband chipsets and owns an important

5 The concept of 'undertaking' has been interpreted widely by the European Courts. See Case C-41/90 *Hofner and Elser v. Macroton GmbH* [1991] ECR I-1979, paragraph 21: 'The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'

6 M Vestager, Briefing to European Parliament, quoted in MLex, 'EU Will Seek More Data on Google Probe in "Coming Months"', 9 November 2015, available at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=736500&siteid=190&rdir=1.

7 M Vestager, Interview with Reuters, 'EU's Vestager Not Planning to Rush Google, Gazprom Antitrust Cases', 9 October 2015, available at http://uk.reuters.com/article/uk-eu-vestager-google-gazprom-idUKKCN0S315720151009.

8 M Vestager, quoted in Reuters, 'UPDATE 1-EU's Vestager Says All Options Open in Google Case', 4 November 2015, available at www.reuters.com/article/eu-antitrust-alphabet-idUSL8N12Z4QD20151104#0sFubwJZGOk05URd.97.

9 Press release of 20 April 2016, Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications, IP/16/1492.

10 Press release of 22 April 2015, 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets', IP/15/4828.

portfolio of mobile phone standard essential patents. The first SO alleged that, since 2011, Qualcomm had paid smartphone and tablet manufacturers to exclusively use Qualcomm's chipsets in their mobile devices. The second SO took the preliminary view that, between 2009 and 2011, Qualcomm had engaged in predatory pricing by selling some of its chipsets at prices lower than the costs of production.[11]

The Commission, however, was less active in closing cases. The year 2016 saw no infringement decision, and a single Article 9 commitments decision, in which the Commission accepted commitments to close an investigation of Bulgarian Energy Holding (BEH). BEH committed to supply a newly created power exchange in Bulgaria with certain volumes of electricity.[12] A separate investigation of BEH into allegations that it was preventing rivals from accessing gas infrastructure in Bulgaria is ongoing.

The courts were more active, deciding seven cases, four of which played out in the Court of Justice (ECJ).[13]

The ECJ's preliminary ruling in *Post Danmark II* confirmed the abusive nature of retroactive rebate systems. The case concerned conditional, retroactive rebates applied by Post Danmark, the Danish postal operator, which enjoyed a statutory monopoly over a part of the relevant market for bulk mail. The ECJ held that for determining whether the discount system was abusive, it was necessary to consider 'all the circumstances' of the case, including the rules of the rebate system, the extent of the dominant position, and the specific market conditions.[14]

In the case at issue, Post Danmark held a market share of 95 per cent in bulk mail. It calculated its retroactive rebates across customers' total demand for bulk mail, covering both non-contestable demand protected by the statutory monopoly and contestable demand. In this way, the retroactive rebates enabled Post Danmark to tie contestable demand to its non-contestable share, which represented around 70 per cent of total demand. Customers switching contestable demand to competitors would lose discounts on their large portion of non-contestable demand. This protected Post Danmark's position in bulk mail, where competition was already limited by the partial statutory monopoly. Unsurprisingly, the ECJ concluded that Post Danmark's retroactive rebate system infringed Article 102 TFEU. The ECJ noted that in the specific circumstances of the case it was not necessary to apply the 'as efficient test', nor was it necessary to show appreciable effects.

The ECJ's conclusion rests on the particular market conditions in bulk mail, which were characterised by the statutory monopoly, and on the specific conditions of Post Danmark's

11 Press release of 8 December 2015, 'Antitrust: Commission sends two Statements of Objections on exclusivity payments and predatory pricing to Qualcomm', IP/15/6271.

12 Press release of 10 December 2015, 'Antitrust: Commission accepts commitments by Bulgarian Energy Holding to open up Bulgarian wholesale electricity market', IP/15/6289.

13 Case C-23/14 *Post Danmark A/S v . Konkurrencerådet*, judgment of 6 October 2015, ECLI:EU:C:2015:651 (*Post Danmark II*); Case C-170/13 *Huawei Technologies v. ZTE Corp. and ZTE Deutschland GmbH.*, judgment of 16 July 2015, ECLI:EU:C:2015:477; Case C-497/12 *Davide Gullotta and Farmacia di Gullotta Davide & C. Sas v. Ministero della Salute* and *Azienda Sanitaria Provinciale di Catania*, judgment of 2 July 2015, ECLI:EU:C:2015:436; Case C-583/13 *Deutsche Bahn AG and Others v. European Commission*, judgment of 18 June 2015, ECLI:EU:C:2015:404.

14 *Post Danmark II*, paragraphs 29, 30, 50.

rebate system, which enabled it to exploit this statutory monopoly in the contestable portion of the market.[15] Moreover, the conduct impacted the market in which Post Danmark was already dominant and held a near monopoly share.[16] The ECJ's emphasis on the need to consider the particular circumstances of a case indicates that the ECJ's conclusions cannot be automatically transposed to other circumstances.

In *Huawei Technologies*,[17] the ECJ discussed under what conditions an owner of standard essential patents (SEP) can invoke these patents to seek an injunction against a patent user, if the owner has previously committed to license the patents on FRAND terms. This issue has been the subject of some debate, including in the Commission's recent *Motorola* and *Samsung* cases.[18] The ECJ has now made clear that Article 102 TFEU sets limits to injunctions based on FRAND encumbered SEPs. Injunctions are not excluded if the patent user does not act in good faith.

The ECJ held that the SEP holder cannot seek an injunction without first alerting the SEP user of the alleged infringement and offering the SEP user the opportunity to conclude a licence on FRAND terms. The SEP holder must present a detailed written offer for such a licence. The burden then shifts to the SEP user to show that it is willing to conclude a licence on FRAND terms. It must respond promptly and in good faith to the offer without engaging in delaying tactics. If the SEP user does not consider the offer to be on FRAND terms, it must submit, promptly and in writing, a specific counter-offer on FRAND terms. If no agreement is reached, a SEP user that is already using the technology must provide appropriate security and be able to render accounts, until adjudication of terms. SEP users, however, remain free to challenge validity, essentiality and infringement in parallel to licensing negotiations, and also after the conclusion of the licence agreement. Raising such challenges does not render them unwilling licensees.

The ECJ's findings in *Huawei* clarify a number of important issues in connection with the exercise of SEPs. Many practical questions, however, remain open – most notably the question of how courts should determine whether licence terms are FRAND.

In *Deutsche Bahn AG*, the ECJ clarified that the Commission may not go beyond the subject matter of the inspection ordered by decision when briefing officials participating in a dawn raid.[19]

15 *Post Danmark II*, paragraphs 39, 41, 59.

16 *Post Danmark II*, paragraph 70.

17 *Case C-170/13 Huawei Technologies v. ZTE Corp. and ZTE Deutschland GmbH.*, judgment of 16 July 2015, ECLI:EU:C:2015:477.

18 Case AT.39939 *Samsung – Enforcement of UMTS Standard Essential Patents*, Commission decision of 29 April 2014; and Case AT.39985 *Motorola – Enforcement of GPRS Standard Essential Patents*, 29 April 2015.

19 Case C-583/13 *Deutsche Bahn AG and Others v. European Commission*, judgment of 18 June 2015, ECLI:EU:C:2015:404.

The cases decided by the General Court were relatively minor.[20] In *Orange Polska*,[21] the General Court found that the Commission had no special duty to evidence a legitimate interest in investigating and finding an infringement for past conduct. In *EasyJet Airline*,[22] the Court examined the grounds on which the Commission could dismiss a complaint under Article 13(2) of Regulation 1/2003. Article 13(2) provides that the Commission may reject a complaint that the national competition authority of a member state has already dealt with. EasyJet argued that the Dutch Competition authority, which had reviewed the case at national level and rejected it on priority grounds, had referred to Dutch aviation law, and not to EU competition law, in reaching its conclusions. On this basis, EasyJet claimed the national competition authority had failed to assess its case under Article 13(2), which requires that the national authority assess the case based on EU competition law. The Court found that the Commission enjoyed a wide margin of discretion in this respect, and that that the similarities between Dutch aviation law and EU competition law, to which the national authority had alluded, were sufficient to trigger the application of Article 13(2).

## III MARKET DEFINITION AND MARKET POWER

### i Market definition

Market definition serves as an analytical framework to assess market power and competitive effects. A relevant market for the purpose of EU competition law circumscribes the sources of competitive constraint faced by the company under investigation.[23] The Commission's Market Definition Notice provides guidance on the Commission's approach to market definition for all areas of EU competition law, including the application of Article 102 of the TFEU, as the Guidance Paper is silent on the topic. The relevant product market comprises all those

20 Case T-486/11 *Orange Polska v. Commission*, judgment of 17 December 2015, ECLI:EU:T:2015:1002; Case T-556/08 *Slovenská pošta v. Commission*, judgment of March 25 2015, ECLI:EU:T:2015:189; Case T-355/13, *EasyJet Airline Co. Ltd. v. Commission judgment of January 21 2015*, ECLI:EU:T:2015:36.

21 Case T-486/11 *Orange Polska SA v. European Commission*, 17 December 2015, ECLI:EU:T:2015:1002. The case is currently under appeal to the ECJ.

22 Case T-355/13 *EasyJet Airline Co. Ltd. v. Commission*, judgment of 21 January 2015, ECLI:EU:T:2015:36.

23 Commission Notice on the definition of the relevant market for the purposes of community competition law (the Market Definition Notice), OJ 1997 C 372/5, paragraph 2.

products or services 'which are regarded as interchangeable or substitutable by the consumer, by virtue of the products' characteristics, their prices and their intended use'.[24] This definition draws on the principles established by the Court of Justice in Michelin, holding that:[25]

> *[…] for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.*

The Commission acknowledges that qualitative differences only allow it as a first step to limit the field of possible substitutes.[26] Actual interchangeability is assessed by the hypothetical monopolist (SSNIP)[27] test, which asks whether a hypothetical monopolist could profitably impose a 5 to 10 per cent permanent price increase over the candidate products without a sufficient number of consumers at the margin switching to other products to render the price increase unprofitable.[28]

A number of EU Court judgments have discussed basic principles of market definition in the context of Article 102 TFEU cases.[29] But some of these cases are relatively old and

24 Market Definition Notice, paragraph 7. Either 'demand-side substitutability' (the ability of consumers to switch their consumption to alternative products in the case of a small change in relative price) or 'supply-side substitutability' (the ability of suppliers to switch production to the products under consideration and market them in the short term without incurring significant additional costs or risks in response to small change in relative price) can provide effective competitive constraints, and when either is present the relevant market ought to be widened; although the Commission considers that 'demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product'. See the Market Definition Notice, paragraph 13.

The same basic principles apply to geographic market definition (in geographic market definition, barriers to trade such as language, import tariffs or regulatory features may be specific additional considerations).

25 Case 322/81 *Nederlandsche Banden-Industrie Michelin v. Commission (Michelin)* [1983] ECR 3461, paragraph 37.

26 Market Definition Notice, paragraph 36.

27 Small but significant non-transitory increase in price.

28 Market Definition Notice, paragraph 17.

29 For example, Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215 (Continental Can) and Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461 (*Hoffmann-La Roche*).

remain quite general.[30] The Commission's decisional practice and court case law in other areas of EU competition law, including merger control, provides additional insight that is also relevant for Article 102 TFEU cases.[31]

### ii Dominance

The application of Article 102 TFEU requires the company under investigation to have a high degree of market power that is referred to as 'dominance'. The ECJ has described dominance as 'a position of economic strength' that provides a company with 'the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers'.[32]

Despite the ubiquitous nature of this dictum (it is cited in virtually every Article 102 TFEU decision and judgment), it provides only limited guidance for companies to understand whether they hold a dominant position. It does not explain, for example, how 'independently' an undertaking must be able to behave[33] or when the threshold of 'appreciable extent' is crossed.[34] What is clear is that no single factor is determinative in assessing a company's dominance;[35] nor does dominance require that there is no competition on the relevant market.[36]

The Guidance Paper equates the concept of competitive independence with the ability to profitably raise prices above the competitive level.[37] Unlike in the context of merger control, where the question is whether the merged entity will prospectively gain power to raise prices, in Article 102 TFEU cases the question is whether the company under investigation already has such power. This does not require regulators to show that the company could raise prices beyond the level that it currently charges (the 'cellophane fallacy').[38] If the company has market power it will already charge above the competitive level at the profit maximising

30 For an example that engages in a detailed discussion of market definition principles in the pharmaceutical sector, see the judgment of the General Court in Case T-321/05 *AstraZeneca* [2010] ECR II-2805; confirmed in Case C-457/10 *P AstraZeneca v. Commission*, judgment of 6 December 2012.

31 See Nicholas Levy, European Merger Control Law: A Guide to the Merger Regulation, (Twelfth edition, Matthew Bender & Co, 2015), Chapter 8, for a discussion of market definition in EU merger control.

32 *United Brands*, paragraph 65 and *Hoffmann-La Roche*, paragraph 38. The Commission's Guidance Paper relies on the same definition, Guidance Paper, paragraph 10.

33 Of course, no undertaking can literally act 'independently' of its customers: even a monopolist is constrained by the demand curve for its product, which is affected by extra-market constraints, and the reduction in demand from customers as price increases.

34 See Bo Vesterdorf, 'Article 102 of the TFEU and sanctions: appropriate when?', ECLR 2011, 32(11), 573–579.

35 *United Brands*, paragraph 66.

36 *United Brands*, paragraph 113.

37 Guidance Paper, paragraph 10. See also Case COMP/39.525 *Telekomunikacja Polska*, Commission Decision of 22 June 2011, not yet published, paragraph 641.

38 For further discussion of the cellophane fallacy, see S Bishop and M Walker, The Economics of EC Competition Law: Concepts, Application and Measurement (third edition, London, Sweet & Maxwell, 2010).

point. Direct proof of dominance would therefore involve comparing the company's prices with what is expected to be the competitive price level. Because determining the competitive price level as a review benchmark is hard, if not impossible, case law has developed indicators for the existence of dominance. The Guidance Paper classifies these broadly into criteria relating to:

*a* constraints imposed by competitors (i.e., an assessment of market structure and market shares);

*b* constraints imposed by the threat of expansion and entry; and

*c* constraints imposed by the bargaining strength of customers.[39]

***Market shares***

In the *Akzo* judgment, the ECJ established a (rebuttable) market share presumption for dominance pursuant to which a company is assumed to be dominant, if it holds a market share of 50 per cent or more in the relevant market.[40] The insight underpinning this is that shares of sales indicate whether a company can 'more easily pursue a pricing policy independent of competitive conditions' and therefore is 'able to control prices'.[41] The Guidance Paper notes that dominance is 'not likely if the undertaking's market share is below 40 per cent'.[42]

That said, even above the 50 per cent threshold it is necessary to consider the particular nature and competitive dynamics of the relevant market when assessing market shares. For example, in bidding markets that are characterised by a limited number of large orders, temporary large shares are not indicative of market power.[43] Similarly, in markets subject to a high degree of innovation or where services are offered for free, market shares may not be a good proxy for market power.[44]

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39 Guidance Paper, paragraph 12.

40 See Case C-62/86 *Akzo Chemie v. Commission* [1991] ECR I-3359 (AKZO), paragraph 60: 'With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50 per cent such as that found to exist in this case.'

41 Case C-62/86 *Akzo* [1991]ECRI-3359, opinion of Advocate General Lenz, paragraphs 111, 114.

42 Guidance Paper, paragraph 14.

43 For this reason, the Guidance Paper notes that 'the higher the market share and the longer the period over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position.', Guidance Paper, paragraph 15.

44 Thus, in *IBM/Telelogic*, the Commission held that market share data did not represent a 'direct proxy for market power' in markets characterised by competition on quality and innovation, in particular because 'competitors who do not regularly upgrade their products, or who do not introduce new products meeting increasing customers' requirements, will rapidly lose out', Case COMP/M.47447, *IBM/Telelogic*, Commission decision of 5 March 2008, paragraph 151. See also Case T-79/12 *Cisco*, where the General Court confirmed that because of the high degree of innovation and the fact that services are provided for free (so that any attempt to increase prices 'would encourage consumers to switch supplier'), market shares of 80–90 per cent were not indicative of market power.

***Expansion and entry***

Any presumption of market power that might accompany a high market share is inapplicable in markets where competitors are able to meet rapidly the demand from customers who want to switch away from the firm with the largest share.[45] As recognised in the Guidance Paper, 'an undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient'.[46] In assessing this likelihood, the Commission considers barriers that prevent timely entry or expansion. These can take the forms of legal barriers (such as legislation conferring a statutory monopoly,[47] or intellectual property rights),[48] or barriers such as economies of scale or scope,[49] technological advantages[50] or network effects.[51]

***Buyer power***

Customers with sufficient countervailing bargaining strength can prevent a company from exercising market power. Such buyer power, however, will not necessarily negate a finding of dominance where a strong buyer is only able to protect itself, but not the entire market.[52]

Generally, exercise of buyer power will require that the buyer has viable competitive alternatives or the ability to develop such alternatives.[53] Even a large buyer will have little or no power if it has no alternative supply options to which it can realistically turn.[54] That said, in some instances, buyer power may also come from the ability of the buyer to retaliate against the seller. For example, in the case of patent licensing, a patent owner may be constrained by the patent portfolios of licensees if it is vulnerable to countersuits in the event of overcharging for its own patents. In the case of a multi-product firm that serves the same buyers in different product markets, buyers may constrain the firm's ability to charge *supra*-competitive prices in a dominant market by threatening to switch their purchases in non-dominant markets.

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45 *Hoffmann-La Roche*, paragraph 41.

46 Guidance Paper, paragraph 16.

47 See, for example, Case 89/113/EEC *Decca Navigator Systems*, Commission decision of 21 December 1988.

48 See, for example, Case COMP/35.141 *Deutsche Post*, Commission decision of 20 March 2001, OJ 2001 L 125/27.

49 *United Brands*, paragraph 122. The extensive investments that a new entrant to the banana market would need to make were held to be 'particular barriers to competitors entering the market' since they generated 'economies of scale from which newcomers to the market cannot derive any immediate benefit and […] the costs of which are irrecoverable if the [entry] attempt fails'.

50 See, for example, *Hoffmann-La Roche*, paragraph 48.

51 This refers to the phenomenon whereby a product or service becomes more valuable to each user when more people use it. See, for example, Case COMP/39.530 *Microsoft (Tying)*, Commission Decision of 16 December 2009, paragraph 420.

52 Guidance Paper, paragraph 18.

53 Guidance Paper, paragraph 18.

54 See, for example, Case COMP/37.990, *Intel*, paragraphs 886, 889: 'Throughout its argumentation on buyer power, Intel ignores the fundamental element in its relationship with OEMs, namely the fact that it is an unavoidable trading partner for them: OEMs depend on Intel for what is the most important single hardware component in their computers. As such, Intel is a must-stock brand.'

## IV ABUSE

### i Overview

Holding or acquiring a dominant position is not in itself unlawful under EU competition law. A dominant company only infringes Article 102 of the TFEU if it abuses its dominant position to restrict or distort competition. As the EU courts have put it, under EU competition law, dominant undertakings have a 'special responsibility' not to impair undistorted competition in the EU.[55] The dominant position does not necessarily have to be on the same market where the effects of the abuse are felt.[56]

The classic formulation of an abuse is from *Hoffmann-La Roche*:

> *The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*[57]

### ii Exclusionary abuses

An exclusionary abuse takes place if a dominant company forecloses competitors in an anticompetitive manner. Not every foreclosure of competitors is anticompetitive. It is a normal (and desirable) part of the competitive process that competitors that have less to offer to customers may leave the market. This has been recognised in the Guidance Paper and has now been affirmed by the ECJ in *Post Danmark I*. As the ECJ noted:

> *Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, inter alia, price, choice, quality or innovation.*[58]

The key task in an abuse analysis is therefore to distinguish between anticompetitive conduct and competition on the merits.

Article 102 of the TFEU lists a number of abusive practices, but these are not exhaustive: *sui generis* abuses can be identified in individual cases.[59] The Guidance Paper

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55 See, for example, *Michelin*, paragraph 57; Case T-321/05 *AstraZeneca* [2010] ECR II-2805, paragraph 35; and Case C-280/08 P *Deutsche Telecom v. Commission* [2010] ECR I-9555, paragraph 177.

56 But see the limitations discussed *in Case C-333/94 P Tetra Pak International v. Commission [1996] ECR I-5951 (Tetra Pak II*). If the effects are felt on a non-dominant market, there may also be a higher legal standard to show anticompetitive effects. See *Streetmap v. Google* [2016] EWMC (Ch), paragraph 98.

57 *Hoffman-La Roche*, paragraph 121.

58 Case C-209/10 *Post Danmark I*, paragraph 22 (*Post Danmark I*).

59 See *Continental Can*, paragraph 26. *AstraZeneca*, with its regulatory-type abuses, represents a recent example.

discusses legal criteria for categories of exclusionary abuses that have been identified in past cases. These legal criteria serve as successive filters to distinguish between abusive behaviour and legitimate pro-competitive conduct.

Outside the abuse categories discussed in the Guidance Paper, conduct must be assessed based on general principles. Central to such an analysis is the recognition that the existence of anticompetitive foreclosure must be determined by reference to equally efficient competitors.[60] Any possible foreclosure of competitors can only be anticompetitive if it is liable to exclude competitors that are at least as efficient as the dominant company. Moreover, even if this is the case, the dominant company retains the possibility to justify its conduct by showing that it is necessary and proportionate to achieve legitimate objectives. It then 'falls to the Commission [...] to show that [...] the justification put forward cannot be accepted.'[61]

These general considerations also underpin the analysis of the specific abuse categories discussed in the Guidance Paper.[62]

***Predatory pricing***

Predatory pricing arises where a dominant company prices its products below costs such that even equally efficient competitors cannot viably remain on the market. In *Akzo*, the ECJ established a two-test rule for the assessment of predatory pricing conduct under Article 102 of the TFEU:[63] (1) pricing below average variable cost (AVC) is presumptively abusive;[64] (2) pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor.[65] The principle set out in the Guidance Paper in assessing predatory pricing conduct is that of a profit sacrifice (i.e., the dominant company deliberately foregoes profits in the short term so as to foreclose competitors with

60 *Post Danmark I*, paragraphs 21–22; and Guidance Paper, paragraphs 25–27.

61 Case T-201/04 *Microsoft* [2007] ECR II-3601, paragraph 688.

62 Although the exclusion of equally efficient competitors is the usual litmus test for abusive conduct, in limited, specific circumstances, a finding of abuse is possible without relying on the test. In C-23/14, *Post Denmark II*, the ECJ held that the Commission's Guidance Paper was a statement of the Commission's priorities but was not binding on the Union's Courts. The ECJ found that, with respect to rebate schemes, there is no legal obligation that the effects of the scheme applied by a statutory monopoly must be measured against an as-efficient competitor (paragraph 57). In cases where the extent of an undertaking's dominance or where rigidities in the market's structure precluded the entry of an as-efficient-competitor, the test was 'of no relevance' (paragraph 59).

63 Confirmed in *Tetra Pak II* and Case C-202/07 P *France Telecom SA v. Commission* [2009] ECR I-2369.

64 See *Akzo*, paragraph 71: 'A dominant undertaking has no interest in applying such prices except that of eliminating a competitor so as to enable it to subsequently raise its prices by taking advantage of its monopolist position.'

65 Ibid., paragraph 72: 'Such practices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.'

a view to strengthening market power).[66] There may be cases where alternative benchmarks, such as average incremental costs, are more appropriate, where, for example, an industry is characterised by high fixed costs and very low variable costs.[67]

***Margin squeeze***

A margin squeeze occurs when a vertically integrated company sells an input to its downstream competitors at a high price and at the same time prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market. This is abusive in EU law when 'the difference between the retail price charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market'.[68] Until recently, margin squeeze cases have generally been viewed as instances of a constructive refusal to supply. But the EU Court's judgments in *TeliaSonera* and *Telefonica* have held that it is not necessary to establish the legal conditions for an abusive refusal to supply in such cases. These judgments therefore treat margin squeeze practices as being more akin to predatory pricing behaviour, particularly as they analyse the margin squeeze and Article 102(a) TFEU.

***Exclusive dealing***

The Guidance Paper describes exclusive dealing as an action by a dominant undertaking 'to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates'. Both Articles 101 TFEU[69] and 102 TFEU can

66 See Guidance Paper, paragraphs 64–66. The Guidance Paper in fact refers to cost benchmarks of average avoidable cost (AAC) and long-run average incremental cost (LRAIC), but recognises that these are likely to be the good proxies for AVC and ATC respectively. See Guidance paper, paragraphs 26–27.

67 See, for example, *Post Danmark I* (*supra*), paragraph 33. The ECJ in *Post Danmark I* (at paragraphs 39–40) also appeared to suggest that proof of anticompetitive effects can substitute for proof of intent in the second *Akzo* scenario (i.e., where a dominant firm's price is between AVC and ATC).

68 Case COMP/C-1/37.451 *Deutsche Telekom*, Commission decision of 21 May 2003, paragraph 107, upheld on appeal by the General Court. Confirmed in TeliaSonera, paragraphs 31–34. A test for a margin squeeze formulated in the Guidance Paper at paragraph 80 is as follows: 'Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a 'margin squeeze).'

69 In many cases the block exemption regulation on vertical agreements will apply to exempt such agreements from Article 101 of the TFEU, provided that: (1) the supplier has a market share of no more than 30 per cent; (2) the exclusive purchasing contract contains no hard-core restrictions; and (3) the exclusivity lasts for less than five years. See Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

apply to exclusive dealing, although traditionally the approach under Article 101 TFEU has been more economic, while under Article 102 of the TFEU it has historically been treated more as a *per se* abuse.[70]

***Exclusive purchasing***

An exclusive purchasing obligation requires a customer to purchase all or a large majority of its needs for a specific product from one supplier. The current approach of the Commission and the courts is to look closely at the actual or likely effects of a particular agreement on the relevant market and assess whether it harms consumers.[71] Factors the Commission will take into account include the duration of the obligation, customers' switching costs, and whether the dominant undertaking is an unavoidable trading partner.[72]

***Exclusionary discounts***

While the grant of discounts is generally pro-competitive, certain forms of discounts may constitute an abuse if applied by a dominant company. This includes, in particular, discounts that are conditioned on exclusivity and retroactive target rebates, that pay out discounts retroactively on past purchases over a reference period if the customer meets pre-defined quantity targets. Common to the latter type of discount is a concern that the dominant company leverages its larger base of sales for calculating discounts in ways that preclude smaller (but equally efficient) competitors from competing for the contestable portion of a customer's demand. While the discount remains above costs for the dominant company because it can spread the discount across a larger base of sales, smaller competitors would be forced to price below costs to match the discounts since they would have to amortise it over a smaller base.

Exclusivity rebates have been condemned in a number of past cases, including *Hoffmann-La Roche*, *Michelin*, *British Airways*[73] and *Tomra*, following a relatively abstract, form-based analysis. In *Intel*, the Commission engaged in a more detailed analysis of the restrictive effects of Intel's discounts to demonstrate that Intel was indeed foreclosing equally efficient competitors. But the Commission maintained at the same time with reference to past case law that such an analysis was not necessary as a matter of law.[74] The General Court has confirmed the Commission's decision that exclusive discounts granted by a dominant company are 'by their very nature' abusive, without the need to examine whether the effects of the discount would foreclose equally efficient competitors.[75]

In *Post Danmark II*,[76] the ECJ found that a retroactive rebate issued by a statutory monopoly that was likely to produce an exclusionary effect could amount to an abuse of a dominant position, even if it did not mandate exclusivity. Determining whether such effects

70 See, for example, *Hoffmann-La Roche*. This approach was partially questioned in Case T-65/98 *Van den Bergh Foods v. Commission* [2003] ECR II-4653 (*Van den Bergh Foods*).

71 See *Van den Bergh Foods*, paragraph 160.

72 Guidance Paper, paragraph 36.

73 Case C-95/04P *British Airways plc v. Commission*, [2006] ECR II-2969.

74 Case COMP/C-3 /37.990 *Intel*, Commission decision of 13 May 2009.

75 Case T-286/09 *Intel*, judgment of 12 June 2014, paragraphs 85 and 88.

76 Case C-23/14 *Post Danmark A/S v Konkurrencerådet*.('Post Danmark II'), judgment of 6 October 2015, ECLI:EU:C:2015:651.

are likely requires an assessment of all the circumstances of the case, including the specific rules governing the retroactive rebate, the extent of the dominant position, the conditions of competition prevailing on the relevant market, and the proportion of customers covered by the rebate scheme.[77]

***Tying***

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product'. The seminal case on tying involved Microsoft's tying of its Windows operating system with its Windows Media Player.[78] The Commission, upheld by the General Court, identified five conditions for an abusive tying:

*a* the tying and tied good are two separate products;
*b* the undertaking concerned is dominant in the tying product market;
*c* customers have no choice but to obtain both products together;
*d* the tying forecloses competition; and
*e* there is no objective and proportionate justification for the tie.[79]

A central element of a tying analysis is to establish whether two components constitute separate products or an integrated whole. In *Microsoft*, the General Court held that such an assessment must be based on 'a series of factors', including 'the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and […] commercial practice'.[80]

A dominant company may achieve the same effect as tying by ostensibly offering a stand-alone version of the dominant tying product alongside a bundled version, but at a price that renders it commercially unrealistic for customers to take the stand-alone version. Past cases have condemned the grant of discounts on dominant products that are conditioned on customers also taking non-dominant products.[81] In the Guidance Paper, the Commission takes the position that such bundled discounts must be assessed by allocating the discounts fully to the price of the non-dominant 'tied' product. If such a calculation results in a price below the dominant company's long run average incremental costs of supplying the 'tied' product, the discount is anticompetitive (unless rivals are able to replicate the bundle).[82]

77 *Post Danmark II*, paragraph 50.

78 Prohibition decisions have been adopted in a number of other cases involving tying allegations, including *Hilti A.G. v. Commission*, Case T-30/89, and *Windsurfing International Inc v. Commission*, Case 193-89.

79 See Case COMP/C-3/37.792, *Microsoft*, Commission decision of 24 March 2004, paragraph 794. The Court of First Instance confirmed that the five conditions were 'consistent both with Article 82 EC and with the case law' and followed from 'the very concept of bundling'. See Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraph 859. See also Guidance Paper, paragraphs 47–74.

80 Case T-201/04 *Microsoft* [2007] ECR II-3601, paragraph 925.

81 See for example, *Hoffmann-La Roche*, paragraphs 110–111; Case COMP/37.859 *Hays/La Poste Belge & Key Mail*, Commission Decision of 5 December 2001, OJ 2002 L 61/32.

82 Guidance Paper, paragraph 60.

***Refusal to deal***

As a general rule, companies, including dominant companies, are free to decide whether to deal with a counterparty. A refusal by a dominant undertaking to supply its products can therefore amount to an abuse under Article 102 of the TFEU only in exceptional circumstances. According to established case law, the following general conditions must be met for such an abusive refusal:

*a* the requested input must be indispensable to compete viably;
*b* the refusal is likely to eliminate all competition in the downstream market; and
*c* there is no objective justification for the refusal.[83]

If the refusal involves intellectual property rights (i.e., a refusal to license) it is moreover necessary to demonstrate that the refusal would prevent the emergence of a new product or would hinder technical development and innovation more generally.[84]

**iii Discrimination**

Unlawful discrimination pursuant to Article 102(c) of the TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions. But such abusive 'price discrimination' requires proof that: (1) similar situations are being treated in a dissimilar manner without legitimate commercial reasons; and (2) that some customers are placed at a 'competitive disadvantage' relative to other customers to such a degree that it creates a risk of foreclosing equally efficient competitors.

Not every different treatment is discriminatory. As a general matter, the EU courts have recognised that differences arising from individual negotiations of terms can be explained by legitimate commercial reasons.[85] Other considerations that may be taken into account include, for example, whether the transactions involve similar products,[86] costs[87] or timing.[88] Moreover, even if there is 'discrimination', the ECJ's *Post Danmark* judgment has made clear that such discrimination is only abusive if it is liable to foreclose equally efficient companies.[89]

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83 Bronner, paragraph 41; Case T-374/94 *European Night Services* [1998] ECR II-3141; Case T-504/93 *Tierce Ladbroke* [1997] ECR II-923.

84 Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, paragraph 332; Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039, paragraph 52; and Case C-241-1/91 P *RTE & ITP v. Commission* [1995] ECR I-743 (Magill), paragraphs 50–56.

85 *Michelin*, paragraph 90.

86 See, for example, Case COMP/38.096 *Clearstream*, Commission decision of 2 June 2004; Case T-301/04 *Clearstream v. Commission* [2009] ECR II-3155; and see Case COMP/36.568 *Scandlines Sverige v. Port of Helsingborg*, Commission decision of 23 July 2004.

87 See, for example, Case 95/364/EC *Brussels National Airport*, Commission decision of 28 June 1995, OJ 1995 L 216/8 (Brussels National Airport).

88 See, for example, Case IV/28.841 *ABG/Oil Companies*, Commission decision of 19 April 1977, OJ 1977 L 117/1.

89 *Post Danmark*, paragraph 30: 'The fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as 'price discrimination',

As a general matter, 'pure' discrimination cases are rare.[90] In past cases, discrimination-type concerns have typically been raised as an 'added' consideration in connection with abusive exclusionary pricing practices, such as retroactive volume rebates.

### iv Exploitative abuses

Article 102(a) of the TFEU provides that an abuse may consist of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'. But the difficulty in determining a benchmark by which prices can be assessed as being unfair has led to a dearth of decisional practice on this issue.[91] In *Scandlines Sverige*, the Commission set out what it considers the most appropriate methodology for assessing unfair prices. The questions to be determined are: (1) whether the difference between the costs actually incurred and the price actually charged is excessive; and, if the answer to that is yes, then (2) whether a price has been imposed that is either unfair in itself or when compared to the price of competing products.[92]

## V REMEDIES AND SANCTIONS

Regulation 1/2003 provides the mechanism by which the Commission sanctions infringements of Article 102 of the TFEU. The Commission is entitled to impose structural or behavioural remedies, interim measures, fines and periodic penalty payments.[93] Alternatively, an undertaking can itself offer commitments to bring the infringement to an end, thereby avoiding a formal finding of an infringement and a fine.

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that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.'

90 See, for example, press release of 5 March 2014, 'Commission fines Romanian Power Exchange OPCOM for discriminating against EU electricity traders', IP/14/214. In that case, the Commission found that OPCOM had wrongfully discriminated against electricity traders from outside Romania by requiring them to have a Romanian VAT registration for accessing the spot electricity markets. Through this provision, OPCOM managed to impose a competitive disadvantage on electricity traders that were already registered for VAT in other EU Member States.

91 See, for example, *United Brands*, paragraphs 248–268: the ECJ annulled the Commission's decision that unfair prices had been charged for Chiquita bananas in Germany, Denmark and Benelux since the difference in prices between branded Chiquita bananas and non-branded bananas was not deemed to be excessive.

92 Case COMP/36.568 *Scandlines Sverige v. Port of Helsingborg*, [2006] 4 CMLR 1298, paragraph 147.

93 Articles 7, 8, 23 and 24 of Regulation 1/2003 respectively. Interim measures can only be imposed where: (1) there is a *prima facie* infringement of Article 102 of the TFEU; (2) there is urgency due to the risks of serious and irreparable damage to competition; (3) damage is considered 'irreparable'; and (4) the balancing exercise between the public interest and the harm caused weighs in favour of the interim measure.

### i Sanctions

The Commission can impose a fine of up to 10 per cent of a company's total turnover of the preceding business year for infringements of Article 102 of the TFEU. The Commission has set out in detail the methodology by which it sets fines, which will take into account, *inter alia*, the nature, length and scope of the infringement, the value of sales of goods affected by the infringement, and whether there are aggravating or mitigating circumstances.[94]

Before 2004, no fine was ever imposed for an infringement of Article 102 of the TFEU that exceeded 1 per cent of the turnover of the undertaking involved. But in recent years, the Commission has shown a tendency to impose increasingly high fines for abusive conduct, both in absolute and percentage terms, culminating in cases such as *Tomra*,[95] where the fine represented 7 per cent of annual turnover, and *Intel*,[96] where the Commission imposed a record fine of €1.06 billion.[97]

Fines can be imposed for a failure to abide by interim measures or commitment decisions, and, as noted, the Commission recently imposed its first ever fine for breach of commitments.[98] The Commission is also entitled to impose procedural fines of up to 1 per cent of an undertaking's annual turnover if an undertaking provides false or late answers to the Commission's requests for information.[99] Finally, the Commission is empowered to impose periodic penalty payments to compel companies to abide by remedies and commitments decisions.[100]

### ii Remedies

Remedies, whether imposed by the Commission or offered voluntarily by an undertaking as commitments, must fulfil certain key objectives. They must: (1) bring the infringement to an end; (2) be proportionate in both scope and duration; (3) not be easily circumvented; and (4) address the competitive distortions resulting from the abuse.[101]

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94 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (the Fining Guidelines), OJ C 210, 1 September 2006.

95 Case COMP/E-1/38.113 *Prokent-Tomra* [2008] OJ C219.

96 Case COMP/C-3 /37.990 *Intel*, Commission decision of 13 May 2009.

97 See also Frances Dethmers and Heleen Engelen, 'Fines under article 102 of the Treaty on the Functioning of the European Union', ECLR, 2011, issue 2, pp. 86 and 88; and Bo Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?' (*supra*) for criticism of the trend of higher fines, in particular considering the lack of legal certainty in the concepts of both abuse and dominance.

98 See footnote 10, *supra*.

99 Article 23(1) of Regulation 1/2003.

100 Article 24(1) of Regulation 1/2003. These can amount to 5 per cent of an undertaking's average daily turnover.

101 See Article 5(4) of the TFEU; and Case C-441/07, *Commission v. Alrosa*, ECR I-5949, paragraph 36; see also Commission Notice on Best Practices for the Conduct of Proceedings concerning Article 101 and 102 of the TFEU, paragraph 115: the Commission has undertaken to verify 'that the commitments address the identified competition concerns and that the commitments offered do not manifestly go beyond what is necessary to address these concerns'. The ECJ has confirmed that these principles apply both to remedies imposed under Article 7 and remedies voluntarily offered under Article 9. See Alrosa (*supra*), paragraph 36.

***Behavioural remedies***

Considerations of expediency and proportionality mean that behavioural remedies are preferred in Article 102 TFEU cases.[102] Structural remedies are only a means of last resort. Behavioural remedies may require the dominant undertaking either to engage in a positive action to bring the infringement to an end or to abstain from a certain type of conduct.[103] Positive obligations have included:

*a* the granting of a compulsory licence;[104]
*b* raising prices above an exclusionary level; [105] and
*c* other forms of compulsory dealing.[106]

Meanwhile, negative obligations have included unbundling products[107] and ensuring non-discriminatory treatment.[108]

***Structural remedies***

Structural remedies are used to rectify effects or abuses that have caused a change in the structure of the market. They will only be proportionate where 'there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking'.[109] Structural remedies may be considered, for example, for foreclosure problems that arise from vertical integration.[110] Thus, in *ENI*, the Commission identified concerns with regard to conduct by ENI that result from its ownership of strategic natural gas pipeline infrastructure.[111] ENI offered to divest its stake in its international transport businesses and, consequently, the Commission held that 'ENI will no longer be subject to the inherent conflict of interest it faced operating both as a transmission system operator and as a company active on the Italian wholesale market'.[112]

102 This is evident from the text of Article 7 of Regulation 1/2003: 'Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy.'

103 See Commercial Solvents, paragraph 45.

104 See Case 238/87 *Volvo v. Erik Veng* (UK) [1988] ECR 6211.

105 See Case COMP/38.233 *Wanadoo*, Commission decision of 16 July 2003.

106 See, for example, *Magill*: certain broadcasting companies were forced to make available their TV listings and to permit their reproduction subject to payment of reasonable royalties.

107 See, for example, Case COMP/34.579 *MasterCard*, Commission decision of 19 December 2007, and Case COMP/36.518 EuroCommerce, Commission decision of 19 December 2007.

108 See, for example, *Brussels National Airport*; and *Tetra Pak II*.

109 Recital 12 of Regulation 1/2003.

110 See DG COMP Competition Policy Newsletter (2007), No. 1, pp. 23–34.

111 Case COMP/39.315 *ENI*, Commission decision of 29 September 2010.

112 Ibid., paragraph 89.

## VI PROCEDURE

The procedural rules for the conduct of Commission investigations are laid out in Regulation 1/2003 and the Commission's Implementing Regulation.[113] In 2012, the Commission published a version of its internal manual of procedure, which provides additional guidance on the Commission's handling of competition law proceedings.[114] A brief summary of the main procedural steps in a typical Article 102 TFEU investigation follows.

*a* The Commission can begin investigations both as a result of complaints by third parties and on its own initiative. Sector inquiries can also provide the impetus for investigations.

*b* The Commission's primary instrument of investigation is the issuance of requests for information. In the past few years, such requests have become increasingly detailed and may involve the production of large quantities of data and internal documents. The Commission may oblige companies to respond to requests for information through the adoption of formal decisions that are subject to penalty payments.

*c* The Commission may conduct unannounced inspections, or 'dawn raids', at a company's premises to obtain documents and information, although such dawn raids are relatively rare in Article 102 cases. Documents that contain advice from external counsel are protected by legal professional privilege, while in-house counsel documents do not benefit from such protection.[115]

*d* After considering the evidence, the Commission will decide whether to: close proceedings; enter settlement discussions; or issue an SO to the company concerned.

*e* The addressee of the SO is entitled to review the Commission's file and respond to the SO in writing. The Commission will also grant the company in question an oral hearing, if requested.

*f* Following the defendant's reply to the SO, and a possible oral hearing, the Commission will proceed to a decision. An adverse decision can be appealed to the General Court on both points of fact and law, and from there to the ECJ on points of law only.

Commission proceedings can also be resolved through the offer of commitments. Negotiation of commitments can take place both prior to adoption of an SO or following an SO and defence. If the Commission considers the offered commitments to be acceptable, it will subject them to a public market test and, if confirmed, make them binding through adoption of a decision under Article 9 of Regulation 1/2003. Commitment decisions involve no finding of infringement and entail no fines.

113 Commission Regulation EC No. 773/2004 of April 2004 on the conduct of proceedings pursuant to Articles 81 and 82 of the EC Treaty.

114 DG Competition Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (the Procedure Manual), March 2012.

115 Privilege applies only to independent external counsel; advice given by in-house lawyers is excluded from the scope of legal professional privilege. See Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, judgment of 14 September 2010.

## VII PRIVATE ENFORCEMENT

While public enforcement is the core of EU antitrust enforcement, actions brought by private claimants before national courts are an increasingly important complement to public enforcement activity.[116] The Commission aims to encourage and facilitate such actions. To this end, it published a proposal for a Directive on private damages actions in June 2013,[117] together with a practical guide on quantifying harm resulting from competition infringements,[118] and a recommendation for collective redress mechanisms in Member States.[119] The Directive's stated aim is to optimise the interaction between public and private enforcement of competition law; to minimise discrepancies between rules applicable to antitrust damages actions in Member States; and to ensure that victims of infringements of EU competition law can obtain full compensation for the harm they have suffered. Among other things, the Directive introduces rules on the disclosure of evidence in such cases, as well as on the standing of indirect customers, the length of limitation periods, joint and several liability of infringers, and the passing-on of damages as a possible defence.

The Directive was published in the Official Journal on 5 December 2014.[120] EU Member States must implement the directive into their national legal systems by 27 December 2016.

116 Private enforcement is facilitated and encouraged by Recital 7, Article 6, and Article 15 of Regulation 1/2003. For commentary, see, for example, C Cook, 'Private Enforcement of Competition Law in Member State Courts: Experience to Date and the Path Ahead' (2008) 4(2) Competition Policy International; M Siragusa, EU Competition Law – Cartels and Horizontal Agreements, (Leuven Claeys & Casteels 2007), paragraph 4.226 et seq.; J Temple Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties Under European Antitrust Law', Fordham Antitrust Conference, September (2005).

117 Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404, 11 June 2013.

118 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11 June 2013; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11 June 2013.

119 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3, 11 June 2013; and Commission communication 'Towards a European Horizontal Framework for Collective Redress', COM(2013) 401/2, 11 June 2013.

120 Directive 2014/104/EU of the European Parliament and Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union, 2015 O.J. L 349/1

## VIII FUTURE DEVELOPMENTS

The debate as to the role economics can and should play in the assessment of abuses continues to play out in the European courts. In her opinion in *Post Danmark II*,[121] AG Kokott observed that despite the 'mounting calls for European Competition law to adopt a more economic approach', the court should 'not allow itself to be influenced so much by current thinking ('zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.'[122] The next important development we can expect in the next year in this regard is the ECJ's decision in *Intel*.

In terms of the Commission, a possible area of activity concerns the value of 'Big Data', particularly following the Bundeskartellamt opening proceedings against Facebook.[123] The Commission will need to articulate how and why collecting data can raise competition concerns, given the Court of Justice's finding that 'issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.'[124]

121 *Post Danmark II*, Opinion of AG Kokott, delivered on May 21 2015, ECLI:EU:C:2015:343.

122 *Post Danmark II*, Opinion of AG Kokott, paragraph 4.

123 Bundeskartellamt Press Release. 2nd March 2016, available at; http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.htm

124 Case C-238/05, *Asnef-Equifax*, paragraph 63.

# Chapter 9

# FINLAND

*Anna Kuusniemi-Laine, Salla Mäntykangas-Saarinen and Kiti Karvinen*[1]

## I INTRODUCTION

The abuse of a dominant position is prohibited in Section 7 of the Competition Act.[2] Furthermore, the concept of dominance is defined in Sections 4(2) and 4a of the Competition Act. The Finnish Competition and Consumer Authority (FCCA) has the authority to investigate competition matters.[3] The FCCA may order the dominant undertaking to terminate the unlawful conduct or resolve the restriction through commitments. The decisions of the FCCA may be appealed to the Market Court and further to the Supreme Administrative Court. The Market Court has the authority to impose fines that have been proposed by the FCCA.

The enforcement procedure in abuse of dominance cases is set out in the Competition Act. The concept of dominance and abuse thereof are, with minor exceptions, similar to EU competition rules. When the abuse of dominance may affect trade between EU Member States, the Finnish authorities must also apply the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the interpretation thereof. The FCCA may issue legally non-binding guidelines that are consistent with the guidelines and Block Exemption Regulations of the European Commission.[4] To date, no specific guidelines

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2 948/2011 as amended. The Competition Act replaced the old Act on Competition Restrictions (480/1992, as amended). The provisions of the Act on Competition Restrictions apply to a large extent to violations that occurred prior to the entry into force of the Competition Act on 1 November 2011.

3 Regional state agencies also have limited powers to investigate competition matters and, by mandate of the FCCA, to take measures to promote competition in their region.

4 Government Proposal 88/2010, p. 6.

on the abuse of dominance have been issued by the FCCA; however, the guidelines on the assessment of the amount of fine[5] and guidelines on prioritisation[6] are relevant to abuse of dominance cases.[7]

## II YEAR IN REVIEW

Based on the published decisions, the FCCA made a decision not to investigate or not to take an action in every abuse of dominance case decided in 2015. The decisions indicate that the FCCA effectively uses its authority to prioritise matters and directs its resources to investigating the most harmful competition restrictions from a competition policy point of view. Furthermore, the FCCA is prepared to resolve matters through discussion and voluntary actions of undertakings, as shown in *Abloy*[8] and *Itella*[9] where the FCCA decided not to proceed after the companies had voluntarily amended their discount systems and pricing practices.

The administrative courts did not adjudicate any cases related to abuse of dominance in 2015. In 2015, the Ministry of Employment and Economy (MEE) published a report of the working group on actions for damages under competition law.[10] The working group was set up to prepare for the national implementation of the EU Directive on competition law damages (2014/104/EU). The report proposed a new separate act on actions for damages for infringements of competition law. The government proposal is expected in May 2016.

### i Competition Authority cases currently active in Finland

In April 2009, the FCCA started to investigate Valio's conduct in the milk production sector. The suspected conduct is predatory pricing in order to remove effective competition from the fresh milk market in Finland. At the moment, the case is pending at the Supreme Administrative Court.

## III MARKET DEFINITION AND MARKET POWER

The definitions of relevant product and geographical market correspond to the approach of the European Commission and the European court praxis. It is explicitly stated in the legislative materials that the definition of markets is an economic-based factual matter that may be determined by, for example, conducting a market survey.[11] Substitutability of demand is the most decisive factor in the determination of a relevant product market, but supply-side substitutability is also taken into consideration by the FCCA.

5 Guidelines on the Application of the Competition Act 3/2011.

6 Guidelines on the Application of the Competition Act 4/2011.

7 In addition, the FCCA has issued guidelines on leniency and guidelines on merger control.

8 FCCA Decision No. 428/V1.6.61/2006, *Abloy Oy*.

9 FCCA Decision No. 471/61/2007, *Itella Oyj*.

10 MEE Publication, Competitiveness 46/2015.

11 Government Proposal 148/1987, p. 18.

Dominant position is defined in Section 4(2) of the Competition Act as follows:

> *A dominant position shall be deemed to be held by one or more undertakings or association of undertakings, who, either within the entire country or a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.*

Despite of the specific definition included in the Competition Act, the concept of dominance is interpreted consistently with the EU competition law.[12]

However, there is an exception to the determination of dominance concerning the Finnish daily consumer goods market. According to Section 4a of the Act, grocery chains with a market share exceeding 30 per cent in the retailing of daily goods in Finland are considered to hold a dominant market position. The aim of the provision was to improve the functionality of competition on the highly concentrated Finnish retail trade market and to ensure that competitors are not excluded from the market. It is, however, explicitly stated that the objective is not to prevent competition on the merits but to ensure that companies deal with suppliers and other market actors in a non-discriminatory manner.[13] The FCCA has publicly stated that the provision does not influence the application of the constituent elements of the abuse of dominance. Furthermore, the FCCA has emphasised that the prohibition of the abuse is only targeted at actions that can be distinguished from the competition on merits.[14]

Two or more undertakings may hold a joint dominant position. In the *Automatia* case, the FCCA took the preliminary view that joint venture Automatia and its member banks had joint dominance in the cash-dispensing market in Finland.[15] The FCCA stated that to hold joint dominance, the companies must, in an economic sense, act as one economic entity on the market. The FCCA did not require the companies to act identically in every situation, but it was fundamental that they were able to act in a similar manner and to a reasonable extent independently from their competitors, customers and consumers. The FCCA's view was also that the joint venture Automatia formed a structural and economic link between the member banks, since they offered cash withdrawal services to their customers via Automatia. Despite the fact that they made the pricing decisions independently, as a result of this link, they had an incentive to price withdrawals made using auto-teller machines (ATMs) outside the Automatia network in a way that would encourage their customers to use Automatia's ATMs. The case was closed with a commitment decision.

12 Government Proposal 148/1987, p. 18.

13 Government Proposal 197/2012, p. 20.

14 FCCA Newsletter 26 March 2014.

15 FCCA Decision No. 964/61/2007, *Nordea Pankki Suomi Oyj, OP-Keskus cooperative and Sampo Pankki Oyj*.

## IV ABUSE

### i Overview

The definition of abuse of dominance included in Section 7 of the Competition Act corresponds almost word for word to the wording of Article 102 of the TFEU. The interpretation of the abuse of dominance is also similar to the application of Article 102.

### ii Exclusionary abuses

*Predatory pricing*

Predatory pricing refers to a pricing policy in which the dominant company prices its products below costs in the short term to foreclose existing or potential competitors from the market. In its assessment of predatory pricing, the FCCA has referred to the criteria set out in the European Court of Justice (ECJ) *Akzo* judgment.[16]

In *Valio*,[17] the Market Court considered that the Finnish dairy company Valio had abused its dominant position by engaging in predatory pricing in the production and wholesale market of fresh milk. The Market Court upheld the FCCA's order for Valio to cease the violation and imposed a €70 million fine on the company. The Market Court found that Valio held a dominant position in the Finnish fresh milk market and that the company had made a strategic decision to foreclose competition by trying to force its competitor Arla Ingman, part of Arla Foods, from the market by dropping its wholesale prices for fresh milk below costs. A central issue in the case is the calculation of costs and, in particular, the treatment of the price of raw milk paid to the farmers. Valio is a cooperative owned by farmers, and it has undertaken to buy all the raw milk produced by its owners and, therefore, the company disagrees with the Market Court's and FCCA's decision to consider the cost of raw milk as a variable cost. Valio appealed the decision to the Supreme Administrative Court in summer 2014. The case was pending at the time of writing.

***Margin squeeze***

Margin squeeze means that a vertically integrated company weakens the position of a competitor in the end-product market by overpricing an intermediary product. The Market Court has dealt with alleged margin squeeze in several cases concerning subscriber connections in the telecommunications market. In the *Oulun Puhelin*, *Aina Group*, *Kymen Puhelin* and *TeliaSonera Finland* cases the Market Court imposed fines totalling €220,000 on the companies for the abuse of a dominant position. According to the Market Court and the FCCA, the companies held dominant positions in their respective geographical areas and abused their market positions by favouring their own service providers with regard to the rents they charged for subscriber connections. The price bias made it difficult for competitors to gain access to the market in consumer services provided over subscriber connections, such as broadband and business-to-business services.[18]

16 Market Court Decision No. 458/12/KR and 36/13/KR, *Valio Oy*.

17 Ibid.

18 FCCA Proposals to the Market Court No. 950/61/2002, *Oulun Puhelin Oyj*, *Aina Group Oyj*, *Kymen Puhelin Oy*, *TeliaSonera Finland Oyj* and Market Court decisions No. 189/07/KR, *Oulun Puhelin Oyj*, No. 356/07/KR, *TeliaSonera Finland Oyj*, No. 355/07/KR, *Kymen Puhelin Oy* and No. 354/KR/07, *Aina Group Oyj*.

The *Lännen Puhelin* case concerned margin squeeze and refusal to supply in the broadband services market. As regards the margin squeeze, the company offered end customers a broadband product based on a different network technology from that of its wholesale product available to competitors. The Supreme Administrative Court upheld the Market Court's decision and considered that, because of the different cost structure of the two technologies, it was not possible to assess whether the company had engaged in margin squeeze.[19] According to the FCCA's report to the Market Court, the prices for the wholesale product had even exceeded the retail prices.[20]

The FCCA has published a memorandum on its evaluation criteria concerning the abuse of dominance in the broadband market. In its memorandum, the FCCA takes the preliminary view that local telecoms operators have dominant positions in their traditional business areas in the markets of subscriber lines as well as the wholesale of broadband services. When assessing the margin between wholesale and retail pricing, the FCCA calculates a weighted average of the monthly gross margin of the ADSL connections. If this is negative, the FCCA takes the preliminary view that the pricing fulfils the criteria for an illegal margin squeeze.[21]

***Exclusive dealing***

In the *Abloy* case, the FCCA assessed, *inter alia*, whether the marketing support paid by the company to accredited dealers constituted an illegal retroactive target rebate. The FCCA took into consideration that, for about half of the dealers, the support amounted to approximately one-third of their operating income and was, thus, highly important and loyalty enhancing. The FCCA considered that the marketing support was non-transparent and its grounds were unclear. According to the FCCA, this could have had exclusionary effects at least on some individual product groups. Following negotiations, the FCCA decided not to proceed with the case after the company voluntarily amended its discounting system on the basis of FCCA guidance.[22]

***Refusal to deal***

In Lännen Puhelin, the Supreme Administrative Court rejected the FCCA's claim that the company had abused its dominant position by refusing to supply its wholesale ADSL broadband product to its competitors. The Court quoted the *Oscar Bronner*[23] criteria and stated that it was necessary to assess whether the refusal to supply in fact removed all competition from the market. According to the decision, the fact that two competitors had managed to construct their own networks covering a significant area of Lännen Puhelin's network coverage area proved that the refusal had not effectively removed competition.[24]

In the SNOY case, the Supreme Administrative Court generally upheld the Market Court's decision and fined Suomen Numeropalvelu (Finnish Number Service) €90,000 for

19 Supreme Administrative Court Decision No. 2474/2/08 and Market Court Decision 260/04/KR, *Lännen Puhelin Oy*.

20 FCCA Proposal to the Market Court No. 949/61/2002, *Lännen Puhelin Oy*.

21 FCCA Memorandum 3 September 2009.

22 FCCA Decision No. 428/V1.6.61/2006, *Abloy Oy*.

23 Case C-7/97, *Oscar Bronner*.

24 Supreme Administrative Court Decision No. 2474/2/08 *Lännen Puhelin Oy*.

refusal to supply in the wholesale market for telephone subscriber information. The company maintained the only nationwide database of telephone subscriber information in Finland and refused to deliver the information to its customer, which offered its services on the internet for free and without registration. Suomen Numeropalvelu justified its refusal by invoking data protection legislation, but this argument was not accepted by the Market Court.[25]

### iii Discrimination

In the *Automatia* case, the FCCA considered that the three banks holding joint dominance in the cash distribution market engaged in discriminatory pricing. According to the FCCA, the price difference of withdrawals made from their joint venture's ATMs and withdrawals made from other ATMs was higher than the difference in costs. The FCCA accepted the commitments offered by the banks, through which the companies undertook to price the cash withdrawals in a non-discriminatory manner.[26]

### iv Exploitative abuses

There is quite a lot of old Finnish case law concerning excessive pricing, but the assessment in these cases has been somewhat formal and it is to be expected that the FCCA will concentrate more on economic effects in its future assessments. This shift to a more economic approach can be seen in the district heating survey. The FCCA assessed the reasonableness of the pricing of district heating companies in a large survey in 2009–2011. The FCCA closed its investigations by stating that the average price level of the district heating companies were high compared with the profitability and risk level of the business operations, but it considered that the threshold for intervention required by the Competition Act was not exceeded.[27]

## V REMEDIES AND SANCTIONS

According to the Competition Act, the FCCA is entitled to impose behavioural remedies, determine commitments offered by the undertakings as binding, withdraw the benefit of a block exemption, issue interlocutory injunctions and impose periodic penalty payments. The Market Court has the authority to impose fines proposed by the FCCA for competition restrictions.

### i Sanctions

The Market Court may impose a maximum fine of 10 per cent of the concerned undertaking's turnover during the year in which the undertaking was last involved in the infringement. The fine will be imposed unless the conduct is deemed minor or the imposition of the fine is otherwise unjustified in respect of safeguarding competition. It is explicitly stated in the Competition Act that the fine may also be imposed on a company to which the business activity has been transferred. The Market Court shall impose the fine proposed by the FCCA.

25 Market Court Decision No. 1097/61/2003.

26 FCCA Decision 964/61/2007, *Nordea Pankki Suomi Oyj, OP-Keskus cooperative and Sampo Pankki Oyj*.

27 FCCA press release, 16 January 2012.

In its Fining Guidelines, the FCCA states that the fine needs to generate a sufficient deterrent and general preventive effect.[28] The amount of the fine is based on an overall assessment, and attention will be paid to the nature and extent, the degree of gravity and the duration of the infringement.

In *Valio*,[29] the Market Court imposed a fine of €70 million on the company for its abuse of dominance. This is the highest fine imposed in dominance cases – and in all competition restriction cases in general – in Finland to date. In the assessment of the fine the Market Court took into account, *inter alia*, the alleged exclusionary object of Valio's conduct, the notion that Valio's conduct was not in line with the fundamental principles of the internal market and the fact that Valio has previously been the subject of an abuse of dominance decision that included the imposition of a fine on the company.

Furthermore, the FCCA and the Market Court may impose periodic penalty payments to enforce an order, condition, prohibition or obligation issued on the basis of the Competition Act. The Market Court has the authority to order a periodic penalty payment to be paid.

### ii Behavioural remedies

If the FCCA considers conduct to amount to an abuse of dominance prohibited in the Competition Act or Article 102 of the TFEU, it may impose behavioural remedies. First, the FCCA can order the undertaking to terminate the prohibited conduct. This was done in the *Valio* case, where the FCCA ordered Valio to cease the alleged predatory pricing of fresh milk and thus, in practice, raise its prices. The Market Court further obliged Valio in its interim decision[30] to comply with the FCCA's order. Second, the FCCA may oblige the undertaking to deliver a product to another undertaking on conditions similar to those that it offers others in a similar position. The FCCA is also entitled to give these orders as interim measures. Furthermore, the FCCA may issue an interlocutory injunction if the application of a competition restraint is deemed to require immediate cessation. After the interlocutory injunction, the FCCA must take a final decision or make a proposal to the Market Court within 60 days. Prior to issuing an interlocutory injunction, the FCCA must hear the undertaking.

### iii Structural remedies

Unlike the Commission, the Finnish competition authorities do not have the authority to impose structural remedies.

## VI PROCEDURE

The FCCA is responsible for the investigation of competition restraints and the effects thereof as well as for initiating the necessary proceedings to eliminate the harmful market effects of

28 FCCA Fining Guidelines, p. 6.

29 Market Court Decision No. 458/12/KR and 36/13/KR, *Valio Oy*.

30 Market Court Decision No. 36/13/KR, *Valio Oy*.

the restraints. The FCCA can begin investigations as a result of complaints by third parties and on its own initiative. The FCCA can also conduct sector inquiries, and these may result in the initiation of further proceedings.

In addition to the FCCA, the regional state administrative agencies have the authority to investigate competitive conditions and competition restrictions. Upon the mandate of the FCCA, the agencies are also entitled to take other measures to promote competition within their respective regions.

The FCCA has the right to prioritise its tasks. According to Section 32 of the Competition Act, it shall not investigate a case in the following situations:

*a* it cannot be deemed likely that an infringement prohibited in Sections 5 or 7 (Articles 101 and 102 of the TFEU, respectively) of the Competition Act exists;

*b* competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement; and

*c* the complaint in the matter is manifestly unjustified.

The prioritisation of cases can also mean that the handling of a case with potential significance and likely anticompetitive objects or effects may be postponed if there are other ongoing investigations with even greater significance.[31]

The FCCA must take the decision to not to investigate a matter without delay. In its Guidelines the FCCA has set the following non-binding deadlines: one month for closing cases to which Article 32 is clearly applicable; four months for completing a preliminary survey according to which further actions can be determined; and six months for (1) closing non-significant cases and (2) drafting of investigation plans and determining objective internal deadlines for cases that require further actions.[32] Overall, the FCCA seeks to handle all competition cases within three years.[33] To date, however, more extensive investigations have, in practice, required a longer process.

The undertaking subject to the FCCA's investigation is obliged to submit information to the FCCA or the relevant regional state administrative agency upon request. This obligation covers all documents and other information needed for the investigation of the content, purpose and impact of a restraint on competition and for clarifying the competitive conditions, as well as information necessary to enable the authority to determine whether the undertaking holds a dominant position. In practice, the FCCA usually sends the undertaking a request for information or arranges a meeting with the representatives of the undertaking to gather the information. Furthermore, the FCCA has the right to hear representatives of the undertaking in person if it is considered necessary for the investigation and the person may, for a justified reason, be suspected of having acted in the implementation of the restraint on competition.

The FCCA also gathers information by conducting inspections. These inspections may be announced or may be 'dawn raid' inspections. In addition to business premises, the FCCA has the right to inspect other premises (e.g., the homes of the management of the undertaking) if reasonable suspicion exists that bookkeeping or other documents relating to the business and the object of the investigation may be held there and if these documents

31 FCCA's Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 9.

32 FCCA's Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 14.

33 The FCCA's operational and financial plan for 2015–2018.

may have relevance in proving a serious violation of Section 7 of the Competition Act or Article 102 of the TFEU. However, the FCCA must seek advance permission from the Market Court to conduct an inspection outside the business premises, and the Market Court may prohibit the inspection if it considers it arbitrary or excessive. Although unannounced inspections are usually conducted in cartel investigations, the FCCA has conducted several dawn raids in abuse of dominance investigations during recent years. The rights of the FCCA to carry out inspections of companies that have outsourced their information management to a third party were added to the Competition Act in 2015. After this amendment, the FCCA has had the right to request information directly from such third-party service providers at the expense of the company subject to inspection and regardless of location of the outsourced information.

The rights of defence of the undertaking subject to proceedings, including the right to be informed about the on-going investigation, the right to receive information and the right to be heard, are set out in the Competition Act.

Prior to making a final decision or a proposal to the Market Court, the FCCA will issue a confidential draft decision to the undertaking under investigation. The undertaking has the right to respond to the draft decision, and it may request an informal meeting with the FCCA to present its opinion on the draft decision. A decision may be appealed to the Market Court and further to the Supreme Administrative Court. A decision of the Market Court concerning the imposition of fines may be appealed to the Supreme Administrative Court.

The case can also be resolved through a commitment decision. The FCCA may accept the commitments offered by an undertaking as binding if the commitments are such that the restrictive nature of the conduct can be eliminated. If an underlying fact significantly changes, the undertaking infringes the commitments or the decision has been based on insufficient, false or misleading information, the FCCA may re-initiate proceedings.

## VII PRIVATE ENFORCEMENT

The Finnish competition law regime is twofold: in addition to administrative enforcement it contains rules for private enforcement according to which a private litigant can have an unlawful agreement declared null and void and damage occurred from the violation compensated.

Section 8 of the Competition Act provides that an unlawful agreement cannot be applied or implemented, (i.e., the agreement or part thereof is null and void by law). The provision applies only inter partes and cannot be invoked by third parties.

Section 20 of the Act provides a specific damages provision, according to which an undertaking or association of undertakings that, intentionally or negligently, violates competition law is obliged to compensate the damage caused by the competition restriction. The damages can be adjusted if considered unreasonable taking into account the financial and other circumstances. The right of action is available to anyone who has suffered damage from the infringement regardless of whether the relationship is contractual or non-contractual. However, if the competition law violation was carried out before 1 November 2011, an action for damages is available only to undertakings[34] and non-undertakings must bring an

34 See Section 12a of the old Act on Competition Restrictions (480/1992, as amended).

action on the basis of the Act on Damages[35] or on contractual liability. Collective actions are available but only to a limited extent in disputes between consumers and undertakings under the Act on Class Actions.[36] A class action can only be brought by the Consumer Ombudsman and, to date, the Consumer Ombudsman has not brought any class actions for competition law damages. In the pending *Asphalt Cartel* and *Raw Wood* cases, however, which involve numerous plaintiffs, practices that resemble those of collective actions have been adopted. In these cases the court has joined the separate actions of each of the claimants to proceed together, thus entailing procedural and cost benefits.

An action for damages can be brought either as a stand-alone or a follow-on case in arbitration or in a general court. Except for the follow-on cases related to abuse of dominance that are currently pending before the general courts, there have not been many follow-on cases related to the abuse of dominance in Finland and, so far, all cases have been withdrawn; instead, abuse of dominance is more often invoked as grounds for action in contractual disputes. In general, the claimant's burden of proof is easier to meet in a follow-on case than in a stand-alone case. Although not bound by the decision of the FCCA or the administrative court, the general court is likely to accept the final decision as adequate proof of an infringement or lack thereof.[37]

In Finland, only single damages can be awarded and the damages law doctrine relies heavily on the principle of non-enrichment. Compensation under Section 20 of the Competition Act covers both direct and indirect economic damage, *inter alia*, compensation of costs, price difference or lost profits.[38] Compensation also includes interest; in practice, penal and return interest may form a significant part of the compensation.

There is no legal assumption of damage in Finland, and the claimant bears the burden of proof of damage.[39] There is no single way of calculating the damage, but in recent case law related to cartel damages, competition economics and extensive economic evidence on the financial effects of the infringement have been utilised. The court has the power to assess the quantum of damage if the claimant has proven the damage suffered but evidence of the amount cannot be presented or can be presented only with difficulty.

Furthermore, there must be a causal link between the harm suffered and the violation of competition law. The claimant must prove that the damage has resulted from the competition law infringement and not from the market conditions or general market structure. In addition, liability for damage also requires that the occurrence of the damage as a consequence of the violating act was foreseeable by the undertaking at the time the act

35 412/1974.

36 444/2007.

37 See, for example, judgment of the District Court of Imatra, *Vuoksen Paperituote Oy/Stora Enso Oyj*, L04/597, 19 January 2007, where the court gave significant weight to the FCA's decision concluding non-existence of dominance and abuse thereof, and dismissed the claim, as sufficient evidence had not been presented to reverse the FCA's conclusion.

38 See Government Proposal 88/2010, p. 66.

39 See the judgment in *Qvist v. John Crane Safematic*, where the district court found the abuse of dominance but dismissed the claim because the claimant failed to prove the damage. The Appeal Court later overruled the judgment of the district court.

was made. This means that there is no liability for indirect damage or consequential loss.[40] Also, contributory negligence on the part of the injured party may have a significant effect on the liability.

According to Chapter 21 of the Code of Judicial Procedure, the party that loses the case is liable for all reasonable costs incurred by the necessary measures of the opposing party.

According to Section 20 of the Competition Act, the right to claim compensation expires if the action has not been instituted within 10 years of the date the infringement occurred, or when the continuous infringement ended. The limitation period does not, however, expire until one year has passed from the date of the final decision of the FCCA or the administrative court. Different limitation periods apply, however, to actions for damages resulting from competition law violations carried out before 1 November 2011.

## VIII FUTURE DEVELOPMENTS

The FCCA has indicated that it will focus on removing structural restraints of competition and on discriminating and binding practices aimed at foreclosing competitors from the market.[41] The FCCA foresees that the number of cases with exclusionary effects may increase because of the current fragile economic situation resulting in under-utilisation of capacity and low demand.[42] The shift of focus on exclusionary practices has already been seen in the recent case law of the FCCA where the authority has been most concerned with conduct involving margin squeeze, predatory pricing, refusals to deal and restrictive rebates. The review of abuse of dominance cases is likely to give more weight to economic-based assessment in the future.

It is likely that the Supreme Administrative Court will give its judgment in the *Valio* case by the end of 2016, since the appeal was submitted in summer 2014. Once final, the decision will clarify the evaluation of costs underlying predatory pricing.

The importance and effectiveness of private enforcement is expected to increase in Finland, both through the landmark judgments in the *Asphalt Cartel* case and *Raw Wood* case, as well as through legislative amendments to be made in line with the EU Directive on competition law damages, adopted in 2014. A government proposal for a new act on actions for damages for infringements of competition law was given on 19 May 2016 and the new rules are expected to enter into force by the end of 2016.

40 Government Proposal 88/2010, p. 66.

41 The operational agreement for 2016–2019 between the Ministry of Employment and Economy and the FCCA, p. 1.

42 The operational and financial plan of the FCCA for 2016–2019, p. 1.

# Chapter 10

# FRANCE

*Antoine Winckler, François Brunet and Frédéric de Bure*[1]

## I INTRODUCTION

Article L.420-2 of the French Commercial Code provides that abuse of a dominant position and abuse of economic dependence are prohibited. Article L.420-4 of the Commercial Code provides for exemptions from Article L.420-2 when the practices concerned result from the implementation of a regulation or if they have the effect of achieving economic progress – including creating and maintaining employment. To benefit from an exemption, the practice must allow consumers a fair share of the resulting benefit, without imposing restrictions that are not indispensable or allowing an undertaking to eliminate competition. In addition, Article L.420-5 of the Commercial Code specifically prohibits abusively low prices to consumers. Abusively low pricing, as defined by Article L.420-5 can only be applied to products and services sold to final consumers, but may be found to exist even when the infringing company is not in a dominant position and the victim is not in a situation of economic dependence. Article L.420-5 has only been applied in extremely rare occasions.

The French Competition Authority (FCA), which is an independent administrative authority, has jurisdiction over anticompetitive practices including abuses of a dominant position. In particular, the FCA may investigate abuse of dominance cases and impose fines of up to 10 per cent of the infringing companies' worldwide turnover. The FCA has not issued formal guidance on the way in which it applies Article L.420-2 of the Commercial Code. The European Commission's guidance on Article 102 TFEU (formerly Article 82 of

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the EC Treaty), however, provides useful indications as to how Article L.420-2 is applied in France.[2] French judges can also directly apply the relevant provisions of the Commercial Code concerning abuse of dominance in the context of civil or commercial litigation.

## II YEAR IN REVIEW

In 2015, the FCA issued 11 decisions on the basis of Article L.420-2 of the Commercial Code. The FCA imposed fines in four decisions amounting to a total of €370.6 million.[3] The FCA accepted commitments in three cases.[4] The FCA also exceptionally accepted to revise the commitments taken by the Golf Federation in 2012 and found that these were not required anymore.[5] One claim was rejected at a preliminary stage for lack of evidence[6] and two requests for interim measures were dismissed.[7]

The most noteworthy decisions in the past year are the following. In *Electronic communications*,[8] the FCA imposed a record-breaking fine of €350 million on Orange, the incumbent telecom operator in France. Following complaints by two other telecom operators in France, Bouygues Télécom and SFR, the FCA conducted an investigation into Orange's telecommunication services provided to business customers. The FCA found that Orange abused its dominant position by: providing its business entities with crucial information collected by Orange as the incumbent operator of the copper local loop, and not making it available to competing telecom operators; implementing several loyalty programmes and loyalty discounts that increased exit costs and discouraged business customers from switching to alternative telecom operators; and granting discounts on virtual private network offers

2 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C45 of 24 February 2009, page 7.

3 FCA decisions No. 15-D-01 of 5 February 2015 concerning practices in the deployment of DTT broadcasting contracts in French overseas territories, which imposed a €4.2 million fine on TDF; No. 15-D-10 of 11 June 2015 concerning practices implemented on the Eiffel Tower site, which imposed a €5.66 million fine on TDF; No. 15-D-17 of 30 November 2015 concerning practices in the mobile telephony sector at La Réunion and Mayotte, which imposed a €10.78 million fine on SFR; and No. 15-D-20 of 17 December 2015 concerning practices in the mobile telephony sector, which imposed a €350 million fine on Orange.

4 FCA decisions No. 15-D-05 of 15 April 2015 concerning practices in the passenger transport sector; No. 15-D-06 of 21 April 2015 concerning practices in the online hotel booking sector; and No. 15-D-09 of 4 June 2015 concerning practices in the mobile telephony equipment facilities sector.

5 FCA decision No. 15-D-16 of 27 November 2015 concerning the commitments subscribed in FCA decision No. 12-D-29 of 21 December 2012 concerning practices in the distribution of insurance products to golfers sector.

6 FCA decision No. 15-D-15 of 18 November 2015 concerning practices in the award of commercial locations at Paris Gare du Nord.

7 FCA decision No. 15-D-11 of 24 June 2015 concerning practices in the brown goods sector and No. 15-D-13 of 9 September 2015 concerning practices in the online advertising sector.

8 FCA decision No. 15-D-20, mentioned above.

(that enable companies having several sites to interconnect them so that they can exchange data in a secured manner) only on the condition that no third-party operators are allowed to connect to the interconnected sites. It was also the first case settled in accordance with the new settlement procedure introduced by Law No. 2015-990 of 6 August 2015. Orange cooperated with the FCA, did not challenge the objections and was given a fine in accordance with the cap agreed upon with the FCA's Investigation Service. In addition to the fine, the FCA took injunction measures designed to restore competition in the marketplace.

In *Mobile telephony in La Réunion and Mayotte II*,[9] the FCA imposed a fine of €10.8 million on the French mobile telephony operator SFR, whose subsidiary SRR enjoys a dominant position in the overseas territories of La Réunion and Mayotte. SFR applied to its professional customers unfair pricing differences between calls made to other customers of the SFR network (on-net calls) and calls made to competitors' networks (off-net calls), the latter being charged at higher prices. Although price differentiation does not constitute an abuse in itself, the FCA considered that excessive price differentiation unrelated to the costs incurred by SFR (the pricing differences were up to 10 times higher than the differences in costs in *La Réunion* and up to almost three times the difference in costs in *Mayotte*) was problematic, as it unduly encouraged professional customers to subscribe to SFR network to increase the share of their on-net calls and reduce their telecommunication spending. In 2014, the FCA had already imposed a fine of €46 million on SFR for similar practices implemented in the residential market in the overseas territories.[10]

In *Booking.com*,[11] the FCA investigated the practices of Booking.com in the French online booking sector following a complaint by the hotel group Accor and a hotel union. The complainants argued that the parity clauses imposed by the online platform booking.com (in terms of prices and room availabilities) prevented competition among online booking platforms and abusively restricted hotels' commercial freedom. Under these parity clauses, hotels were required to offer to Booking conditions that were at least as favourable as those offered to competing platforms or through hotels' online and offline sales channels, in terms of prices, number of nights and other terms (such as booking conditions or breakfast). In order to allow the FCA to close the investigation, Booking offered behavioural commitments and accepted in particular to amend price parity clauses in order to allow hotels to offer lower prices and better commercial conditions on other online booking platforms. Booking also accepted to allow hotels to offer lower rates through their offline sales channels and to reserve a number of rooms greater than the number of rooms allocated to Booking to their direct sales channels. Booking was allowed to keep a 'narrow' parity clause preventing hotels charging lower rates directly online, in order to prevent 'free-riding' of Booking's commercial investments. This investigation was conducted in parallel with the European Commission and with the Italian, Dutch, UK and Swedish competition authorities. (The German authority took a stricter approach banning 'narrow' parity.)

9 FCA decision No. 15-D17, mentioned above.

10 FCA decision No. 14-D-05 of 13 June 2014 concerning practices implemented in the mobile telephony sector for household customers in La Réunion and Mayotte.

11 FCA decision No. 15-D-06, mentioned above.

## III MARKET DEFINITION AND MARKET POWER

Under French law, as under EU law, regulators and judges must typically first define the relevant markets where the alleged practices were implemented, before establishing the existence of a dominant position (whether single or collective dominance) or of 'economic dependence' before establishing the existence of an abuse.

### i Market definition

The FCA mostly relies on qualitative criteria, although it may also rely on an econometric analysis to define relevant markets. To assess demand-side substitutability, the FCA takes into account the nature and use of the product, the price differences between similar products, consumer preferences, the legal environment, the brand image of the products and the distribution channels. If the data is available, the FCA may also use quantitative techniques such as cross-elasticity of demand to delineate product markets. In a ruling of 13 July 2010, the French Supreme Court confirmed that products or services that are substitutable by consumers because of their characteristics, price, or intended use, belong to the same product market.[12]

In *Nespresso*,[13] the FCA defined a narrow market composed only of coffee capsules compatible with Nespresso coffee machines. The FCA determined that espresso-pod coffee machines and coffee capsules did not belong to the same product market because:

*a* coffee machines and coffee capsules are not:
- bought simultaneously;
- necessarily bought at the same shops;
- manufactured and marketed by the same firms; and

*b* an internal document of Nespresso considered that the two products were separate.

The FCA then defined a specific market composed of coffee capsules compatible with Nespresso machines because users of Nespresso machines were not in a position to use any other kind of capsule.

Supply-side substitutability also constitutes a relevant criterion. In *Mobile telephony*,[14] the FCA found that each operator held a monopoly on the wholesale market for the termination of voice calls on its own network because, *inter alia*, there is no supply-side substitutability, as only the terminating operator is capable of localising the recipient of the call and of terminating the call. The Court of Appeal followed the same reasoning.[15]

The FCA also considers that a relevant geographic market covers the area in which a company may use its market power or monopoly power (eg, to raise prices profitably)

12 French Supreme Court, 13 July 2010, No. 09-67439.

13 FCA decision No. 14-D-09 of 4 September 2014 concerning practices in the espresso coffee machines sector.

14 FCA decision No. 12-D-24 of 13 December 2012 concerning practices in the mobile telephony sector.

15 Court of Appeal of Paris, 19 May 2016, *Mobile telephony*.

without being constrained by other players located in other areas or from other product lines.[16] The FCA also examines, for example, the specific geographical features and cost of transportation to delineate geographic markets.

### ii Single dominance

Dominance is achieved when a company can define its pricing policy independently from its competitors and customers in the relevant market.[17] The FCA considers that market shares are a strong indicator of market power. For instance, in *Mobile telephony in La Réunion and Mayotte II*,[18] the FCA essentially relied on SFR's high market shares (60 per cent in La Réunion and 85 per cent in Mayotte) to establish market dominance.

To establish single dominance, the FCA also examines the following criteria in addition to market shares: the countervailing market power of competitors, the intensity of competition on the market, the existence of potential new entrants and the specific advantages of the leading firm (e.g., brands, organisation, better products or services). In the *Pet food* case,[19] Royal Canin, which held a market share limited to 40 per cent, was considered to be in a dominant position, because: the second and the third largest competitors respectively held a 12 per cent and 7 per cent market share; Royal Canin had a very good brand image bolstered by high advertising expenses and regular contact with prescribers; and the relevant market was characterised by high barriers to entry.

In *Electronic communications*,[20] the FCA considered that Orange was dominant on fixed and mobile telecommunications services to professional customers since it held a market share above 50 per cent in all market segments (and SFR and Bouygues Télécom had significantly lower market shares on a lasting basis) and enjoyed significant notoriety resulting from its incumbent monopoly status. In *Eiffel Tower,* concerning practices implemented by TDF (the former incumbent audiovisual broadcasting operator),[21] the FCA found that TDF was in a dominant position since radio broadcasting from the Eiffel Tower requires specific expertise and TDF's incumbent operator status conferred it a competitive advantage (TDF also had the appropriate equipment already in place on the site) and limited the ability of alternative operators effectively to compete on the market to be awarded the possibility to operate the Eiffel Tower site.

In *Overseas DTT,* involving TDF again,[22] the FCA considered that TDF was in a dominant position on access to the necessary infrastructures for terrestrial Hertzian broadcasting by television channels in the overseas territory, because TDF owned the relevant infrastructures, which new entrants could not replicate at a reasonable cost, and no other operator (including telecommunication operators) was in a position to provide similar hosting services.

16 FCA Annual Report for 2011, page 118.

17 FCA decision No. 04-D-48 of 14 October 2004 concerning practices implemented by France Telecom, SFR Cegetel and Bouygues Telecom.

18 FCA decision No. 15-D-17, mentioned above.

19 FCA decision No. 05-D-32 of 22 June 2005 concerning practices in the pet food sector.

20 FCA decision No. 15-D-20, mentioned above.

21 FCA decision No. 15-D-10, mentioned above.

22 FCA decision No. 15-D-01, mentioned above.

### iii Collective dominance

Collective dominance may result from structural links between undertakings, whether capitalistic or contractual links, or from the market structure, or both. In the absence of structural links, the FCA applies the cumulative *Airtours* criteria (ie, oligopolistic market, market transparency, possibility to engage in retaliation actions in case of deviation and absence of countervailing power).[23]

In *Saint-Pierre-et-Miquelon*,[24] the FCA imposed a total fine of €381,400 on companies active in the aggregates market in the archipelago of Saint Pierre and Miquelon for anticompetitive agreement and abuse of a collective dominant position. In particular, the FCA found that four undertakings held a collective dominant position as: they together held an 86 and 88 per cent market share in the upstream and downstream markets for production and sale of aggregates respectively; they had structural links through the operation of a common quarry and had adopted a common strategy; deviation would be unlikely given their historical links; entry barriers were high; and there were no alternative downstream competitors.[25]

Although collective dominance cases are rare under French law (there have been only three cases since 2000),[26] the FCA's decisional practice shows that it tends to resort to collective dominance when it lacks evidence to support a claim of explicit collusion.

### iv Economic dependence

Economic dependence is a specific infringement under French competition law, which has no equivalent in EU competition law. Pursuant to Article L.420-2(2) of the Commercial Code, abuse of economic dependence of a customer or supplier is prohibited when it is likely to affect competition on the market. This provision was originally drafted to protect suppliers from large retail chains (i.e., supermarkets) but is in practice applied essentially when invoked by resellers confronted with situations of refusal to supply and discrimination.

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23 General Court decision of 6 June 2002, case No. T-342/99, *Airtours*.

24 FCA decision No. 12-D-06 of 26 January 2012 concerning practices implemented in the civil engineering sector in Saint-Pierre-et-Miquelon.

25 In addition to FCA decision No. 12-D-06 mentioned above, see FCA decision No. 05-D-49 of 28 July 2005 concerning practices in the sector of hiring maintenance for postage machines; and FCA decision No. 02-D-44 of 17 July 2002 concerning the water market sector. See also FCA decision No. 07-D-08 of 12 March 2007 concerning practices in the supply and distribution sector of cement in Corsica, which was partially dismissed by the Paris Court of Appeals with respect to collective dominance.

26 See FCA decision No. 12-D-06 of 26 January 2012 concerning practices implemented in the civil engineering sector in Saint-Pierre-et-Miquelon, FCA decision No. 05-D-49 of 28 July 2005 concerning practices in the sector of hiring maintenance for postage machines; and FCA decision No. 02-D-44 of 17 July 2002 concerning the water market sector. See also FCA decision No. 07-D-08 of 12 March 2007 concerning practices in the supply and distribution sector of cement in Corsica, which was partially dismissed by the Paris Court of Appeals with respect to collective dominance.

According to established case law, economic dependence arises when a company is forced into a commercial relationship with another company because it cannot purchase substitutable products under similar terms and conditions or sell its products to other customers. The FCA examines the following cumulative criteria:

*a* the supplier's brand notoriety;
*b* the supplier's market share;
*c* the supplier's share in the reseller's turnover; and
*d* the possibility for the reseller to find an alternative supplier.[27]

## IV ABUSE

### i Overview

Article L.420-2 of the Commercial Code specifically mentions a number of abuses, including refusal to supply or deal, tying, discriminatory practices that may result in an abuse of a dominant position or abuse of economic dependence. However, this list of abuses is not exhaustive.

The FCA relies on an 'objective' approach regarding abuse of a dominant position or abuse of economic dependence. The FCA considers that an abuse of a dominant position may be characterised even in the absence of an actual effect on the market. In other words, attempts to abuse a dominant position may also be sanctioned. In *SNCM*,[28] the court considered that a ferry line operator between Corsica and Marseille abused its dominant position by submitting a global and indivisible (i.e., Island to Continent) offer to the call for tenders launched by the Corsica Transport Office while its competitors submitted point-to-point (i.e., harbour-to-harbour) bids. By doing so, SNCM did not allow the public authority to compare bids on an individual basis, and to split the contract between several ferry operators. Although the bidding procedure was ultimately declared void by administrative courts and therefore the practice did not have any effect, the FCA fined SNCM for its attempted abuse of a dominant position.

### ii Exclusionary abuses

*Predatory pricing*

Predatory pricing is a pricing strategy whereby the dominant firm offers below-cost prices, thereby incurring losses or forgoing profits in the short term, in order to eliminate actual or potential competition with a view to reinforcing and exploiting its market power in the longer term. The FCA considers that only the following two situations can amount to predatory pricing: when the dominant company's prices are lower than the average variable costs (unless the company can convincingly explain that its behaviour did not result from a predatory strategy aimed at eliminating competitors); or when the company's prices are between average variable costs and average total costs and there is clear and convincing evidence that its behaviour is part of a predatory strategy aimed at eliminating competitors

27 Paris Court of Appeals, 4 May 2004, *CNPA v. Honda Motor e.a.* See also FCA's decisions No. 14-D-07 of 23 July 2014; No. 10-D-08 of 3 March 2010; No. 04-D-26 of 30 June 2004; No. 02-D-77 of 27 December 2002 and No. 01-D-49 of 31 August 2001.

28 Paris Court of Appeals, 9 March 2010, *SNCM*.

(*Akzo* test). French authorities use a slightly stricter, economics-based test than that of the European Commission: the presumption is more easily rebuttable and the FCA has to show that there is a realistic possibility of the dominant player recouping the losses. This may explain why, to date, there is no successful precedent of predatory pricing under French law.

In *SNCF*,[29] the FCA had held that SNCF had pursued price-based exclusionary practices for part of its entire train freight traffic activity because SNCF's prices, although higher than direct average variable costs, were lower than the costs that would be avoided for a three-year period if SNCF terminated its entire train freight traffic activity (including support and structural costs attributable to entire train freight traffic). Although SNCF's pricing policy was not predatory as the losses incurred by SNCF were sustainable and pre-existed the opening-up of the sector to competition, the FCA nevertheless considered that it was abusive. The Paris Court of Appeal overturned this part of the decision, considering that charging prices superior to average variable costs, but inferior to average total costs, may only be considered as an abuse when there is evidence that the dominant firm made specific plans to exclude competitors from the market.[30] However, the FCA had not sufficiently established the existence of a predatory strategy.

More recently, in *Bottin Cartographes*,[31] following an opinion by the FCA, the Paris Court of Appeal dismissed predatory pricing claims against Google. Bottin Cartographes, a competitor of Google, claimed that offering an enterprise mapping service free of charge to businesses constituted an abusive predatory strategy. In particular, Bottin Cartographes alleged that Google was not allowed to offer a free version of its software without supporting it with advertising or other similar revenues, supported by revenues derived from a premium, paid-for version ('freemium' business model). In its opinion,[32] later confirmed by the Court, the FCA reaffirmed that for multi-product companies, the predation test to be conducted is a modified *Akzo* test, where average variable costs are to be replaced by average incremental costs, and average total costs by long-run average incremental costs. In practice, the FCA found that the relevant costs in that case were the costs borne by Google, rather than the costs borne by its less efficient competitors, and the costs specifically associated with the allegedly abusive activity to the exclusion of common costs supported by Google as a multi-service firm (in particular, the costs associated with the acquisition of the underlying maps were not relevant because Google would bear them anyway for its other services). On the other hand, the FCA and later the Court confirmed that where a product is offered in different versions (one basic, free version and one premium, paid-for version), the revenues to be taken account are those associated with all versions of the product. On this basis, the FCA and the Court of Appeals dismissed Bottin Cartographes' claim by noting that the econometric studies submitted by the parties showed that Google's revenues exceeded the total relevant costs, and even if Google's revenues could have been exceptionally lower than the corresponding average total costs, there was no evidence of a predatory strategy. On this last point, the FCA and the Court emphasised that it may be economically rational for Google initially to offer products and services for free in order to increase its number of users, and in any case,

29 FCA decision No. 12-D-25 of 18 December 2012 concerning practices implemented in the railway freight sector.

30 Paris Court of Appeals, 6 November 2014.

31 Paris Court of Appeals, 25 November 2015, *Bottin Cartographes v. Google*.

32 FCA opinion No. 04-A-18 concerning a dispute opposing Bottin Cartographes to Google.

strong competition remained in the market, with a number of competitors – in particular, free open source solutions and other multi-product companies – that could not be foreclosed by Google's behaviour. As a result, it would have been impossible for Google to recoup the potential losses, so that no predatory strategy could be found.

In *Gas market*,[33] nevertheless, the FCA imposed interim measures on Engie (the former incumbent operator on the French market for gas distribution) at the request of Direct Energie, which alleged that Engie implemented a price-below-cost strategy on its commercial offers intended to both individual and business customers. In particular, Direct Energie argued that Engie charged predatory prices by attributing some of its marketing and commercial costs, which are common to its competitive and regulated offers, to its regulated activities only. Given the risk that Engie implemented a predatory pricing strategy, and pending the investigation on the merits, the FCA ordered that Engie set the prices of its offers in such a way as to take into account all the related costs incurred in the short-term for the sale of these offers, including commercial costs.

***Leveraging practices***

Leveraging practices consist for a dominant firm of taking advantage of its superior market position on a dominated market to expand its position to another market.

In *PMU*,[34] the FCA expressed concerns that the French legal monopolist for offline horse racing betting leveraged its position to exclude competitors from the market for online horse racing betting. In particular, the FCA was concerned that by pooling together its online and offline bets PMU could attract more bettors, discourage potential new entrants and, in time, drive competitors out of the market, since a greater pool of bets allows for more complex and diversified bets. The winnings on successful bets can also be significantly higher because there is a greater pool of debts. The FCA accepted commitments from PMU to stop pooling its online and offline bets, and that both online and offline activities would be kept separate. Although this could be interpreted as coming close to 'an efficiency offence', because horse racing bettors precisely look for the highest possible winnings (as in any lottery), the FCA justified its preliminary findings by stating that its decision was consistent with the public policy objective of limiting the risk of addiction to online betting.

More recently, in *Passenger transport*,[35] the FCA accepted the commitments offered by SNCF in order to prevent its subsidiary Keolis from leveraging SNCF's monopoly in the railway passenger transport market into the competitive market for urban transport of passengers (bus, metro, tram). More specifically, the FCA was concerned that Keolis could rely on its parent company's railway expertise in order to submit bids that are not replicable by competitors for the supply of advice and technical assistance to urban transport operators. SNCF committed, in particular, that only its subsidiaries that are fully independent from its railway passenger transport activity may respond to calls for tender regarding technical assistance to urban transport operators.

33 FCA decision No. 16-MC-01 of 2 May 2016 concerning practices in the energy sector.

34 FCA decision No 14-D-04 of 25 February 2014, concerning practices in the online horse race bets sector.

35 FCA decision No 15-D-05, mentioned above.

***Margin squeeze***

Margin squeeze is a strategy whereby the dominant vertically integrated firm applies excessive prices on upstream products or services that make downstream rivals' activities unprofitable. French courts consider that margin squeeze restricts competition only if a potential competitor, as efficient as the dominant vertically integrated firm, cannot enter the downstream market without incurring losses; such restriction may be presumed only when the products or services supplied to its competitors by the dominant firm are indispensable to enable them to compete on the downstream market.[36]

In *Eiffel Tower*,[37] the FCA found that TDF had implemented a margin-squeeze strategy in the market for the renewal of the national occupancy contract for audiovisual and radio broadcast from the Eiffel Tower site. Among other practices, the FCA found that the offers made by TDF to alternative operators for hosting services (which were indispensable to compete on the downstream market for the broadcasting of radio programmes from the Eiffel Tower) constituted a margin squeeze that did not allow alternative operators as efficient as TDF to submit competitive offers for the operation of the Eiffel Tower facilities. The FCA imposed a fine of €660,000 on TDF on this ground.

***Exclusivity clauses***

Exclusive dealings entered into by a dominant firm do not constitute a *per se* abuse under French law, provided that the dominant firm's behaviour does not result in additional foreclosure of its competitors. To assess whether exclusivity clauses may restrict competition, the FCA examines the clauses' scope, duration, the existence of a technical justification and the economic consideration granted to the customer.[38]

In *Mobile telephony equipment*,[39] the FCA was concerned about the duration (20 years) and the restrictions created by the early termination terms contained in the agreements between mobile operators and TDF for the hosting of their antennae (early termination was possible only for very few sites each year). To address these concerns, TDF offered commitments designed to allow mobile operators to obtain better conditions for the hosting of their antennae and in case of a switch to alternative operators. TDF committed in particular to limit the duration of new hosting agreements to 10 years, to cap the penalties generated by early termination and to increase the number of sites (or quota) for which early termination was possible.

***Loyalty rebates***

Under French law, loyalty rebates granted by a dominant firm may be considered abusive when the discount tends to remove or restrict the buyer's freedom to choose its sources of supply absent a legitimate economic *quid pro quo*.[40] The FCA considers forward-looking

36 French Supreme Court, 3 March 2009, No. 08-14.435.

37 FCA decision No 15-D-10, mentioned above.

38 FCA decision No. 08-D-16 of 3 July 2000 concerning practices in the ID photos sector.

39 FCA decision No 15-D-09, mentioned above.

40 FCA decision No. 04-D-65 of 30 November 2004 concerning practices in the postal services sector. See also FCA's decision No. 05-D-32 of 22 June 2005, mentioned above.

quantitative rebates (as opposed to rebates based on historical sales) conditional upon individual orders, volumes or turnover as generally valid, because they tend to reflect efficiency gains and economies of scale.

In *Electronic communications*,[41] the FCA considered, *inter alia*, that Orange had implemented abusive loyalty programs in the markets for telecommunication services provided to business customers. Orange's 'change of mobile' policy allowed its customers automatically to cumulate loyalty points calculated based on the age of their subscription and of their consumption volume. Orange decided, however, that its customers were allowed to use their points only if they renewed their subscription to Orange for another 12 or 24 months. In addition, Orange offered specific discounts of up to 15 per cent on the client's main subscription in exchange for an extension of the period of the original contract from 12 to 24 (or 36) months and also had an incentive mechanism designed to encourage customers to have all their lines with Orange. The FCA found that these loyalty offers had a locking-in effect on customers and increased the costs incurred by competing operators (costs generated by migration are generally paid – at least partially – by the third-party operator).

***Tying and bundling***

Tying and bundling consist of tying or bundling two distinct products that belong to two different markets, either by forcing consumers to buy the tied products together or by providing them an incentive to buy the products together. The FCA considers that tying by a dominant firm may be abusive if the following two conditions are met: the tying and tied products are distinct products; and the tying practice is likely to lead to anticompetitive foreclosure.[42]

Since 2012, the FCA has issued only one decision in relation to tying in the golf insurance sector.[43] In *Golf insurance*, the FCA expressed competition concerns with respect to the inclusion of insurance products – which are theoretically optional – in the licence delivered by the French Golf Federation. The FCA was particularly concerned that the French Golf Federation used its legal monopoly on the delivery of licences to foreclose its rivals from the golf insurance market through tied selling. To address these concerns, the French Golf Federation accepted to take commitments to prevent bundling practices. In 2015, the FCA adopted another decision, finding that these commitments were no longer justified given developments in the market.[44]

***Refusal to deal***

The concept of refusal to deal is regularly used by the FCA. It covers a broad range of practices, such as the refusal to grant access to an essential facility or network, the refusal to supply products to existing or new customers, and the refusal to license intellectual property rights. The FCA's test is similar to the test adopted by the European Commission. Refusal to grant access to an essential facility is abusive if the following five conditions are met:

41 FCA decision No. 15-D-20, mentioned above.

42 FCA decision No. 11-MC-01 of 12 May 2011 concerning practices in the delivery of parcels to collection points sector.

43 FCA decision No. 12-D-29 of 21 December 2012 concerning practices in the distribution of insurance products to golfers sector.

44 FCA decision No. 15-D-16, mentioned above.

*a* the facility belongs to a dominant firm;
*b* access to the facility is necessary to compete on a related market;
*c* competitors cannot duplicate the facility at reasonable costs;
*d* the dominant firm unduly refuses access to the facility (or unduly imposes restrictive conditions); and
*e* access to the facility is possible.[45]

The same principles apply *mutatis mutandis* for refusal to supply a product or service. Concerning intellectual property rights, the French courts consider that software may constitute an essential facility only if it is proved that the software is indispensable to operate on a market, and a competitor could not develop an alternative software under economically reasonable conditions, even if they are less favourable than those benefiting the dominant undertaking.[46] In practice, the following facilities have been considered essential under French law: transport facilities, the electricity network, the telephone network and certain databases or software.

In *SNCF*,[47] the FCA and the Paris Court of Appeal considered that SNCF abused its dominant position by delaying the release of information concerning access to freight yards, thereby preventing its competitors from accessing rail capacities essential to their business activity; by retaining exclusive use of certain railway cars that are used for large tonnage transportation and constitute an essential part of the infrastructure; and by pursuing a train path overbooking policy that prevented its rivals from participating in certain calls for tender or honouring certain contracts.

In *Cegedim*,[48] the FCA fined Cegedim, a company active both in the provision of healthcare databases and of customer relation management (CRM) software, for refusing access to its database of medical information (the benchmark for the sector) to pharmaceutical laboratories that used the CRM software of one of its competitors, Euris. Access to the healthcare database is vital for CRM software suppliers because the quality of the software partially depends on the information available in the first place. The FCA considered that Cegedim's database was not an essential facility because there were alternative, albeit inferior, rival databases. However, such a refusal to deal nevertheless amounted to a breach of Article 102 TFEU as Cegedim used its dominant position in the market for medical databases to discriminate against customers using a competing CRM software, thus preventing the competing CRM software provider from gaining market shares. The FCA pointed out that the practice had caused the said competitor to lose 70 per cent of its customers between 2008 and 2012. In 2015, the Paris Court of Appeal upheld the FCA's decision and considered in particular that the practices implemented by Cegedim had unjustifiably disadvantaged Euris in terms of costs and reputation.[49]

45 FCA interim measures decision No. 03-MC-04 of 22 December 2003 concerning a request for interim measures filed by Messageries Lyonnaises de Presse.
46 Paris Court of Appeals of 31 January 2006, *NMPP*.
47 FCA decision No. 12-D-25, mentioned above, upheld by Paris Court of Appeal, 6 November 2014, *SNCF*.
48 FCA Decision No. 14-D-06 of 8 July 2014 concerning practices in the medical information database sector.
49 Paris Court of Appeal, 25 September 2015, *Cegedim*.

***Disparagement***

Under French law, disparagement consists in publicly discrediting an identified competitor or its identified products or services. The FCA considers that disparagement is distinct from criticism as it originates from an economic player seeking to benefit from an unjustified competitive advantage by discrediting its competitor or products, and may constitute an abuse of dominance (if disparagement originates from a dominant player).

In *Sanofi*[50] and *Schering-Plough,*[51] the FCA fined two pharmaceutical companies for disparagement practices that consisted in widely publicising differences between their originator drug (or the generic manufactured by the producer of the originator drug) and generic drugs, at the time of the entry of generic drugs into the market. Irrespective of whether such differences were verified or not, the companies could not prove that they had therapeutic consequences. Though both Sanofi and Schering-Plough had not explicitly presented generic drugs as inferior but only pointed at factual differences, the very fact of shedding doubts without scientific supporting evidence was found abusive by the FCA. Sanofi was fined €40.6 million and Schering-Plough was fined €15.3 million.

***Most-favoured-nation clauses***

In *Booking.com*,[52] the FCA accepted commitments addressing its preliminary concerns that the most-favoured-nation clauses imposed by Booking.com could have exclusionary effects. The decision is also based on the concern that the most-favoured-nation clauses could be 'horizontal' anticompetitive agreements. These clauses prevented hotels from offering to rival platforms or other distribution channels (including through their own sales channels) lower prices or better commercial conditions (availability, services) than to Booking.com. In particular, the FCA considered that these clauses could prevent smaller platforms and new entrants from gaining market shares by offering lower prices or better services to customers (including by offering lower commission rates to hotels).

***Other exclusionary tactics***

The FCA may intervene under Article L.420-2 of the Commercial Code, where a dominant company's allegedly abusive conduct is likely to lead to anticompetitive foreclosure.

In *Overseas DDT*,[53] the FCA imposed a fine of €4.2 million on TDF, considering that TDF had abused its dominant position by failing to provide the technical and pricing information concerning access to its broadcasting infrastructures to competitors. In the context of a call for tender issued by France Télévisions in the overseas territories, access to such information was necessary for the bidders (that also included TDF) to prepare their offers. Separately, the FCA also found that TDF implemented a similar strategy in connection with the Eiffel Tower site.[54]

50 FCA decision No. 13-D-11 of 14 May 2013 concerning practices in the medicinal products sector. Upheld by the Paris Court of Appeals on 18 December 2014.

51 FCA decision No. 13-D-21, mentioned above.

52 FCA decision No. 15-D-06 mentioned above.

53 FCA decision No. 15-D-01, mentioned above.

54 FCA decision No. 15-D-10, mentioned above.

### iii Discrimination

Discrimination basically consists of the application of dissimilar conditions to trading partners in equivalent transactions, thereby placing them at a competitive disadvantage.[55] The FCA considers that discriminatory practices may restrict competition when such practices have as their object or effect exclusion of a competitor from the market (first-line discrimination); or the dominant firm discriminates between its customers, thereby producing an adverse effect on a market in which the dominant firm is not active (secondary-line discrimination).

In *Electronic communications*,[56] the FCA found that Orange gave access to more comprehensive information pertaining to the copper local network to its own commercial entities than that which was made available to third-party operators. The FCA considered that the (first-line) discrimination in the access to information concerning the operation of the copper local loop had artificially strengthened Orange's dominant position, and affected third-party operators by making them appear less reactive and less informed than Orange.

In 2015, the FCA also received a complaint and a request for interim measures against Google, essentially on the same grounds as in the 2010 *NavX* case, where the FCA took a strict approach to secondary-line discrimination, suggesting that dominant firms have an obligation to treat all their customers equally, even when the dominant undertaking is not active in the downstream market.[57] According to the complainant Gibmedia, Google suspended Gibmedia's AdWords account (that allowed Gibmedia to advertise its own websites) in a manner that was not objective, transparent and non-discriminatory. The FCA refused to grant interim measures in the absence of serious or immediate harm to consumers, the sector or the complainant being proven, but decided to continue the investigation on the merits.[58]

### iv Exploitative abuses

Exploitative abuses consist of a dominant firm imposing unbalanced conditions to its trading partners, and in particular imposing excessively high prices. Under specific circumstances, the FCA considers that dominant firms are deprived of the right to adopt a course of action or take measures that are not themselves abuses and that would even be unobjectionable if adopted or taken by non-dominant undertakings. In 2015, the FCA did not issue a single sanctioning decision concerning exploitative abuses. In 2009, however, the FCA fined Orange in the *Telecommunication in overseas départements* case.[59]

In this case, the FCA investigated the rates applied by Orange for connection services between the island of Réunion and the mainland and found that 'there existed a

55 FCA decisions No. 06-D-23 of 21 July 2006 concerning practices in the map editing and tourist information sector; No. 07-D-28 of 13 September 2008 concerning practices implemented by the Havre Port authority; and No. 09-D-02 of 20 January 2009 concerning practices in the press distribution sector.

56 FCA decision No. 15-D-20, mentioned above.

57 FCA decision No. 10-MC-01 of 30 June 2010 concerning the practices of Google in the online advertising sector; FCA's decision No. 10-D-30 of 28 October 2010 concerning the practices of Google in the online advertising sector.

58 FCA Decision No. 15-D-13, mentioned above.

59 FCA decision No. 09-D-24 of 28 July 2009 concerning practices implemented in the telecommunications sector in overseas departments.

clear disproportion between these rates and the value of the services', which resulted in the imposition of excessive pricing on consumers (residential and professional), and hindered the development of the high-speed market on the island of Réunion, and the development of Orange's competitors.

## V REMEDIES AND SANCTIONS

Article L.464-2 of the French Commercial Code provides that the FCA may impose fines on infringing undertakings of up to 10 per cent of the firms' worldwide turnover. The FCA may also order undertakings to terminate anticompetitive practices within a specified time limit, or impose remedies, or both. Alternatively, the FCA may accept commitments offered by the dominant firms being investigated in response to the former's competition concerns. In the event that the undertakings do not comply with the FCA's decision to terminate anticompetitive practices or with the FCA's orders, or do not implement their commitments, the FCA may impose penalty payments of up to 5 per cent of the undertaking's average daily turnover.

### i Sanctions

According to Article L.464-2 of the Commercial Code, fines should be proportionate to: the gravity of the infringement; the importance of the damage to the economy; the group or company's individual situation; and recidivism. In any event, fines cannot exceed 10 per cent of the highest consolidated worldwide turnover achieved since the fiscal year preceding the starting date of the anticompetitive practices.

In 2011, the FCA issued guidelines on the methods for determining fines.[60] The basic amount of the fine is calculated as a proportion of the value of sales related to the infringement, taking into consideration the gravity of the infringement and the damage to the economy. The proportion of the value of sales is between zero and 30 per cent. The basic amount of the fine is then adjusted taking into account the duration of the infringement, the existence of aggravating circumstances (e.g., if the undertaking has a specific ability to influence or moral authority), or mitigating circumstances (e.g., if the infringement was authorised or encouraged by public authorities). Other factors that might also be taken into account are the size and the economic power of the undertaking or its group, the fact that the undertaking is a single product company, and reiteration.

Since the issuance of the FCA's fining guidelines, only 15 abuse of dominance fining decisions have been issued: in the *Saint-Pierre-et-Miquelon*, *Mobile Telephony*, *Rail Freight*, *Ordre National des Experts Comptables*, *Sanofi*, *Schering-Plough*, *EDF*, *Amaury*, *Mobile telephony at La Réunion and Mayotte* (two cases), *Cegedim*, *Antilles dairy products*, *Overseas DDT deployment*, *Eiffel Tower* and *Electronic communications* cases.[61] In 2015, the FCA imposed a record-breaking fine of €350 million on Orange in the *Electronic communications* case (after settlement). [62]

60 Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties.

61 FCA decisions No. 12-D-06; No. 12-D-24; No. 12-D-25; No. 13-D-06; No. 13-D-11; No. 13-D-20; No. 13-D-21; No 14-D-02; No. 14-D-05; No. 14-D-06; No. 14-D-08; 15-D-01; 15-D-10; No. 15-D-17; No. 15-D-20 mentioned above.

62 FCA Decision No. 15-D-20, mentioned above.

### ii Behavioural remedies

The FCA may impose behavioural remedies, either as an interim measure or as a sanction imposed in its decision on the merits. Pursuant to Article L.464-1 of the Commercial Code, the FCA may grant interim measures and order behavioural remedies in the event that the reported practices cause serious and immediate damage to the general economy, the economy of a sector or the interests of either the consumers or the complainant. Since 2010, interim measures have been granted in five abuse of dominance cases.[63]

Pursuant to Article L.464-2 of the Commercial Code, the FCA may also order the undertakings to terminate anticompetitive practices within a specific time frame or impose specific conditions following a decision on the merits.

In *Electronic communications*,[64] the FCA imposed behavioural remedies in addition to sanctions. In particular, the FCA ordered Orange to provide competitors with an equal access to the information it collects as the operator of the local loop, and to put an end to the loyalty and exclusivity policy subject to the investigation.

### iii Structural remedies

Pursuant to Article L.430-9 of the Commercial Code, the FCA can order an undertaking or a group of undertakings that abused either their dominant position or the state of economic dependence of a commercial partner to alter or terminate the agreements that gave rise to the underlying dominant position, even in cases where the agreements had been authorised by the FCA in the context of a merger review. This provision therefore enables the FCA to undo a transaction or an agreement for abuse of dominance. The FCA has used this power on only one occasion. In the *Water Market* case,[65] the FCA found that the Compagnie Générale des Eaux and the Lyonnaise des Eaux, which had created several joint ventures, were abusing their collective dominance by deciding not to compete against their joint ventures for certain calls for tenders. The FCA found that the termination of the joint ventures was necessary to remedy the behaviour and, ultimately, the Compagnie Générale des Eaux and the Lyonnaise des Eaux voluntarily decided to do so.

The FCA is also empowered to order structural remedies for abuse of dominance or abuse of economic dependence in the retail sector (see Article L.752-26 of the Commercial Code).

### iv Commitments

As an alternative to sanctions and remedies, the FCA may also accept commitments offered by undertakings pursuant to Article L.464-2 of the Commercial Code. The FCA can make

63 FCA decisions No. 10-MC-01 of 30 June 2010 concerning practices in the online advertising sector; No. 11-MC-01, mentioned above; No. 14-MC-01 of 30 July 2014 concerning practices in the pay TV sector (partially quashed by Paris Court of Appeals, October 9, 2014); No. 14-MC-02 of 9 September 2014 in the gas and electricity sector (partially quashed by Paris Court of Appeals, October 31, 2014) and 16-MC-01, mentioned above.

64 FCA decision No. 15-D-20, mentioned above.

65 FCA decision No. 02-D-44 of 17 July 2002 concerning the sectors for drinking water and purification, notably concerning the pooling of resources in order to respond to calls for tender.

such commitments binding in exchange for the closing of the investigation on the merits without any infringement findings. The FCA uses this option relatively often (up to three cases out of 11 in 2015) to intervene more quickly and avoid the administrative costs and legal constraints of establishing an abuse of dominance.

## VI PROCEDURE

The French Minister of the Economy, certain other public entities and any company may refer practices falling within the scope of Article L.420-2 of the Commercial Code to the FCA. The FCA may also initiate investigations *ex officio* into alleged abuses of a dominant position. The FCA cannot investigate facts that took place more than five years ago unless a procedural act interrupts this statute of limitations (see Article L.462-7 of the Commercial Code). If the FCA considers that the complaint is unsubstantiated, it can issue a reasoned decision rejecting the complaint at a preliminary stage.

### i Interim measures

The claimants may request interim relief. A request for interim relief must be filed concurrently with the action on the merits and lasts approximately six months. The FCA will order interim measures if the following cumulative criteria are met: the FCA has jurisdiction over the practices in dispute on the merits; there is a reasonably strong *prima facie* case establishing that the alleged practices breach competition rules; and the alleged practices may have serious and immediate effects on the general economy or on the interests of the plaintiff. In practice, interim measures are ordered mainly in situations where the defendant's actions threaten to foreclose a competitor from a market. The interim measure investigation is followed by a hearing and a decision whereby the FCA decides whether interim measures are justified and whether an investigation on the merits is required. The FCA generally issues a decision within one or two months after the hearing.

The FCA did not grant interim measures in 2015. In *Gibmedia*, the FCA dismissed a request for interim measures against Google. According to the complainant, Gibmedia, Google suspended its AdWords account (allowing it to advertise its websites) without prior notice and based on obscure and discriminatory grounds. Gibmedia thus requested that its account be reinstated as an interim measure pending the investigation on the merits. The FCA, however, refused to grant any interim measure, as it found that the legal standard for such an urgent procedure was not met. In particular, the FCA found that no serious or immediate harm to consumers, the sector or the complainant could be demonstrated.[66] Similarly, the FCA dismissed a request for interim measures by retailer Concurrence against Samsung.[67] Concurrence claimed that Samsung had implemented a number of anticompetitive practices and requested interim measures to force Samsung to supply the Elite product range and accept that its products be sold through market places websites. The FCA found that Concurrence did not prove that the alleged practices caused it a serious and immediate harm, notably because Concurrence's financial difficulties dated back to 2008 (i.e., several years before the alleged anticompetitive practices took place) and Concurrence waited two-and-a-half years before requesting interim measures.

66 FCA Decision No. 15-D-13, mentioned above.

67 FCA decision No. 15-D-11, mentioned above.

In 2016, however, the FCA ordered interim measures against Engie in the gas market to ensure that the price of some of its offers to business customers reflected its costs.[68] The FCA is still investigating the case on the merits.

### ii Investigation on the merits

If the FCA considers that the complaint is well grounded, it appoints case handlers in order to investigate the case. The case handlers have wide investigative powers and may conduct dawn raids if they are authorised to do so by a court, or request information from undertakings. The investigation period typically lasts from six months to three years (or sometimes more), until the FCA notifies the companies involved of its objections. The investigation procedure is partly adversarial (i.e., each interested party is given an opportunity to present its case during the investigation period). The exchange of written submissions, including two written reports issued by the case handlers, generally lasts one or two years, until a hearing is scheduled.

### iii Hearing

The parties are invited to a hearing before the FCA Board, where the case handlers provide an oral presentation of their observations. The parties may also present their observations orally.

### iv Decision

The FCA generally issues a decision within three months of the hearing. It may find that the alleged practices are not established, or impose a financial sanction on the undertakings and order remedies. The parties may appeal the decision before the Paris Court of Appeals within a month. Paris Court of Appeal rulings may in turn be challenged before the French Supreme Court, which only has jurisdiction over matters of law.

### v Commitments

If the FCA intends to implement the commitment procedure as an alternative to a classic infringement procedure, the case handlers inform the undertakings of the FCA's preliminary competition concerns at an early stage during the investigation (before a statement of objections has been issued), and invite them to offer commitments that adequately address the identified concerns.[69] Once the proposed commitments have been received, the case handlers carry out a market test, which is published on the FCA's website, to ensure that the proposed commitments are considered adequate by the main stakeholders. The FCA may either accept or reject the commitments. The FCA may also eventually require amendments. If the FCA finally considers that the commitments offered address its competition concerns, it makes the commitments binding in its final decision.

### vi Settlement

The settlement procedure was recently modified by Law No. 2015-990 of 6 August 2015. Under the new regime, companies that are willing to settle commit to not challenging the objections notified by the FCA, and in exchange, can negotiate a fine range with the

68 FCA decision No. 16-MC-01, mentioned above.

69 See Notice of 2 March 2009 on the commitment procedure (engagements).

Investigation Service. Companies may also offer compliance and behavioural commitments. The FCA board takes the ultimate decision, but will comply with the fine range negotiated with the Investigation Service.

Although the new regime was not applicable to Orange *stricto sensu* in *Electronic communications*,[70] the FCA Investigation Service anticipated the reform of the settlement procedure and negotiated a €350 million cap for the fine in exchange for Orange's commitment not to challenge the objections and to implement behavioural remedies. The FCA Board eventually imposed the maximum fine on Orange.

## VII PRIVATE ENFORCEMENT

Private enforcement claims may be brought under general tort law provisions (Article 1382 of the Civil Code) generally within five years of the day the victim becomes aware or should have become aware of the wrongdoing.

Private enforcement claims require the defendant to prove a fault, a damage and a causal link between the two. Although the FCA's decisions are not binding in civil and commercial courts for private enforcement cases, courts generally follow the FCA's decisions with respect to the existence of dominance abuses in follow-on actions. Establishing a fault is significantly more difficult in stand-alone actions. Proving the existence and the amount of the damage is also difficult in dominance cases, which explains why claimants often have to rely on expert economic and accounting reports. The principle of full compensation for the damage suffered applies (both material and non-material damage).

Antitrust class actions are available in France since 2014 under the following conditions:

*a* the claim is a follow-on action after a sanction decision by the FCA or the European Commission;

*b* the action is brought within five years of the final sanction decision (no longer subject to an appeal);

*c* the claim is brought by a consumer association on behalf of consumers; and

*d* consumers have opted in to join the class action.

Private enforcement has been limited in France, as: there has not been any antitrust class action so far; the majority of cases are settled out of court; and there is no easy access to evidence for claimants who bear the burden of proof. Furthermore, although specific district courts and commercial courts have exclusive jurisdiction over antitrust claims, the judges are not specialised in antitrust matters and often do not have sufficient independent means to assess the existence of dominance and the effects of the alleged abuses on the markets. Private claimants in France, therefore, essentially rely on decisions issued by the FCA.

For instance, in *Outremer Telecom v. Orange*,[71] Outremer Telecom brought an action before the Paris Commercial Court based on a 2009 FCA decision.[72] Outremer Telecom alleged that Orange's abuses of its dominant position (and anticompetitive agreements)

70 FCA decision No. 15-D-20, mentioned above.

71 Paris Commercial Court, 16 March 2015, *Outremer Telecom v. Orange*. Appeal pending.

72 FCA decision No. 09-D-36 of 9 December 2009 concerning practices in the mobile telephony sector in the Antilles and Guyana.

on the mobile telephony market in the Antilles and Guyana (French overseas territories in the Caribbean), prevented it from expanding on this market. The Paris Commercial Court awarded Outremer Telecom €7.9 million to compensate the damage resulting from Orange's abusive loyalty rebates and excessive prices policy on off-net calls.

Purely stand-alone actions (not based on a previous FCA decision) are rare. Nevertheless, in *Bottin Cartographes v. Google*,[73] the Paris Commercial Court granted Bottin Cartographes €500,000 in damages in the first instance, based on a stand-alone claim alleging that Google implemented predatory prices by offering its Google Maps API ('application programming interface') service, which enables third-party website operators to display a map on their website, free of charge. On appeal however, the Paris Court of Appeal overruled the first instance decision and dismissed all the plaintiff's claims.[74] The Paris Court of Appeal decided to support its decision by asking the FCA for its opinion on the existence of a dominant position and the question of predation.[75] The FCA found that irrespective of Google's market position, Google's behaviour with regards to Google Maps API could not be deemed predatory because the economic analysis submitted to the FCA showed that Google always covered at least its average incremental costs, and, in any event, there was no evidence of a predatory strategy, especially as there was a significant number of competitors in the market, many of them offering their products for free or on a 'freemium' basis, like Google. On the basis of the FCA's opinion, the Court of Appeal found that Google's behaviour could not be deemed abusive and dismissed all claims.

## VIII FUTURE DEVELOPMENTS

The FCA has recently published a joint report with the German Competition Authority about the potential antitrust concerns raised by data collection, especially in 'digital' markets.[76] In their report, the two competition authorities analyse the antitrust enforcement tools available to address 'data-based' conduct resulting from the capacity of companies to derive significant market power from their ability to collect and process a large quantity of data that is not replicable by third-party operators.

The FCA also launched a sector inquiry into advertising markets on 23 May 2016, and specifically mentioned that it intends to analyse the market power and corporate strategies of Google and Facebook in respect of 'Big Data'.

73 Paris Commercial Court, 30 January 2012, *Bottin Cartographes v. Google*.

74 Paris Court of Appeal, 25 November 2015, *Bottin Cartographes v. Google*.

75 FCA opinion No. 04-A-18 concerning a dispute opposing Bottin Cartographes to Google.

76 FCA and Bundeskartellamt joint Report of 10 May 2016, Competition Law and Data.

# Chapter 11

# GERMANY

*Stephan Barthelmess and Tilman Kuhn*[1]

## I INTRODUCTION

Under German competition law, unilateral conduct by an enterprise with market power is governed by Sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC),[2] which prohibit (1) the abuse of a (single or collective) dominant position, and (2) specific types of abusive behaviour by enterprises that have 'relative' market power in relation to small or medium-sized enterprises (as trading partners or competitors). Germany has thus used the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that goes beyond the substance of the prohibition on the abuse of a dominant position laid down in Article 102 of the TFEU. Another distinct characteristic of German antitrust law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance.

Guidance on the application of the rules can be gathered from case law of the German Federal Cartel Office (FCO) and the German courts, notably the Federal Court. There is no formal general guidance on unilateral conduct available, apart from the FCO's somewhat dated notice on below-cost pricing,[3] which is currently being updated.

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1 Stephan Barthelmess is a partner and Tilman Kuhn is a counsel at Cleary Gottlieb Steen & Hamilton LLP. The authors express their gratitude to their colleague Christian Fischoeder for his assistance with the update of this chapter.

2 An English version of the ARC is available at www.gesetze-im-internet.de/englisch_gwb/index.html.

3 The old version of the notice is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Bekanntmachungen/Bekanntmachung%20-%20Angebot%20unter%20Einstandspreis.pdf?__blob=publicationFile&v=2.

Guidance on the amount of fines for restrictive unilateral conduct can be gathered from the FCO's guidelines on the setting of fines, which apply to all areas of German antitrust law.[4]

No special rules apply in Germany to the public sector or state-owned enterprises. Section 130(1) of the ARC stipulates that the ARC will also apply to enterprises that are entirely or partially publicly owned or are managed or operated by public authorities.

Special rules apply to certain regulated industries, such as electricity, gas, telecommunications and post and railway. The Federal Network Agency monitors compliance with certain of these regulations in cooperation with the FCO.

## II YEAR IN REVIEW

The enforcement activity by the FCO in the abuse of dominance area over the past couple of years has been quite limited. The FCO carried out several sectoral investigations in industries with arguably oligopolistic structures in which it suspected structural problems. These sector inquiries were often followed by individual investigations against specific companies with respect to specific conduct.[5]

Recently, the FCO has focused on the energy, fuel and food retail sectors. Since May 2011, the FCO has published seven reports on investigations into different sectors of which five specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel and food retail).[6] In July 2015, the FCO started to carry out another investigation into the submetering and billing of heating and water costs.[7]

In the past year, the FCO has also focused on the digital economy and online platforms[8] – notably in light of the recent rise in 'online cases', including a decision concerning Google. In early 2015, the FCO launched a new 'Task Force for Internet Platforms', which is charged with developing new concepts on how to deal with the digital economy. The FCO is also investigating CTS Eventim's conduct in the online ticket resale area, and Amazon's Audible and Apple with respect to their activities in the audiobooks sector. The FCO prohibited a (modified) best-price clause that the hotel platform Booking.com[9] had been using, after the Düsseldorf Court of Appeal had already affirmed the FCO's prohibition of its rival HRS's

4 An English version of the guidelines is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.

5 Arguably, this process limits the defence rights of companies subject to the subsequent antitrust proceedings, as they are obliged to respond to the sector inquiry without knowing the specific allegations that will be brought against them later on.

6 English summaries of some of the FCO's sector inquiry reports are available at www.bundeskartellamt.de/EN/AboutUs/Publications/Sectorinquiries/sectorinquiries_node.html.

7 FCO press release of 2 July 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/02_07_2015_Submetering.html?nn=3591568.

8 See FCO's annual review of 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/21_12_2015_Jahresr%C3%BCckblick.html?nn=3591286.

9 FCO press release of 23 December 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591286.

best-price clauses.[10] In March 2016, the FCO commenced proceedings against Facebook to investigate whether Facebook engaged in abusive conduct by infringing data protection rules.[11] Finally, in May 2016, it published together with the French competition authority a study on 'big data', assessing market power and potential anticompetitive effects in this context.[12]

The following tables list significant decisions dealing with abuse of a dominant position adopted by the FCO in 2015 and important proceedings that are ongoing.

***2015 FCO Decisions***

| *Sector* | *Company* | *Conduct* | *Fine* |
|---|---|---|---|
| Ticket resale | Deutsche Bahn | Limitation of competitors' access to Deutsche Bahn's ticket sales channels | No fine; case settled (2016) |
| District heating | Stadtwerke Leipzig | Excessive pricing | No fine; case settled |
| Postal services | Deutsche Post | Margin squeeze and loyalty rebates | No fine |
| Online search | Google | Linking display of search-result snippets of news publishers to agreement to use content free of charge | No infringement |
| Easements | City of Titisee-Neustadt | Discriminatory grant of easements for electricity and gas networks | No fine |
| Refilling of CO2 cartridges for soda makers | SodaStream | Use of safety instructions and warranty exclusions aimed at *de facto* exclusivity for SodaStream for refilling its gas cylinders | €225,000 |

***Ongoing cases***

| *Sector* | *Company* | *Conduct* | *Case opened** |
|---|---|---|---|
| Online ticket resale | CTS Eventim | Not specified | November 2014 |
| Audiobooks | Audible/Amazon/ Apple | Exclusive distribution agreement between Apple's iTunes Store and Audible | November 2015 |
| Social networks | Facebook | Potential abuse in social networks by infringing data protection rules | March 2016 |
| Ticket sales | Deutscher Fußball-Bund | Bundling ticket sales for football matches (European football championship 2016) to membership of DFB fan club | March 2016 |

* 'Case opened' refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation.

Further important case law and other developments are described in the following sections.

10 Most online cases were dealt with under Article 101 of the TFEU and its German equivalent Section 1 of the ARC (prohibiting anticompetitive agreements). However, in the HRS hotel portal case, the FCO held that a best-price clause requested by HRS from hotels listed on its platform also violated Sections 19 and 20 of the ARC (abuse of dominance). Given the violation of Article 101 of the TFEU and Section 1 of the ARC, the Düsseldorf Court of Appeal ultimately left open whether the best-price clause also infringed Sections 19 and 20 ARC (judgment of 9 January 2015, case VI – Kart 1/14 (V)).

11 FCO press release of 2 March 2016, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591286.

12 The study is available at: www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591286.

## III MARKET DEFINITION AND MARKET POWER

There are two slightly different concepts of market power in German antitrust law. While the assessment of 'absolute' single or collective dominance typically requires a detailed market analysis (of market definition as well as of market power), the assessment of 'relative' market power focuses more on a comparison of market power between larger and small and medium-sized companies as trading partners or competitors. Generally, the FCO (and the German courts) continue to place considerable importance on market shares and has only slowly started to adopt the more sophisticated economic analyses used by the EU Commission.

### i Market definition

In defining relevant product markets, the FCO primarily analyses the substitutability of goods and services from a demand-side perspective based on intended use, characteristics and price of the relevant products. In some cases, the FCO also referred to the 'small but significant and non-transitory increase in price' (SSNIP) test as an additional, but not the only or the principal, criterion for market definition.[13] The concept of supply-side substitution (i.e., other manufacturers being able and willing to adjust their production within a short time and without significant cost) is also relevant under appropriate circumstances.[14]

Demand-side substitutability is also the principal basis for defining the relevant geographic market. As under EU law, it comprises the area in which the enterprises concerned compete, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because of appreciably different competitive conditions.[15]

In practice, *ex post* behavioural enforcement tends to take a somewhat narrower view on market definition than merger control, given that the perspective of specific customers or competitors potentially harmed by the conduct at issue can sometimes influence the assessment.

The Düsseldorf Court of Appeal held in its HRS decision that (at least in hotel search) a relevant market for a service required that it was rendered in return for payment, which was not the case with respect to an online hotel comparison service.[16] In its *Google* decision, the FCO expressed some doubt in this regard, but left it ultimately open.[17]

13 For example, FCO, decision of 12 December 2003, case B9-60211-Fa-91/03 – ÖPNV-Hannover; decision of 2 July 2008, case B2-359/07 – Loose/Poelmeyer; Federal Court, decision of 4 March 2008, case KVR 21/07 – Soda-Club II.

14 For example, Federal Court, decision of 16 January 2007, case KVR 12/06 – National Geographic II. Specifically with respect to retail markets, the usual product range of a retailer may constitute a single market ('portfolio market' or Sortimentsmarkt).

15 Federal Court, decision of 5 October 2004, case KVR 14/03 – Melitta/Schultink.

16 Düsseldorf Court of Appeal, decision of 9 January 2015, case VI Kart 1/14 (V), para. 43 – HRS.

17 FCO, decision of 8 September 2015, case B6-126/14, para. 129 – Google.

### ii Dominance

As noted, German antitrust rules on unilateral conduct apply to companies in a position of single or joint dominance, and to companies enjoying 'relative' market power over small and medium-sized companies. Section 18 of the ARC defines single and collective dominance.

***Single dominance***

According to Section 18(1) of the ARC, single dominance exists if a company is (1) without competitors, (2) not exposed to significant competition or (3) in a 'superior market position' as compared with its competitors (which can exist even if there is significant competition in the market). According to the FCO's merger control guidelines (the principles of which can also be applied in the antitrust area), single dominance exists where the market power of an enterprise enables it to act without sufficient constraints from its competitors (i.e., a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, the final consumers).[18]

Section 18(3) of the ARC lists the following criteria that may in particular be taken into account for the assessment of whether a company is in a 'superior market position':

*a* the enterprise's market share;
*b* its financial resources;
*c* its access to input supplies or downstream markets;
*d* its affiliations with or links to other enterprises;
*e* legal or factual barriers to market entry;
*f* actual or potential competition by domestic or foreign enterprises;
*g* its ability to shift its supply or demand to other products; and
*h* the ability of the enterprise's customers or suppliers to switch to other enterprises.

In practice, the FCO and the German courts tend to focus on whether an enterprise has sufficient market power to determine the most important business parameters. A somewhat static appraisal of market shares (both in absolute and relative – compared to competitors – terms) is still the most important factor. The rebuttable market share-based presumption pursuant to Section 18(4) of the ARC provides an important first indication of possible dominance where the market share of a company exceeds 40 per cent.[19] While not impossible, it is often difficult in practice to rebut the presumption with economic arguments, especially in the case of high market shares substantially above the presumption threshold. This is notably because German law expressly stipulates that a dominant position can be based on a 'superior' market position, even if the company concerned faces significant competition from its rivals.

18 FCO, Guidance on Substantive Merger Control of 29 March 2012, para. 9. In its guidelines, the FCO refers to Federal Court, decision of 12 December 1978, case KVR 6/77 – Erdgas Schwaben, and ECJ, decision of 14 February 1978, case 27/76 – United Brands. An English version of the guidelines is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6.

19 Dominance may also (exceptionally) be found to exist if the market share remains below the presumption threshold.

***Collective dominance***

According to Section 18(5) of the ARC, collective dominance exists where there is no substantial competition between the two or more largest companies in a market and where they jointly are not constrained sufficiently by competition from third parties. Pursuant to the FCO's merger control guidelines, collective dominance is defined as a few companies in an oligopolistic setting engaging in tacit coordination or collusion with the result that they effectively do not compete with each other.[20]

Section 18(6) of the ARC also provides for market share-based legal presumptions for collective dominance. Thus, three or fewer companies are presumed to be collectively dominant if they have a market share of at least 50 per cent; and five or fewer companies are presumed to be collectively dominant if they have a market share of at least two-thirds. These presumptions are rebuttable and the companies can show that substantial competition exists between them individually, or that they are jointly sufficiently constrained by outsiders or customers.

The FCO and the German courts generally employ the criteria established by the EU General Court in *Airtours v. Commission*[21] in determining collective dominance (albeit in a somewhat modified form).[22] However, until recently, there had not been a case where companies had been considered in a collective dominant position in the context of abuse proceedings.[23]

In June 2015, the German Federal Court dealt with the first case in which a possible abuse of a collective dominant position was at issue.[24] While the lower Stuttgart District Court found that the defendant, a public broadcasting company, did not hold a single dominant position, as it did not – by itself – have a superior market position compared with the private broadcasting companies,[25] it found the defendant to have a collective dominant position together with the remaining public broadcasting companies, because there was no competition between the public broadcasters because of their strong commonality of interests, and all public broadcasting companies would – together – hold a superior market position[26] compared with the private broadcasting companies. The court found that public broadcasting companies had a 'must-carry status' as input providers for broadband cable providers as turning to private broadcasters only was not a viable alternative. On appeal, the Stuttgart Court of Appeals left open whether the public broadcasting companies held a collective dominant position because it considered that there had not been an abuse in any

20 FCO, Guidance on Substantive Merger Control of 29 March 2012, para. 81.

21 Case T-342/99, 6 June 2002, [2002] ECR II-2585.

22 For example, Federal Court, decision of 11 November 2008, case KVR 60/07 – E.ON/ Stadtwerke Eschwege; decision of 20 April 2010, case KVR 1/09 – Phonak/GN Store.

23 In contrast, collective dominant positions were held to exist in several merger control cases.

24 Stuttgart Court of Appeals, judgment of 21 November 2013, case 2 U 46/13.

25 Stuttgart District Court, judgment of 20 March 2013, case 11 O 215/12.

26 The term 'superior market position' is part of the legal definition of dominance pursuant to Section 18 of the ARC and must not be confused with the term 'stronger market power' pursuant to Section 20 of the ARC (see below).

event. The Federal Court, upon further appeal, simply referred to the defendant's must-carry status and thus considered it dominant on the market for input for cable television providers without elaborating on the distinction between single and joint dominance.[27]

*'Relative' dominance*

As noted above, going beyond the scope of Article 102 of the TFEU, the ARC prohibits exclusionary (and discriminatory) conduct not only by companies that are dominant in 'absolute' terms, but also by companies on which 'small or medium-sized companies depend' as suppliers or purchasers of certain kinds of goods or commercial services,[28] and by companies enjoying 'stronger market power in comparison to their small and medium-sized competitors'.[29] The prohibitions aim at protecting small and medium-sized companies against anticompetitive conduct by their larger competitors or trading partners.

The prohibition of discrimination or unreasonable obstruction for 'relatively' dominant enterprises towards dependent companies is primarily designed to address buyer power in the (food) retail trade. Thus, Section 20(1) 2nd sentence of the ARC establishes a presumption of dependency if a purchaser of goods frequently receives rebates or similar bonuses from its suppliers that go beyond customary rebates. The protection of small and medium-sized competitors against exclusionary conduct of competitors with 'stronger market power' is also principally targeted at retail markets (food, gas, etc.). An example of prohibited exclusionary conduct is frequent pricing below cost.[30] In the food sector, pricing below cost (by food retailers) even in a single instance is prohibited. Note that the ARC does not precisely define the concept of small and medium-sized companies that enjoy protection under these rules. The concept is generally understood to be turnover-related, but there are no specific turnover 'thresholds', and the amounts can differ from industry to industry.[31]

## IV ABUSE

### i Overview

Section 19(1) of the ARC contains a general prohibition of the abuse of a dominant position. Sections 19 and 20 of the ARC contain non-exhaustive examples of specific types of abusive conduct. Section 20(2) of the ARC extends the prohibition of exclusionary and discriminatory

27 Federal Court, judgment of 16 June 2015, case KZR 83/13, para. 46; see also judgment of 16 June 2015, case KZR 3/14, para. 45.

28 Section 20(1) of the ARC.

29 Section 20(3) of the ARC.

30 Section 20(3) of the ARC.

31 In a recent decision, the Frankfurt District Court (judgment of 18 June 2014, case 2-03 O 158/13) found that Deuter, a German manufacturer of outdoor backpacks, had a 'powerful market position' and therefore held a position of relative dominance pursuant Section 20(2) of the ARC, because Deuter had apparently claimed to be the 'European leader in functional backpacks' and had not contested the allegation of being dominant during the court proceedings. The judgment does not contain any further discussion of why Deuter was found to be dominant. Upon appeal, the Frankfurt Court of Appeals merely found that the fact that Deuter was 'relatively dominant' had not been disputed in the proceedings (judgment of 22 December 2015, case 11 U 84/14 (Kart).

conduct to companies on which small or medium-sized companies depend, and Section 20(3) of the ARC prohibits exclusionary conduct by companies that enjoy superior market power compared with their small and medium-sized competitors.

The most significant specific types of abuse are discussed below (see Section IV.ii–iv, *infra*). There are no *per se* abuses, as all relevant unilateral conduct may, at least in principle, be justified by means of a comprehensive analysis of all relevant circumstances and a balancing of the conflicting interests. As a practical matter, however, once the FCO has concluded that the type of conduct at issue is generally abusive, it will not conduct an in-depth economic effects analysis. Instead, it is – according to Section 20(4) of the ARC – up to the companies concerned to demonstrate an objective justification for their conduct (e.g., cost efficiencies as justification for rebates).

### ii Exclusionary abuses

German antitrust law prohibits exclusionary conduct, including predatory pricing, and notably offers below cost. The (somewhat dated) FCO's notice on below-cost pricing provides some guidance on which costs are relevant for the assessment of exclusionary below-cost pricing.[32]

In this regard, the FCO found in July 2015 that Deutsche Post had abused its dominant position in the market for licensed letter postal services by imposing a margin squeeze and granting illegal loyalty rebates. In particular, the FCO found that Deutsche Post prevented competitors (in particular mail consolidators) from profitably offering end-to-end delivery services to customers and thereby competing with Deutsche Post.[33]

Another form of exclusionary abuse is exclusive dealing, including strategies such as exclusivity or loyalty rebates. As a general rule, dominant companies may not grant rebates that create an incentive for customers to purchase their entire, or almost entire, demand of products or services at issue from the dominant enterprise.

In November 2015, the FCO initiated proceedings in this regard against Amazon's subsidiary Audible.com and Apple. They had entered into an exclusive long-term agreement regarding Apple's purchase of digital audiobooks from Audible for resale on the iTunes store.[34]

German antitrust law also prohibits leveraging a dominant position, such as through contractual or economic tying and bundling. Case law is scarce here, and the German practice is similar to the EU practice.

An abuse may also occur if a dominant enterprise refuses to grant another enterprise access to its networks or other infrastructure for a reasonable fee if it is impossible for the other enterprise, for legal or practical reasons, to be active on the upstream or downstream market as a competitor of the dominant enterprise (essential facility). In the *Puttgarden/Germany ferry terminal* case, the Federal Court clarified that access may, however, be refused if the joint use is impossible for legal reasons (e.g., a public authorisation is not granted).[35]

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32 See footnote 3.

33 FCO, decision of 2 July 2015, case B9-128/12. A press release in English is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/07_07_2015_Post.html?nn=3591568.

34 FCO press release of 16 November 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_11_2015_Audible.html?nn=3591568.

35 Federal Court, decision of 11 December 2012, case KVR 7/12.

Where the possibility of joint use by both parties is unclear, the dominant enterprise (in that case the port owner) bears the burden of proof. The case was referred back and remains pending before the Düsseldorf Court of Appeal.

In January 2015, the FCO fined SodaStream for a repeated abuse of its dominant position on the market for refilling CO2 gas cylinders used in soda water carbonating machines sold by SodaStream.[36] As early as 2006, the FCO found that SodaStream had acted abusively by reserving the right to refill its gas cylinders, and ordered SodaStream to permit third parties to refill the gas cylinders. The decision was confirmed by the Federal Court in 2008. SodaStream subsequently modified its marketing concept, but retained safety instructions and warranty exclusions implying that SodaStream was exclusively entitled to refill its gas cylinders.

Several German patent infringement courts have been called upon to rule whether commitments to grant licences on fair, reasonable and non-discriminatory (FRAND) terms given by participants in standardisation procedures prevent them from seeking injunctions against users of their standard essential patents under antitrust law. While most German courts took a fairly patent-owner-friendly position on the issue, linking the FRAND compulsory licensing defence to very strict requirements, the Düsseldorf District Court[37] referred a proceeding to the European Court of Justice (ECJ) to clarify perceived discrepancies between the German case law and the legal position expressed by the European Commission.[38] In its judgment of 16 July 2015, the ECJ specified the conditions under which the seeking of an injunction is not abusive.[39] The case is now again pending before the Düsseldorf District Court.

In January 2014, the FCO started an investigation against state-owned railroad company Deutsche Bahn AG (DB) for an alleged abuse of a dominant position. The FCO examined whether DB abused its dominant position in the provision of train station services by charging higher commissions to competitors than to its own subsidiaries for selling tickets. The FCO closed its investigation in May 2016 following commitments by DB, notably to sell competitors' tickets in DB shops and to permit competitors to install ticket machines in train stations.[40]

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36 FCO, decision of 22 January 2015, cases B3-50/12 and B3-164/14. A press release in English is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/22_01_2015_SodaStream.html?nn=3591568.

37 Düsseldorf District Court, decision of 21 March 2013, case 4b O 104/12 – Huawei/ZTE.

38 The referral order cites the European Commission's press release of 21 December 2012 (IP/12/1448) regarding Samsung.

39 ECJ, judgment of 16 July 2015, case C-170/13 – Huawei/ZTE: Prior to seeking an injunction, the patent holder has to notify the alleged infringer of the infringement by designating the patent and specifying the way in which it has been infringed; if the alleged infringer has expressed its willingness to conclude a licence agreement on FRAND terms, present the infringer with a written offer for a licence on FRAND terms, specifying, in particular, the royalty and the way in which it is to be calculated; seeking an injunction remains abusive if the infringer then makes a counter-offer and provides adequate security.

40 FCO press release of 24 May 2016, available at: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/24_05_2016_DB_Fahrkarten.html?nn=3591286.

### iii Discrimination

Section 19(2) No. 1 of the ARC prohibits discrimination (i.e., treating an undertaking, directly or indirectly, differently from other similar undertakings, without any objective justification).

After the German legislator had introduced an ancillary copyright for news publishers in 2013, the collecting society VG Media (representing several German news publishers) adopted a new tariff for the use of news publishers' online content and raised monetary claims against Google for the display by Google of small text excerpts ('snippets') from their websites. Google refused to pay and announced it would discontinue the display of snippets from VG Media members, unless they agreed to the display of their snippets without payment. VG Media filed a complaint with the FCO, arguing that Google abused its allegedly dominant position by refusing to pay for the display of snippets. The FCO informally rejected the complaint in August 2014,[41] and issued a formal rejection decision in September 2015[42] holding that Google did not engage in discriminatory conduct. In particular, the FCO considered Google's conduct justified by its interest to preserve its business model and to reduce the risk of liability for damages. These interests would outweigh those of VG Media.

On 29 January 2015, the FCO decided that a municipality had abused its dominant position by carrying out a discriminatory selection procedure regarding the grant of easements to operate electricity and gas networks.[43]

### iv Exploitative abuses

Section 19(2) No. 2 of the ARC prohibits exploitative abuses, notably 'imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition'. To determine whether prices are excessive, the FCO and the German courts follow the EU law approach of comparing the dominant company's prices with prices charged on comparable markets with functioning competition, with its competitors' prices, and with the dominant company's costs.

A recent abuse case concerned the food retailer EDEKA. In the aftermath of EDEKA's acquisition of retailer PLUS, EDEKA urged its suppliers to grant EDEKA certain commercial benefits ('wedding rebates'). In 2014, the FCO found this abusive, noting that the conduct not only had negative effects on the suppliers, but also on smaller competing retailers from whom the suppliers might try to recover the rebates ('waterbed effect').[44] The

41 FCO press release of 22 August 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_VG_Media.html?nn=3591568.

42 FCO, decision of 9 September 2015, case B6-126/14. A press release in English is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html?nn=3591568.

43 FCO press release of 29 January 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/29_01_2015_Titisee_Neustadt.html?nn=3591568.

44 FCO press release of 3 July 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/03_07_2014_edeka.html?nn=3591568 and FCO, decision of 3 July 2014, case B2-58/09.

Düsseldorf Court of Appeal annulled the FCO's decision because it could not be established that EDEKA had abused its dominant position. The Court considered the rebates to have resulted from negotiations between parties with approximately equal negotiation power.[45]

In a decision of 15 January 2015, the Munich Court of Appeals held it abusive for a sports federation to make an athlete's admission to sports competitions conditional on his or her consent to submitting all disputes to arbitration.[46] This decision potentially has a considerable impact on the submission of disputes in the sports area to the Court of Arbitration (CAS) in Lausanne.

## V REMEDIES AND SANCTIONS

### i Sanctions

Persons or entities that participated in an infringement of antitrust law or violated an FCO decision can be fined within the framework of an administrative offence procedure. German antitrust law is different from EU law in this respect, insofar as the FCO needs to identify one or more individuals (who will likely also be fined, albeit more moderate amounts) who have committed the infringement and then attribute their behaviour to the legal entity they represented to impose a fine also on that entity.

*Parental liability*

As a consequence, it is difficult for the FCO to fine a parent company for infringements committed by employees of its subsidiaries. Essentially, the FCO needs to find either that employees of the parent company were involved in the misconduct or that parent company employees neglected their supervisory duties.

*Legal successor liability*

The most recent ARC Amendment in 2013 introduced express liability for fines of legal successor entities (i.e., entities resulting from corporate transformations).[47] The change was meant to close an important enforcement gap under the previous rules, under which liability for fines was – in principle – limited to the specific legal entity that had committed the infringement and did not extend to new legal entities resulting from corporate transformations, such as corporate mergers. This gap had been used by several companies to avoid fines through corporate restructurings.[48]

45 Düsseldorf Court of Appeal, decision of 18 November 2015, case VI-Kart 6/14 (V).

46 Munich Court of Appeals, judgment of 15 January 2015, U 1110/14 Kart – Pechstein.

47 Section 30(2a) of the Administrative Offences Act.

48 However, according to the Federal Court's case law, a legal successor can also be held liable under the old rules (which remain applicable to conduct that occurred prior to the change in law) if – from an economic perspective – the legal successor's assets were (nearly) identical with those of the legal entity that committed the infringement. In this context, the Düsseldorf Court of Appeal recently confirmed a fine imposed by the FCO on a German coffee roaster (judgment of 10 February 2014, case V-4 Kart 5/11 (OWi), see FCO press release of 11 February 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/11_02_2014_OLG-Melitta.html?nn=3591568). The fine was originally imposed on Melitta Kaffee GmbH in December 2009. By merging Melitta Kaffee

***Maximum fine***

The maximum fines amount to €1 million for an individual and 10 per cent of the consolidated group turnover for a legal entity.[49]

In June 2013, the FCO published new fining guidelines. Contrary to the previous guidelines, which were fairly similar to the European Commission's 2006 guidelines,[50] the new guidelines deviate significantly from the Commission's guidelines.[51]

The new guidelines reflect a Federal Court decision of 26 February 2013[52] clarifying, after several years of legal debate, that the 10 per cent maximum for a fine on a company should not be considered a cap limiting a fine calculated independently of the relevant company's turnover that could otherwise be higher (as is the case under EU law), but rather the upper limit of the fining scale, which should, thus, be applied only in cases of the most extreme hard-core infringements.

Pursuant to the new guidelines, the FCO first determines a basic amount of the fine, which is 10 per cent of the group's relevant turnover achieved with the products or services related to the infringement for the period during which the infringement was ongoing. In a second step, this initial amount is multiplied depending on the size of the group by a factor between two and six, or even higher in cases where the group's turnover exceeds €100 billion. The resulting basic amount may then be adjusted in a third step for mitigating or aggravating circumstances.

While the FCO noted that the level of fines would not change significantly under the new guidelines, they link the amount of the fine more closely to the size of the company. Therefore, for smaller companies selling in essence only one product, fines are likely to be lower in the future, whereas the new guidelines may lead to higher fines for larger companies that are active in several markets and where the relevant conduct only relates to one specific product.

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GmbH into Melitta Europa GmbH & Co KG (prior to the ARC amendment), the company tried to avoid liability for the fine. The Court found Melitta Europa GmbH & Co KG to be liable for the fine because it was, from an economic point of view, nearly identical with Melitta Kaffee GmbH and the merger was evidently carried out with the sole intention of avoiding liability for the fine. The decision was confirmed by the Federal Court (judgment of 27 January 2015, case KRB 39/14) as well as by the German Federal Constitutional Court (judgment of 20 August 2015, case 1 BvR 980/15).

49 Section 81(4) of the ARC.

50 According to the previous guidelines, the FCO first determined a basic amount of the fine, taking into account the gravity as well as the duration of the infringement and then adjusted the basic amount by a deterrence factor, reflecting aggravating and mitigating circumstances.

51 The new FCO fining guidelines are available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.

52 Federal Court, judgment of 26 February 2013, case KRB 20/12 – Zementkartell.

To date, the FCO imposed fines applying the new guidelines in several cartel proceedings[53] as well as concerning vertical proceedings against mattress manufacturers.[54] In addition, the FCO also based a (relatively small) fine in a dominance case concerning a producer of carbon dioxide cartridges for soda water preparation on the new guidelines.[55] The FCO stated that the new guidelines would also apply to infringements that took place prior to the adoption of the new guidelines.[56]

*Collecting benefits of infringement*

German administrative offence law allows the FCO also to collect proceeds derived from an infringement, either in separate administrative proceedings or by determining a fine that reflects such proceeds (in which case the total fine may exceed the 10 per cent maximum).

**ii Behavioural remedies**

Sections 32 to 34 of the ARC allow for behavioural remedies. Thus, the FCO may impose all measures necessary to bring an infringement effectively to an end and that are proportionate to the infringement. This includes the right to impose measures that require action by the infringer. Section 32a of the ARC allows the FCO to impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition. Such measures should, however, not last longer than one year.

The FCO recently ordered hotel online booking platform HRS to delete best-price clauses from its contracts with hotel partners.[57] Under these clauses, hotels had to agree to always offer their most favourable conditions regarding prices, availability, and booking and cancellation terms for online bookings via HRS and not to offer more favourable conditions to other online platforms or in case of direct bookings at their reception. Although the clauses (also referred to as 'most-favoured-nation clauses' (MFNs)), were assessed primarily under Section 1 of the ARC (the equivalent of Article 101 of the TFEU), the FCO found that HRS also abused a dominant position relative to its small and medium-sized hotel partners

53 The proceedings concerned rail manufacturers, breweries, sausage manufacturers, manufacturers of concrete paving stones, providers of specialist mining services, automotive parts producers, providers of container transport services, manufacturers of prefabricated garages, and in a customer allocation proceeding concerning certain services provided in power plants.

54 FCO press release of 22 August 2014, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/22_08_2014_Matratzen.html?nn=3591568 and FCO press release of 6 February 2015, available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/06_02_2015_Matratze.html?nn=3591568.

55 FCO press release of 22 January 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/22_01_2015_SodaStream.html?nn=3591286; see also FCO, decision of 22 January 2015, case B3-164/14 (Commitments SodaStream).

56 FCO press release of 31 July 2013, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/31_07_2013_Wala.html – Wala Heilmittel.

57 FCO, decision of 20 December 2013, case B9-66/10. A press release is available in English at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3591568.

by imposing the contested clauses. The FCO ordered HRS to delete the clauses, explaining explicitly in its decision why it considered the remedy to be proportionate and why the mere prohibition of the conduct would not have been sufficient to end the infringement.[58] On 9 January 2015, the Düsseldorf Court of Appeal affirmed the FCO's decision.[59]

Subsequently, in a decision of 22 December 2015, the FCO enjoined Booking.com to drop its 'narrow' best-price clauses from its contracts with hotels.[60] These clauses were narrower than the ones in dispute in the HRS case insofar as they allow hotels to offer their rooms on other hotel booking portals for a lower price, but not on the hotels' own website. The FCO still considered the clause to restrict both competition between the existing portals and competition with the hotels themselves noting that hotels would *de facto* be required to lower their own price to adjust to any lower offer on other platforms. This in turn meant that the lower price had also to be offered to Booking under the 'narrow' best-price clause. The clause would therefore in practice still result in uniform prices (albeit potentially on a lower level), similar to the effect of the general best-price clause in the HRS case. It is worth noting that national competition authorities in France, Italy and Sweden did not deem such 'narrow' best-price clauses to be anticompetitive, so that the FCO took a stricter stance.

### iii Structural remedies

Section 32(2) of the ARC provides for the possibility of structural remedies, including divestitures (unbundling) of companies; however, structural remedies are subject to a strict proportionality test and may only be applied where behavioural remedies would be insufficient to remedy the infringement. To date, the FCO has not imposed any structural remedies in abuse cases.

## VI PROCEDURE

In the administrative proceedings, the FCO carries out investigations in order to decide whether to issue a prohibition decision and, if appropriate, a fine. Such decisions can be taken simultaneously or consecutively, and both are subject to judicial review of the facts and the law by the Düsseldorf Court of Appeal. The Court's decisions can be further appealed – on points of law only – to the Federal Court. In practice, the courts indeed carry out an independent review of the cases brought before them. While they often side with the FCO, it is by no means rare that FCO decisions are overturned based on factual or legal errors of the FCO.

58 In a similar case against Amazon, the FCO ended proceedings after Amazon announced that it would no longer enforce its price parity clauses. Under the contested clauses, retailers undertook to offer their products at the most favourable price through Amazon Marketplace as compared with other online platforms and their own online shops; however, these proceedings concerned an infringement of Section 1 of the ARC (the German counterpart of Article 101 TFEU) rather than an abuse of a dominant position (case B6-46/12).

59 Düsseldorf Court of Appeal, judgment of 9 January 2015, case VI – Kart 1/14 (V).

60 FCO, press release of 23 December 2015, available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591568. The FCO's proceedings against Expedia are still ongoing.

### i Commencement of investigations and investigative powers

The FCO may commence investigations *ex officio* or, in practice more frequently, following complaints of third parties (e.g., competitors, customers or suppliers).[61] The FCO may carry out informal discussions or send informal questionnaires. It can, however, also take formal measures such as information requests or, subject to a prior court order, surprise inspections (dawn raids) in the course of which it can seize documents and electronic files.

### ii Right to be heard

During all stages of an investigation, the enterprises investigated have the right to be heard. The FCO will usually serve a statement of objections before it issues a decision to which the company concerned may respond. The party concerned also has the right of access to the file, including digitally stored data and media.

### iii Guidance

There is no formal procedure for obtaining guidance on individual cases, but the FCO is open to informal contacts and may provide informal guidance in this context.

### iv Settlements

In light of the increasing importance of settlements in German antitrust proceedings over the past few years, the FCO published a guidance paper on its settlement practice on 23 December 2013.[62] Settlements have frequently been reached in hard-core cartel and vertical restraints cases (resale price maintenance, online impediments). In its guidance paper, the FCO notes that there is no regulatory framework for settlements, but that its power to conclude settlements derives from its discretion to pursue cases. A party to an investigation has no right to a settlement but can of course suggest it to the FCO. A settlement does not require parties to commit not to appeal any fining decision included in the settlement; however, there are no cases where an enterprise would have appealed an administrative fine on which it had previously settled.

### v Cooperation with other authorities

Cooperation between the FCO, the other national competition authorities and the European Commission takes places via the European Competition Network (ECN). This cooperation may involve exchanging information about cases and decisions, exchanging evidence, and mutually assisting each other with investigations. For example, the FCO and ECN jointly published a monitoring report on developments in the German electricity and gas markets in

61 There is no formal complaint procedure though, which means notably that complainants do not have a legal remedy against a rejection of their complaint.

62 The guidance paper is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf?__blob=publicationFile&v=2. In contrast to the EU settlement programme, under German law settlements can also be concluded in cases other than those involving cartels, including dominance cases.

2015. The FCO has set up an internal coordination unit to represent the authority within the ECN. The FCO is also an active member of the International Competition Network (ICN). FCO President, Andreas Mundt, has chaired the ICN's Steering Group since 2013.

## VII PRIVATE ENFORCEMENT

Section 33 of the ARC provides an express legal basis for damage claims based on infringements of antitrust law. Following a significant increase in cartel-related follow-on damage litigation over recent years, damage actions or other types of litigation (e.g., requesting the termination of discriminatory conduct, access to a network or infrastructure, etc.) based on alleged restrictive unilateral conduct have also become fairly frequent. Unlike cartel damage cases, these actions often do not follow an investigation and decision by the FCO (or other competition authorities), but are brought on a stand-alone basis.

German law currently does not provide for class actions seeking damages.[63] A practical way to consolidate damages claims of various victims of anticompetitive behaviour is to assign the claims to one party or institution, which then brings the lawsuit. In a case in which claims had been assigned to the company Cartel Damages Claims (CDC), the Düsseldorf District Court dismissed CDC's collective damage claims against various German cement manufacturers, holding that the assignments of the claims to CDC for the purpose of enforcing them in court were null and void in violation of public policy.[64] Under German procedural rules, the defeated party in a court case has to pay the court fees and must reimburse the winning side for its costs. As CDC's special purpose vehicle for the enforcement of the claims was only minimally funded, it would not have been able to cover such costs had it lost the case. The fact that CDC did not bear any of the risks of losing the case was considered a violation of public policy. The Düsseldorf Court of Appeals affirmed the judgment.[65] However, if properly funded, a company to which damage claims were assigned should be able to bring consolidated lawsuits. Of course, the decision means that entities bringing such claims must assume considerable financial risk (or have the assignors of the claims share such risk), which reduces the attractiveness of the scheme.

In addition, consumer associations may bring actions on behalf of consumers, but only for injunctions, not for damages. Where a company has derived benefits from abusive or predatory conduct, the FCO and, if the FCO has not done so, consumer associations may in principle seek to collect such benefits on behalf of the German state (private damage claims and fines imposed by the FCO already reducing such benefits are taken into account). In practice, however, such actions are very rare.

In the context of follow-on suits, German courts are legally bound by any (final) decision of the European Commission, the FCO, or any other national competition authority in an EU Member State finding an infringement of EU antitrust law.[66] The binding effect is,

63 In December 2014, the EU Directive on Antitrust Damages Actions (2014/104/EU) came into effect. The Member States have to implement the Directive in their national law by the end of 2016.

64 Düsseldorf District Court, judgment of 17 December 2013, case 37 O 200/09 – CDC.

65 Düsseldorf Court of Appeals, judgment of 18 February 2015, case VI U 3/14; CDC has not further appealed this decision.

66 Section 33(4) of the ARC.

however, limited to the determination of the antitrust infringement, so that causation and amount of damages need to be established subject to the normal rules on burden of proof in German court proceedings.[67]

## VIII FUTURE DEVELOPMENTS

The FCO can be expected to further expand its activities with respect to the internet economy and in the e-commerce sector, as FCO President, Andreas Mundt, stated that the FCO intended to continue taking a leading role in this area among other competition authorities. With respect to possible dominance issues, he recently explained that the internet economy would be of primary interest for the FCO, as 'big data' was quickly becoming a source of market power. According to Mundt, it is essential for safeguarding competition that markets are kept assailable. The FCO is thus currently investigating whether Facebook's terms of use infringe data privacy laws and whether such an infringement would be abusive under antitrust law. A 'Task Force for Internet Platforms' launched by the FCO is expected to present its report on competition issues in digital markets in the course of 2016, after the German Monopolies Commission[68] had already issued its Special Report on Competition Policy Challenges of Digital Markets in June 2015.[69]

The Monopolies Commission recently repeated that it sees competitive deficits in the fields of railway transportation, postal services and in the energy sector. While the Monopoly Commission does not have enforcement or legislative powers, the FCO and the legislator take its view into account in their enforcement and legislative strategy and practice.

67 Munich Court of Appeals, judgment of 21 February 2013, case U 5006/11 Kart; Berlin District Court, judgment of 6 August 2013, case 16 O 193/11 Kart.

68 The Monopoly Commission is an independent institution primarily charged with giving advice on competition matters to the Federal government (Section 44 of the ARC).

69 Monopolies Commission, Special Report 68, available at www.monopolkommission.de/index.php/en/reports/special-reports/284-special-report-68.

# Chapter 12

# INDIA

*Anand S Pathak*[1]

## I INTRODUCTION

The conduct of dominant enterprises is regulated by Section 4 of the Indian Competition Act 2002, as amended (the Act). Section 4 prohibits the abuse of a dominant position by an enterprise or group. Notably, an abuse of a dominant position is prohibited, not dominance itself or the creation of dominance.

The Act regulates the conduct of both private and public sector (state-owned) enterprises as well as departments of the government that engage in non-sovereign functions, across all sectors of the Indian economy. The Competition Commission of India (the Commission) has wide powers of investigation and enforcement under the Act.

Since 20 May 2009, the date Section 4 entered into effect, the Commission has had exclusive jurisdiction to enforce Section 4. In addition, Section 60 of the Act provides that the provisions of the Act shall have effect notwithstanding any inconsistent provision of any other law currently in force.

While no specific policy statements in respect of Section 4 have been made by the Commission so far, the Commission generally is guided in its enforcement of Section 4 by the preamble to the Act, which envisions the prevention of conduct having an adverse effect on competition, the promotion of competition to protect the interests of consumers and to ensure freedom of trade with regard to the economic development of the country.

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## II YEAR IN REVIEW

During 2015–2016, the Commission adopted eight decisions under Section 4 of the Act: *Coal India*,[2] *DLF (New Town Heights)*,[3] *TAM Media*,[4] *DLF Universal*,[5] *Jaiprakash Associates Limited (JAL)*,[6] *Indian Railways*,[7] *Builders Association of India (Kerala Chapter)*[8] and *Rural Electrification Company Power Distribution Company Ltd (REC)*.[9] Of these, the Commission found contraventions in two cases, namely, *Coal India* and *DLF (New Town Heights)*. In all the other cases this year, the Commission, following the investigation of the Director General (DG), found no violation of Section 4 of the Competition Act. The most remarkable among these were the Commission's decisions in the real estate sector where the Commission, pursuant to a detailed investigation, found no abuse of dominance. Specifically, in *DLF Universal*, the Commission rejected all charges of abuse of dominance against DLF in the market for the development and sale of commercial space in Gurgaon. In *JAL*, the Commission did not agree with the DG's analysis of the relevant market and JAL's dominance, and ultimately rejected the allegations of abuse of dominance against JAL in the market for residential apartments in Gurgaon. The Commission's findings in *JAL* were in stark contrast to the Commission's findings in *DLF*,[10] where the Commission has previously found that DLF had abused its dominance in the market for high-end residential apartments in Gurgaon and penalised DLF an amount of 6.3 billion rupees for the conduct. This case, where the Commission penalised DLF, is currently pending before the Supreme Court of India on appeal from a decision of the Competition Appellate Tribunal (COMPAT), the appellate authority.

2 Case No. 8/2014, *In Re: GHCL Limited v. Coal India Limited & Ors.*

3 Case No. 13/2010, *In Re: Pankaj Aggarwal v. DLF Gurgaon Home Developers Private Limited*; Case No. 21/2010, *In Re: Sachin Agarwal v. DLF Gurgaon Home Developers Private Limited*; Case No. 55/2012, *In Re: Anil Kumar v. DLF Home Developers Limited.*

4 Case No. 70/2012, *In Re: Prasar Bharti v. TAM Media Research Private Limited.*

5 Case No. 24/2014, *In Re: Shyam Vir Singh v. DLF Universal Limited.*

6 Case No. 72/2011, *In Re: Sunil Bansal & Others v. Jaiprakash Associates Ltd. & Ors*; Case No. 16/2012, *In Re: Shri Deepak Kapoor v. Jaiprakash Associates Ltd. & Ors*; Case No. 34/2012, *In Re: Shri Tarsem Chand & Another v. Jaiprakash Associates Ltd. & Ors.*, Case No. 53/2012, *In Re: Shri Sanjay Bhargava & Others v. Jaiprakash Associates Ltd. & Ors*; Case No. 45/2013, *In Re: Shri Raghuvinder Singh v. Jaiprakash Associates Ltd. & Ors.*

7 Case No. 100/2013, *In Re: Sharad Kumar Jhunjhunwala v. Union of India & Ors*; Case No. 49/2014, *In Re: Ismail Zabiulla v. Union of India, Ministry of Railways & Ors*; Case No. 89/2014, *In Re: Yaseen Basha v. Union of India & Ors.*

8 Case No. 42/2013, *In Re: Builders Association of India (Kerala Chapter) v. The State of Kerala & Ors.*

9 Case No.33/2014, *In Re: XYZ v. REC Power Distribution Company Ltd.*

10 Case No. 19/2010, *In Re: Belaire Owners' Association v. DLF Ltd.*; Case No. 18/2010, *In Re: Park Place Residents' Welfare Association v. DLF Home Developers Ltd. and Ors*; Case No. 24/2010, 30/2010, 31/2010, 32/2010, 33/2010, 34/2010, 35/2010, *In Re: Pushkar Dutt Sharma & Ors v. DLF Home Developers Ltd. and Ors*; Case No. 19/2010, *In Re: Magnolias Flat Owners Association v. DLF Ltd.*; Appeal No. 23/2011, 12/2012, 19/2012, 20/2012, 8/2013, 9/2013, 11/2013, 29/2013, *DLF Ltd. & Ors. v. Competition Commission of India & Ors.*

In another seven cases involving claims of abuse of dominance, the Commission adopted a *prima facie* view under Section 26(1) of the Competition Act directing the DG to investigate the complaints under Section 4 of the Competition Act. Some of the important cases in which such orders have been passed relate to the complex interplay of intellectual property rights and competition laws (genetically modified cotton seeds), the energy sector and the healthcare sector. The Commission has, at the *prima facie* stage, also rejected 30 complaints that alleged abuse of dominant position, including two complaints against Ola and Uber, both radio taxi aggregators. Interestingly, the COMPAT has overturned the Commission's decisions in two cases and has ordered investigations against two state-owned enterprises. In *Maharashtra State Power Generation Company Limited (Mahagenco)*,[11] relying on pre-May 2009 conduct (i.e., prior to the entry into force of Section 4 of the Act), the COMPAT reversed the Commission's decision that corruption or favouritism-related issues are *per se* not competition law issues; and directed investigations into the alleged irregularities in the award of contracts for appointment of private liaising agents for ensuring coal supplies for a thermal power plant. Similarly, in public-sector oil marketing companies (PSU OMCs),[12] the COMPAT ordered investigations into the allegedly abusive terms contained in the dealership agreements used by the PSU OMCs.

In 2015–2016, although the COMPAT has not rendered any significant substantive decision relating to Section 4 of the Competition Act, the COMPAT has remanded a large number of cases back to the Commission for re-inquiry based on procedural lapses by the Commission. Under Section 4 of the Competition Act, the COMPAT has issued four decisions: *Indian Railways*,[13] *Mahagenco*, *PSU OMCs* and *Coal India*. The COMPAT upheld the Commission's decision in *Indian Railways* and reversed the other three: *Mahagenco*, *PSU OMCs* and *Coal India*.

## III MARKET DEFINITION AND MARKET POWER

Market definition and market power remain the starting point of every competition law assessment for determining dominance and the abuse of dominance by an enterprise.

The Act defines 'relevant product market' as a market comprising all those products or services that are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The notion of 'relevant geographic market' is defined by the Act as a market comprising an area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. The notion 'relevant market' is defined by the Act as a market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. In Section 19, the Act also lists exhaustively factors that the Commission must take into account in defining the relevant market.

11 Appeal No. 43/2014, *Surendra Prasad v. Competition Commission of India and Ors*.

12 Appeal No. 51/2014, *North East Dealers Association v. Competition Commission of India and Ors.*

13 Appeal No. 1/2014, *Sharad Jhunjhunwala v. Union of India, Ministry of Railways & Ors*.

The market definitions adopted by the Commission in cases involving the real estate sector seem to suggest that the Commission is retracing its steps and trying to distance itself from the markets defined in the Commission's earlier DLF orders. In *DLF (New Town Heights)*, while examining DLF's conduct in relation to residential apartments priced in the range of 4 million to 6 million rupees, the DG in the first investigation report defined the relevant market as the market for 'high-end' residential apartments in Gurgaon. The Commission rejected the DG's investigation and directed further inquiry. It appears that the Commission disapproved of the DG's findings as the Commission had, in the earlier DLF orders, classified apartments priced at 2 billion rupees (approximately) as high-end apartments. In the supplementary investigation report, the DG identified the relevant market by reference to pricing of the residential apartments. Then, in a related proceeding, the DG identified the relevant market as the market for residential apartments in Gurgaon. Notably, the DG found DLF to be dominant in the geographic territory of Gurgaon in relation to each of these relevant product markets. However, the Commission was not keen on defining the relevant market and observed that where, under possible alternative relevant market definitions, the conclusions on dominance remain the same, a precise definition of the relevant market is not necessary. The Commission ultimately applied an objective approach and adopted a price-neutral market definition of residential apartments in Gurgaon.

In the case against JAL, the DG submitted two investigation reports. In the first report, the DG identified the relevant market as the market for residential apartments in Noida and Greater Noida. After considering the DG's findings in the first report, the Commission directed the DG to conduct a further inquiry, *inter alia*, into whether integrated townships (comprising residential apartments with a wide range of amenities, such as clubs, parks, swimming pools, gymnasiums, shopping complexes and schools) constituted a distinct relevant market. In the supplementary report, the DG found that an integrated township is a separate product when compared to other residential apartments, villas or bungalows. The Commission applied the substitutability test in relation to the amenities that are available within the integrated townships with those that are available outside the integrated townships and rejected the market definition proposed by the DG in the supplementary report, thereby accepting JAL's claim that the nomenclature of 'Integrated Township' is being used merely as a marketing strategy for the residential apartments. However, two members of the Commission dissented and considered the market for integrated township (as opposed to that of residential units or apartments) as the relevant market, while observing that JAL 'collected several thousands of crores of rupees from the consumers on the pretext of offering residential units in "integrated townships" and cannot now be allowed to turn around and say that it is a "marketing gimmick" when it is subjected to the scrutiny of this Commission'. Because of a legislative oversight in the Act (see below), a Commission decision that rejects the DG's finding of an abuse of dominance cannot be appealed to the COMPAT by the informant. As a result, the *JAL* decision of the Commission cannot be appealed to the COMPAT.

Continuing with its decisional practice, in DLF Universal, the Commission applied 'end use' as the criterion for delineating the relevant product market by distinguishing properties intended for commercial and residential purposes. The Commission defined the relevant market as that of commercial space in the geographic territory of Gurgaon.

In a recent case relating to the abuse of leveraging, *REC*, the Commission investigated if an affiliate of REC, taking advantage of REC's role as the nodal authority for implementing rural electrification projects, sought to leverage the REC Group's dominance in the market for financing projects under the rural electrification schemes (i.e., the first relevant market)

to obtain consultancy work (on nomination basis) in the market for preparation of detailed project reports for the various projects covered under the said rural electrification schemes (i.e., the second relevant market). In line with international jurisprudence and the Commission's own decisional practice, the Commission has acknowledged the need for identifying more than one relevant market for assessing the abuse of leveraging.

In a recent decision involving television measurement services, *Tam Media*, while holding television media as a separate product market, the Commission considered the substitutability of television with radio, internet (websites such as YouTube) and print media. The Commission, *inter alia*, took into account the lack of visual impact of radio, limited penetration of internet and low literacy levels being an impediment in the appeal of print media to conclude that television as a media is not substitutable with any other media. The Commission also considered whether the television measurement services market was two-sided. Considering the consumer base of television rating agencies, the Commission noted that broadcasters and advertisers were on the same side of the market as both were consumers of television measurement services and, as such, the television measurement services market constituted a single-sided market. In defining the relevant geographic market, the Commission noted that conditions of competition were uniform on a pan-India basis and defined the relevant market as the market for audience measurement for channels and programmes in India.

During the past year, the Commission has also focused on narrow regional markets in some cases. In the cases against radio taxi aggregators, namely, *Ola Cabs*[14] and *Uber Cabs*,[15] the relevant geographic markets were defined by city. After considering the unique market conditions and competitive concerns prevailing in Delhi, Kolkata and Bengaluru (the cities in respect of which claims of abusive practices were made in the complaints), the Commission decided in favour of the taxi aggregators in Delhi and Kolkata, while directing the DG to conduct an investigation into the allegedly abusive conduct of Ola Cabs[16] in the geographic market of Bangalore.

Consistent with its assessments in the previous year, the Commission refused to consider global markets in *Coal India*. Coal India argued that the market should be the supply of coal 'globally' as imported coal is substitutable with domestically produced coal, and based on the fact that the informant had admitted to using imported coal for power generation. Rejecting this argument, the Commission relied on the definition of dominant position contained in the Act and stated that 'dominant position means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour'. The Commission, therefore, defined the geographical territory of India as the relevant geographical market. Notably, on appeal, the decision of the Commission was set aside on account of certain procedural lapses, and the matter has been

14 Case No. 82/2015, *In Re: Mega Cabs Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*; Case No. 06/2015, *In Re: M/s Fast Track Call Cab Private Limited v. ANI Technologies Pvt. Ltd.*

15 Case No. 96/2015, *In Re: Meru Travel Solutions Private Limited v. Uber India Systems Pvt. Ltd. & Ors.*

16 Case No. 06/2015, *In Re: M/s Fast Track Call Cab Private Limited v. ANI Technologies Pvt. Ltd.*

remanded back to the Commission for a rehearing. However, the COMPAT has not made any observations on the merits of the case (i.e., the Commission's assessment of Coal India's abusive conduct on the relevant market).

In assessing dominance and market power in the relevant market, the Commission is required by Section 19 of the Competition Act to assess dominance in the context of a broad range of non-exhaustive factors, including market share, size and resources of the enterprise, the size and importance of the competitors, vertical integration, entry barriers and dependence of consumers on the allegedly dominant enterprise. The role and importance of each of these factors will vary on the facts of each case and the alleged theory of harm. Although, in its decisions the Commission will assess dominance of the allegedly dominant enterprise under each of the Section 19 factors, generally speaking, market share and the size and resources of the enterprise will be the most important in the Commission's assessment.

A review of the orders passed by the Commission in the past year (particularly in the real estate sector) indicates the use of an inconsistent approach for determining dominance of an enterprise. In *JAL*, for assessing JAL's market position, the Commission, *inter alia*, took into account JAL's market shares in terms of projects developed by JAL and its competitors in the relevant geographic market as on 31 March 2012, and actual sales of JAL and its competitors in the period between 2009 and 2011. The Commission found that JAL was closely competing with its rivals, but was behind one of its competitors. The Commission also considered JAL's overall financial resources and land reserves. The Commission took into account the ultimate intended use of JAL's land reserves to conclude that its land reserves do not confer any commercial advantage on JAL in the relevant market. The Commission then considered the presence of a large number of competitors offering comparable services in the relevant market to find that JAL was not dominant in the relevant market.

Likewise, in *DLF Universal*, while assessing DLF Universal's dominance, the Commission considered DLF Universal's market shares in terms of: (licensed) land reserves for development of commercial projects in the relevant geographic market; commercial projects launched by real estate developers in the relevant market; and actual sales of DLF Universal and its competitors. The Commission found that although DLF Universal was the leading player in relation to licensed land reserves for commercial purposes, its market shares were only 8.9 per cent and closely followed by its competitors. In terms of the projects launched and sold, DLF Universal was found to be considerably behind its competitors. The Commission also took into account land banks and the financial resources of DLF and found DLF not to be dominant in the market for commercial premises in Gurgaon.

In contrast, in *DLF (New Town Heights)* involving residential apartments, despite adopting a different market definition, the Commission did not undertake a separate assessment of DLF's dominance in the market for residential apartments in Gurgaon. In this case, the Commission continued to base its assessment of dominant position upon the archaic and historical data used by it in the earlier DLF orders to hold DLF dominant in the relevant market, probably on the basis that there has been no change in the market dynamics. Instead, the Commission ought to have undertaken a separate assessment of DLF's dominance and applied similar criteria and tests (such as comparison of the market position of DLF and its competitors in the relevant market on the basis of projects developed and actual sales, availability of viable alternatives for home buyers and intended use of land reserves) that it applied in JAL and DLF Universal to assess DLF's dominance in the market for residential apartments in Gurgaon. It must be said that the Commission's decisions in *JAL* and *DLF Universal* on the one hand and its decision in *DLF (New Town Heights)* on the other

are inconsistent with each other, reflecting the fact that the Commission seems to be taking a very different approach in respect of residential apartments, simply to maintain consistency with its earlier DLF order, and for its arguments before the Supreme Court as part of its litigation strategy, where the case is pending on appeal from COMPAT.

In *REC*, the Commission found REC to be a dominant enterprise in the market for financing projects under the rural electrification schemes (i.e., the first relevant market). While assessing REC's dominance, the Commission, *inter alia*, took into account REC's role as the nodal agency for implementation of these projects (including the key role played by REC in securing the project approvals and project finance).

In *TAM Media*, the Commission found TAM Media to be dominant in the relevant market on the basis of a 100 per cent market share, absence of competitors, high entry barriers and network effects (i.e., value of products being directly proportional to the user base).

In *Builders Association of India (Kerala Chapter)*, while examining the conduct of a state-owned enterprise, Kerala State Construction Corporation Limited, in the market for provision of civil construction works to the state government, the Commission found the state-owned enterprise not to be dominant in the relevant market on the basis of the presence of a large number of competitors.

In *Coal India* and *Indian Railways*, the Commission considered the statutory and regulatory framework together with government policies that led to the dominant positions of two state-owned enterprises (i.e., Coal India (as producer and supplier of coal) and Indian Railways (as owner and operator of the Indian rail network)).

## IV ABUSE

### i Overview

Under Section 4(2) of the Act, an enterprise (or a group) abuses its dominant position if it:

*a* directly or indirectly imposes unfair or discriminatory conditions in the purchase or sale of goods or services or price in purchase or sale (including predatory price) of goods or services (exclusion: discriminatory conditions or prices that may be adopted to meet competition);

*b* limits or restricts (1) production of goods or provision of services or markets therefor; or (2) technical or scientific development relating to goods or services to the prejudice of consumers;

*c* indulges in conduct resulting in denial of market access in any manner;

*d* makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

*e* uses its dominant position in one relevant market to enter into or protect another relevant market.

Section 4(2) of the Act appears to contain an exhaustive list of conduct that may constitute abuse of dominance, unlike Article 102 of the TFEU. The list of 'abuses' in Section 4(2) is sufficiently broad and could cover most exploitative and exclusionary conduct that could be characterised as an abuse of dominance. Section 4(2)(c), in particular, which prohibits any conduct by a dominant enterprise resulting in 'denial of market access in any manner', is

frequently used by complainants or informants to cover exclusive dealing, refusal to supply and other theories of anticompetitive harm that do not fall within any of the other categories in Section 4(2).

It is notable that, unlike Article 102 of the TFEU, the Act does not provide for objective justifications as a defence to the anticompetitive conduct of dominant enterprises. However, in Indian Railways, where a complaint was made alleging, *inter alia*, certain unfair practices relating to the passenger reservation system and compulsory catering in super-fast trains, the Commission rejected the allegations on the basis of efficiency justifications put forth by Indian Railways while issuing an advisory to do away with some of the charges levied by Indian Railways that may not affect its revenues in any significant manner. However, one member of the Commission dissented with the Commission's findings and held that the service charge levied by the Indian Railways for internet ticket bookings amounted to imposition of unfair prices in violation of Section 4(2)(a)(ii) of the Act. On appeal, the COMPAT upheld the Commission's findings. It is important to bear in mind that the only defence recognised under Section 4(2) of the Act is conduct of a dominant enterprise that meets the competition. To date, the Commission has not provided any published guidance in its decisions on the scope of this defence, but based upon various observations contained in the Commission's decisions, it seems that Section 4(2) will not be interpreted to impose on a dominant enterprise an affirmative duty to engage in actions inconsistent with normal competitive conduct of a dominant firm.

**ii Exploitative conduct**

In *Coal India*, the Commission concluded that Coal India, taking advantage of being the lone producer and supplier of coal in India and coal being the most important raw material for power generation, had unilaterally decided terms and conditions of coal supply agreements and included in its agreements with the buyers one-sided and onerous clauses that favoured Coal India. In particular, the Commission noted that the clauses relating to quantity commitments (from the buyer's side), supply obligations (from the seller's side) and the terms relating to quality assessment, sampling analysis of stones and oversized coal were abusive.

In *DLF (New Town Heights)*, the Commission noted that the terms and conditions of the apartment buyer agreements were similar to those previously examined by the Commission where the Commission found them to be one-sided and onerous for the apartment buyers. On the facts of the present case, the Commission found DLF's arbitrary and unfair cancellation policies and its conduct of keeping buyers in the dark about the eventual shape, size and location of apartments, increasing the number of floors without prior notification to buyers, increasing the super area of the apartments followed by unfair additional demands on account of increase of super area, and arbitrary cancellation of allotments and subsequent forfeiture of booking amounts to constitute abusive conduct.

It should be noted that the Commission, in *CREDAI*,[17] also conducted a detailed investigation into the conduct of builders and developers under Section 3 of the Act, which assesses anticompetitive conduct. The Commission found that inclusion of such terms and conditions in apartment buyers' agreements is the industry practice and all builders, irrespective of their market positions, impose such terms. The Commission also acknowledged

17 Case No. 59/2011, *In Re: Jyoti Swaroop Arora v. Tulip Infratech Ltd*.

the regulatory vacuum in the real estate sector and observed that such practices would have to be alleviated with the efforts of the sectoral regulator and CREDAI, the industry association. The Commission's observations in CREDAI seem to indicate that the Commission has tacitly acknowledged that the issues examined in the earlier *DLF* case currently on appeal in the Supreme Court and *DLF (New Town Heights)* are, indeed, not a matter for assessment under competition law, but rather a matter that could, at best, be deficiency of services that ought to be addressed under the Indian Consumer Protection Act, 1986.

In *TAM Media*, the Commission considered whether TAM Media had abused its dominant position by imposing higher prices on broadcasters than advertisers for television audience measurement services. While holding that TAM Media had not abused its dominant position, the Commission observed that a dominant enterprise may charge different prices for a particular service where the operation and use of the same are in different market conditions, i.e., where the two transactions are not comparable. The Commission also acknowledged the freedom of a dominant enterprise to choose suppliers that meet its quality and other requirements.

### iii Exclusionary conduct

In *REC*, the Commission has reviewed whether the entry of an affiliate of REC in the second relevant market (i.e., the market for preparation of detailed project reports for rural electrification projects) led to the denial of market access for the other firms that were active in that market, in contravention of Section 4(2)(c) of the Act. The Commission noted that under the Act, the abuse of denial of market access under Section 4(2) essentially involves the establishment of two criteria; namely, conduct of a dominant enterprise or group and the anticompetitive effects or distortion of competition resulting from such conduct (leading to denial of market access) in the very same market in which the abuse has taken place. After a detailed inquiry, the Commission found no abuse of dominance, including on the basis that there was no evidence to demonstrate that REC favoured its subsidiary over the other consultancy firms in connection with the preparation of detailed project reports. Among other things, the Commission considered that although the entry of the REC affiliate led to a reduction of market shares of the other consultancy firms, the market was nevertheless competitive. The Commission also relied upon fluctuations in the REC Group's market shares in the second relevant market in subsequent years to clear REC of any charges of foul play.

### iv Leveraging

In the recent REC decision, the Commission closed the case, thereby absolving the REC Group of charges of leveraging. It was alleged that owing to its close association with REC, one of the subsidiaries of REC gained substantial market shares in the market for the preparation of detailed project reports immediately upon its entry despite being a new player without any prior proven track record in the provision of consultancy services. While examining the alleged abuse of leveraging, the Commission noted that: 'the leveraging doctrine applies when a firm has sought to use its dominance in one relevant market to enter into or protect the second market without competing on merits in that market.' Further, the Commission noted that under Section 4(2)(e) of the Act (which deals with the abuse of leveraging), 'there should be […] conduct on the part of the dominant enterprise/group to demonstrate the use of dominant position to enter into or protect another relevant market.' After evaluating the evidence gathered by the DG, including the statements recorded by the representatives of various state discoms (i.e., power distribution companies), the Commission concluded that:

'the evidence on record does not reveal any explicit "conduct" on the part of the [REC Group] to show that it was influencing the decision of the state discoms in the second relevant market by using its dominant position in the first relevant market.' In addition, the Commission also reviewed the data pertaining to instances where the detailed project reports prepared by the various consultancy firms (including the REC affiliate) were rejected and found that the data did not indicate any undue preferential treatment of the REC subsidiary company. Interestingly, the Commission has acknowledged that awarding contracts on a nomination basis is inherently a commercial call and the exercise of such commercial freedom cannot be treated as anticompetitive conduct.

While the Commission did not find any fault with REC's actions, it has nevertheless issued an advisory emphasising the importance of competitive neutrality. The Commission identified the inherent conflicts under the current regime where REC, as the nodal agency for implementing a flagship programme of the government of India (i.e., rural electrification), performs a variety of functions, including project appraisal, inspection and disbursement of funds, on the one hand, and a subsidiary of REC engages in commercial activities such as preparation of detailed project reports that are ultimately accepted or rejected by REC, on the other hand. The Commission has recommended a change in the regime in the form of appointment of a neutral referee so as to ensure a level playing field between the state-owned enterprises and the private players.

## V REMEDIES AND SANCTIONS

### i Sanctions

Under Section 27 of the Competition Act, if an enterprise or group is found to have abused its dominant position, the Commission may impose fines of up to 10 per cent of the enterprise's or group's average turnover for the preceding three financial years. The Commission may also pass a cease-and-desist order together with any other orders or directions as the Commission may deem fit. While deciding the amount of penalty, the Commission may take into consideration certain aggravating or mitigating factors. So far the Commission has not issued any guidelines on penalty. In addition, Section 48 of the Competition Act empowers the Commission to proceed against persons who are in charge of the company at the time the anticompetitive conduct occurs.

The table below shows the penalties imposed in Section 4 cases in 2015–2016, where the Commission found an abuse of dominance.

| *Informant* | *Opposite parties* | *Penalty (million rupees)* | *Total penalty (million rupees)* | *Percentage* |
|---|---|---|---|---|
| *Case: In Re: GHCL Limited v. Coal India Limited & Ors.* | | | | |
| Coal India Limited | Coal India Limited<br>Western Coalfields Limited | 17,730 (approximately) | | 3 per cent of the average of the turnover for the three preceding financial years |
| *Case: In re: DLF Gurgaon Home Developers Private Limited & Ors.* | | | | |
| DLF Ltd. | DLF Ltd. | 6,300 | | 7 per cent of the average of the turnover for the three preceding financial years |

### ii Behavioural remedies

In both *Coal India* and *DLF*, the Commission had also issued cease and desist orders. However, the Commission's *DLF* order is now on appeal before the Supreme Court of India.

### iii Structural remedies

No structural remedies have been imposed by the Commission to date.

## VI PROCEDURE

### i Proceedings before the Commission

The Act provides the procedure for the filing of the information (i.e., the complaint), the investigation process, inquiry by the Commission and the procedure for appeal. Any person may file an 'information' (i.e., a complaint) with the Commission alleging contravention of the provisions of the Act. The informant (i.e., the complainant) may also file an application with the Commission for interim measures by describing the harm that would be caused if no interim protection is granted. Once the information is filed, the Commission, as far as possible, is required to record its opinion on the existence of a *prima facie* case within 60 days of the filing of the information. If the Commission is of the opinion that there exists a *prima facie* case, the Commission may direct the DG of the Commission (which is the investigation wing) to conduct an investigation into the alleged anticompetitive conduct and submit its report within the time specified by the Commission.

Upon completion of the investigation, a non-confidential version of the DG's report is provided to the informant and a confidential version of the report is provided to the enterprises under investigation. The parties are then directed to file their respective comments or objections to the report within the time limit specified by the Commission. Thereafter, the Commission schedules the case for hearing the parties – both the informant and the enterprises that allegedly infringed Section 4. The hearing is sometimes attended by a representative of the DG, but the DG is not present to defend the investigation report in all cases. Rather, in a case where the report finds an infringement of Section 4, the Commission relies on the informant to provide its submissions and, where the DG's report is favourable to the informant, to defend the DG's report. Where the report finds no infringement of Section 4, the Commission invites only the informant for a hearing before rejecting the information or complaint. The Commission is not obligated to accept the DG's report, and there have been cases where the Commission has disagreed with the findings of the DG and rejected the report. Notably, there is a lacunae in the Act that has resulted in certain orders being non-appealable before the COMPAT. Where the DG finds a violation of Section 4, but the Commission disagrees with the DG, such orders of the Commission cannot be appealed to the COMPAT because there is no provision in the Act that provides for such an appeal, which is clearly an oversight by the legislature and a gap in the Act.

*Appellate procedure*

An appeal against the final order of the Commission may be made to the COMPAT within 60 days from the date of the final order. An appeal against the order of the COMPAT may be made to the Supreme Court of India within 60 days from the date of the COMPAT's order.

Interim measures are available to parties before the Commission, the COMPAT and the Supreme Court of India. Frequently, parties also file writ petitions before the Delhi High

Court if they believe that principles of natural justice are being violated or their legitimate legal rights are being ignored by the Commission. The number of such petitions filed before the Delhi High Court increased substantially during 2015–2016 as a result of perceived concerns of overlapping jurisdiction of the Commission on the one hand and another regulatory agency or court on the other, and the potential for conflicting findings.

## VII PRIVATE ENFORCEMENT

Although the Competition Act does not provide for private enforcement, it does allow a successful informant or any other person affected by the findings of the Commission, to make an application before the COMPAT for compensation from the dominant enterprise based on the findings of the Commission or the orders of the COMPAT.

## VIII FUTURE DEVELOPMENTS

### i Dawn raid powers

The first-ever dawn raid was conducted by the DG in 2014–2015 in the investigation in the Bull Machines case, where the Commission directed that the DG investigate JCB for a possible abuse of dominant position by initiating vexatious litigation in the Indian market for backhoe loaders.[18] Section 41 of the Competition Act empowers the DG to conduct these raids after obtaining a warrant from the Chief Metropolitan Magistrate, Delhi. Soon after the dawn raid, JCB filed a writ petition before the Delhi High Court challenging the dawn raid. The Delhi High Court stayed the investigation, while directing the DG to file 'a personal affidavit indicating the material available and the reasons that prompted him to take the drastic action'.

### ii Overlapping jurisdiction

In the Ericsson writ petition, the Delhi High Court single judge has upheld the Commission's jurisdiction to examine issues covered by the Act and has held that areas covered under the Competition Act do not fall within the domain of patent enforcement authorities under the Indian Patents Act, 1971.

In the Google writ petition, the High Court has held that the Commission has an inherent power to review or recall its own orders that are in the nature of administrative directions.

18 Case No. 105 of 2013, *In Re: M/s Bull Machines Pvt Ltd v. M/s JCB India Ltd. & M/s JC Bamford Excavators Ltd.*

# Chapter 13

# INDONESIA

*Rahmat SS Soemadipradja and Verry Iskandar*[1]

## I INTRODUCTION

While a legal regime regulating competition had long been the subject of much academic debate in Indonesia, it was not until 1998 – a year of crucial economic and political transition – that actual reform became possible. Prior to this, success in business was very much dependent on access to government. This was illustrated during the Asian financial crisis of 1997, during which it became apparent that only those with close government ties, and monopolistic and centralised control of the market were able to weather the storm.

It was a condition of the International Monetary Fund's (IMF) bailout of the Indonesian economy that the Indonesian government implement a competition law – in the IMF's letter of intent of January 1998, of its 50 conditions, there were at least seven relating to a national competition law.[2]

### i The Indonesian Competition Law

Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (ICL) was enacted on 5 March 1999.[3] It entered into force within 12 months of its enactment.[4] Those in contravention were given six months from its entry into force in which to comply.[5]

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2 IMF letter of intent dated 15 January 1998, titled 'Indonesia – Memorandum of Economic and Financial Policies', available at www.imf.org/external/np/loi/011598.htm.

3 As publicised in the State Gazette of the Republic of Indonesia, 33 of 1999.

4 Article 53 of the ICL.

5 Article 52(2) of the ICL.

The ICL only applies to business actors – persons or entities, legal or otherwise, established and domiciled, or which engage in activities, in Indonesia, that individually or with others by agreement engage in business activities in the economic sphere.[6]

### ii The Competition Regulator

The ICL provides for the establishment of the Commission for the Supervision of Business Competition (KPPU).[7] Established in 2000, the KPPU's functions include:[8]

*a* law enforcement, through the investigation, prosecution and adjudication of matters involving business actors in breach of the ICL; and

*b* the promotion of sound competition law and policy, through the provision of advice and policy recommendations to governments, national and local.

### iii Elucidations, regulations and guidelines

Interpretation of the ICL is aided by elucidations, which are akin to explanatory memoranda in Commonwealth jurisdictions but are incorporated into the ICL, and by regulations, which can be implemented and enforced by the KPPU, as long as they are not inconsistent with the ICL. The ICL is also complemented by guidelines that are periodically released by the KPPU.

### iv State-owned enterprises

State-owned enterprises (SOEs), as business actors, are subject to the ICL. Article 51 of the ICL, however, stipulates that an SOE can maintain a monopoly or other competitive advantage if:[9]

*a* its activities relate to the production or marketing of goods or services that affect the livelihood of society at large and involve branches of production of strategic importance to the state; and

*b* it has been specifically provided for by law.

## II YEAR IN REVIEW

Business actors are seldom prosecuted under the ICL and, in recent history, most prosecutions have only alleged contraventions in the limited context of government tender and procurement processes. The most recent KPPU annual report indicated that 56 per cent of reported prosecutions related to bid rigging and collusion in the context of such processes.[10]

### i Airport Cooperation Agreement

PT Angkasa Pura I (Persero) (Angkasa Pura) is an SOE responsible for managing airports in eastern Indonesia, including the I Gusti Ngurah Rai Airport (Bali International Airport).

6 Article 1(5) of the ICL.

7 Article 30(1) of the ICL.

8 Articles 35 and 36 of the ICL.

9 Article 51 of the ICL.

10 2014 KPPU Annual Report, p. 32.

Angkasa Pura entered into a cooperation agreement with PT Execujet Indonesia (Execujet), which granted Execujet the exclusive right to provide 'ground handling services' on the south apron of Bali International Airport for non–scheduled domestic and international flights (including, for example, charter flights).

On 24 February 2014, the KPPU determined that the cooperation agreement violated the prohibition on monopolistic practices under Article 17 of the ICL, ordered Angkasa Pura to terminate the cooperation agreement, and fined Angkasa Pura 5 billion rupiah and Execujet 2 billion rupiah.[11]

On appeal by Angkasa Pura and Execujet, the Central Jakarta District Court and then the Supreme Court upheld the KPPU determination.[12]

**ii Seaport crane tying agreement**

PT (Persero) Pelabuhan Indonesia II (Pelindo II) is an SOE responsible for managing and operating 12 seaports across 10 Indonesian provinces. Their largest port is Tanjung Priok in North Jakarta, which is open to international trade.

At Tanjung Priok, sea freight companies were historically free to use either their own vessel-based or others' shore-based cranes to load and unload goods. In 2012, Pelindo II and PT Multi Terminal Indonesia (MTI) entered into an agreement, which made MTI the monopoly provider of shore-based cranes. Pelindo II and MTI issued a circular letter, which required all users of Tanjung Priok to only use the shore-based cranes provided by MTI – they were prohibited from using their own cranes or those of any other provider.

On 24 February 2015, the KPPU determined that both Pelindo II and PT MTI had violated the prohibition on tying agreements under Article 15(2) of the ICL, with regard to the market for shore-based cranes at certain Tanjung Priok docks, while it was similarly determined that PT MTI had violated the same prohibition with regard to certain other Tanjung Priok docks.

The KPPU ordered that both companies revoke the circular letters, terminate the relevant agreements made between them, and announce such revocation and termination in two national Indonesian newspapers, and fined MTI 5.3 billion rupiah.[13] Pelindo II was not fined.

The North Jakarta District Court overturned the KPPU determination.[14] The Supreme Court agreed with the District Court. The reasoning of neither court has been published.

11 KPPU Decision 13/KPPU-I/2014 dated 24 February 2015.

12 Central Jakarta District Court Decision 179/Pdt.Sus/2015/PN JKT.PST dated 1 July 2015, Supreme Court Decision 728K/PDt.Sus-KPPU/2015 dated 20 November 2015.

13 KPPU Decision 12/KPPU-I/2014.

14 North Jakarta District Court Decision 1/Pdt.Sus/2015/PN JKT.UTR dated 30 July 2015.

### iii Other significant decisions

| *Sector* | *Investigating authority* | *Conduct* | *Case opened* |
|---|---|---|---|
| Stevedoring | KPPU | Pelindo II entered into leases with various port user lessees, under which the lessees were required to exclusively use a stevedoring company owned by Pelindo II.<br>The KPPU ordered that Pelindo II amend the leases to comply with the ICL's prohibition on tying agreements and imposed a fine of 4.8 billion rupiah. On appeal, both the North Jakarta District Court and the Supreme Court reversed the KPPU's decision.[1] | March 2013 |
| Bancassurance | KPPU | PT Bank Rakyat Indonesia (BRI) was in a bancassurance relationship with PT Asuransi Jiwa Bringin Jiwa Sejahtera (BRIngin Life) and PT Heksa Eka Life Insurance (Heksa) – when potential mortgagors approached BRI for finance, they were only offered a choice between the life insurance products of BRIngin Life and Heksa.<br>The KPPU imposed fines of 25 billion rupiah on BRI, 19 billion rupiah on BRIngin Life, and 13 billion rupiah on Heksa.<br>On appeal, the Central Jakarta District Court and the Supreme Court reversed the KPPU decision.[2] | March 2014 |

1 North Jakarta District Court Decision 1/Pdt.Sus.KPPU/2013/PN.JKT.UT dated 10 February 2014, Supreme Court Decision 302K/Pdt.Sus-KPPU/2015 dated 25 August 2015.
2 Central Jakarta District Court Decision 615/Pdt.Sus/2014/PN.JKT.PST dated 23 April 2015, Supreme Court Decision 703K/Pdt.Sus-KPPU/2015 dated 26 January 2016.

### iv Ongoing investigations

In March 2016, the KPPU began investigating PT Telekomunikasi Indonesia's (Telkom) 'Triple Play' agreements. These agreements ostensibly require that a Telkom customer subscribe to Telkom's internet, pay-TV and fixed-line services, even if they require only one such service.

## III MARKET DEFINITION AND MARKET POWER

The ICL's definitions of the 'relevant market' and a 'dominant position' are roughly consistent with the definitions of 'market' and 'market power' that prevail in several other jurisdictions.

### i Relevant market

The 'relevant market' is an area in which products are marketed, or a range of products, in which the products, whether goods or services, are the same or of the same type, or can be substituted for one another.[15]

This definition contemplates a type of market defined by its location (geographical market) and another defined by its range of products (product market). The geographical market is an area in which business actors actually sell their products or, more broadly, an area in which such products are available or capable of being distributed to. The product market is a range of products that are the same or of the same type, or can be substituted for

15 Article 1(10) of the ICL.

one another.[16] Products are regarded as being capable of being substituted for one another when consumer opinion is that the product is sufficiently similar in function, size, use, price or other key characteristic. Products may also be so regarded when supplier opinion is that a new supplier in a competing product is sufficiently able to bring that product to the relevant market.

**ii Dominant position**

Article 1(4) of the ICL provides that a business actor will occupy a 'dominant position' if it:

*a* has no substantial competitor in the relevant market; or

*b* is in the strongest position of its competitors in the relevant market, as judged by its financial capacity, access to sales, and ability to adjust the supply or demand levels for a certain good or service.

Article 25(2) of the ICL provides that a business actor or a group of business actors will occupy a 'dominant position' if they:

*a* control at least 50 per cent of the market for a certain good or service; or

*b* together with two or three business actors or two or three groups of business actors control at least 75 per cent of the market for a certain good or service.

Articles 1(4) and 25(2) should be read together, rather than as inconsistent definitions.

Insofar as Article 25(2) applies, two or three business actors or two or three groups of business actors will only be regarded as together controlling a certain percentage of a relevant market if they employ the same strategies or policies in that market. For example, two independent business actors who employ the same pricing policies will be deemed to collectively control the sum of the percentages of the market they individually control. This control may be assumed even in the absence of an explicit agreement between the actors.[17]

***Application***

In applying these Articles to determine whether a business actor occupies a dominant position, the KPPU will conduct a barriers assessment, which aims to determine the competitive pressures affecting the business actor. The barriers that are assessed can be categorised as those erected by existing or potential competitors, consumers or suppliers. In principle, there should be a negative correlation between the significance of these barriers and the dominance of the business actor's position in the relevant market.[18]

***Structural and behavioural approaches***

The ICL only employs the term 'dominant position' in Articles 1(4) and 25 and in the title of Chapter V, which contains Article 25. The concept of a dominant position underlies, however, several more: Articles 4 (prohibiting oligopolies), 13 (prohibiting oligopsonies), 15 (prohibiting exclusive agreements), 17 (prohibiting monopolies), 18 (prohibiting

16 KPPU Regulation 3 of 2009 on Guidelines on the Implementation of Article 1(10) of the ICL on the Relevant Market, Appendix A, Chapter III, p. 5.

17 Knud Hansen, et al, *Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition*, GTZ-Katalis, 2002, p. 338.

18 Ibid.

monopsonies), 19 (prohibiting market controls), 20 (prohibiting predatory pricing), and in those comprising the remainder of Chapter V: Articles 26 (prohibiting interlocking directorships), 27 (prohibiting cross-ownership), and 28 (regarding mergers, consolidation and acquisitions).

Whereas Articles 1(4) and 25, which employ the term 'dominant position', reflect a behavioural approach, the Articles that merely employ the concept, reflect a structural approach:[19] Articles 1(4) and 25, read together, only prohibit certain behaviours, while the others prohibit structures thought to give rise to or strengthen a dominant position.[20] One apparent exception is Article 20, which does prohibit behaviour, but is better understood from the structural approach, as it prohibits behaviour only capable of being engaged in by a structurally advantaged business actor.

## IV ABUSE

### i Overview

The ICL is brief and frequently ambiguous. The apparent interpretive tension between its Articles purporting to define 'dominant position' provides only one example. It consists of only 11 Chapters and 53 Articles, with only three of the Chapters being substantive.

Chapter III prohibits specified agreements, Chapter IV prohibits specified activities, while Chapter V prohibits specified activities by business actors in a dominant position, and certain business structures that place business actors in a dominant position. Business actors can theoretically breach provisions of Chapters III and IV without being in a 'dominant position', but it is nearly always the case that only those business actors in such a position will be able to breach such provisions and attract KPPU scrutiny.

*Prohibited agreements*

Chapter III of the ICL prohibits agreements that result in oligopolies, price-fixing, market allotment, boycotts, cartels, certain joint ventures, oligopsonies, vertical integration, exclusive agreements and agreements with foreign entities. In most instances, the Chapter III Articles end with a qualification that a business actor will only be prohibited from entering into such an agreement where this would involve monopolistic practices or result in unfair competition in the relevant market. This reflects the ICL's preference for the application of the rule of reason to, as opposed to a *per se* interpretation of, its prohibitions.

It is worth highlighting Article 11 of the ICL, which prohibits agreements resulting in cartels, as one article that is to be interpreted in accordance with the rule of reason. This contrasts with other jurisdictions, where cartel activities are usually *per se* violations of the relevant competition laws.

*Prohibited activities*

Chapter IV of the ICL prohibits monopolistic and monopsonistic activities, market control and conspiracies. Again, application of the rule of reason is preferred, as is clear from the inclusion in many of the provisions of the caveat that the prohibited activity must result in unfair competition in the relevant market.

19 Ibid.

20 Article 25 of the ICL.

***Abuses of a dominant position***

The ICL prohibits entities from using a dominant position directly or indirectly to:[21]

*a* set trading terms, with the aim of preventing or barring consumers from obtaining goods or services on a competitive basis, with regard to price or quality;

*b* limit markets or technological innovation; or

*c* bar potential competitors from entering the relevant market.

Although not apparent from the text of the prohibition, it is KPPU policy to interpret it in accordance with, again, the rule of reason. In practice, this means the activity of a business actor in a dominant position will only be considered an abuse if it results in unfair competition in the relevant market. It will not be considered an abuse if it contributes to the business' success by delivering efficiency improvements or innovations, as opposed to by excluding competitors.

The test for whether there has been an abuse of a dominant position is objective. No anticompetitive intent is required, although its existence may be important in determining whether there has been an abuse.[22]

**ii Exclusionary abuses**

***Exclusive dealing***

The ICL deals with exclusive dealing by prohibiting a business actor from entering into an agreement with another business actor that provides:[23]

*a* the business actor receiving a good or service is required to either supply or not supply that good or service to a specified party or place;

*b* the business actor receiving a good or service must be willing to buy another good or service from the business actor that supplied the original good or service; or

*c* for a certain price, or discount on the price, of a good or service, on condition that the business actor receiving the good or service from the supplying business actor:

- must be willing to buy another good or service from the supplying business actor; or
- will not buy the same good or service or a good or service of the same type from another business actor that is a competitor of the supplying business actor.

The ICL therefore not only prohibits exclusive dealing, but also a common form of leveraging – the tying agreement – under which, for example, a distributor will purchase a particular good or service on the condition that the distributor purchase another good or service.

Again, the KPPU has issued relevant guidelines.[24]

21 Article 25(1) of the ICL.

22 KPPU Regulation 6 of 2010 on Guidelines on the Implementation of Article 25 of the ICL on Abuse of Dominant Position, Appendix, p. 20, available at http://eng.kppu.go.id/wp-content/uploads/2010/03/Pasal-25-POSISI-DOMINAN.pdf.

23 Article 15 of the ICL.

24 KPPU Regulation 5 of 2011 on Guidelines to Article 15 of the ICL on Exclusive Agreements.

***Refusal to deal***

The ICL prohibits refusals to deal, or boycotts, by prohibiting a business actor from entering into an agreement with a competing business actor that:[25]

*a* could prevent other business actors from engaging in the same business activity, either in a relevant domestic or foreign market; or

*b* provides that the competing business actor will not sell a specified good or service from any other business actor, if this would:

- actually or potentially result in that other business actor's loss; or
- limit the other business actor's ability to sell the specified good or service in the relevant market.

The KPPU also treats the threat of such agreements as breaching the prohibition, as such threats may still induce actions by consumers or suppliers that are harmful to competition.[26]

The KPPU has determined an allegation of a refusal to deal,[27] but is yet to issue relevant guidelines.

**iii Discrimination**

The ICL prohibits price discrimination, by prohibiting a business actor from entering into an agreement that results in a purchaser being required to pay a price for a good or service different to the price to be paid by another purchaser.[28]

The rule of reason prevails, such that in practice the KPPU will not pursue a business actor for price discrimination where the setting of a different price for different purchasers:

*a* does not result in unfair competition in the relevant market; or

*b* is otherwise reasonable in the circumstances, for example, if based on a difference in quantities ordered or payment terms.

The KPPU will, however, pursue a business actor if the discrimination is premised on a non-economic basis (for example, the purchaser's ethnicity, race or social status).

The KPPU is yet to issue relevant guidelines.

**iv Exploitative abuses**

The ICL prohibits predatory, or exclusionary, pricing, by prohibiting business actors from selling a good or service at a loss or an otherwise very low price, with the intention of eliminating competitors from the relevant market, if this would involve monopolistic practices or result in unfair business competition.[29]

The KPPU has yet to determine any allegations of predatory pricing, however it has issued relevant guidelines.[30]

25 Article 10 of the ICL.

26 Ibid.

27 KPPU Decision 11/KPPU-I/2005, *Cement Gresik Distribution* case, dated 22 March 2006.

28 Article 6 of the ICL.

29 Article 20 of the ICL.

30 KPPU Regulation 6 of 2011 on Guidelines to Article 20 of the ICL on Predatory Pricing.

## V REMEDIES AND SANCTIONS

The ICL does not explicitly provide for remedies. It does provide for three categories of sanctions: administrative, basic criminal and additional criminal.

### i Administrative sanctions

The KPPU is authorised to impose, on business actors that have violated the ICL, administrative sanctions, including orders:[31]

*a* annulling a range of prohibited agreements;
*b* to cease prohibited forms of vertical integration;
*c* to cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market or other public harm;
*d* to cease abuses of a dominant position;
*e* preventing a prohibited contemplated merger or consolidation of business actors, or acquisition of shares;
*f* for the payment of compensation; and
*g* fining business actors between 1 billion and 25 billion rupiah.

All sanctions are final. There are no interim measures.

Administrative sanctions are imposed in accordance with KPPU Guidelines,[32] which help to determine compensation payable by, and fines imposed by the KPPU on, business actors that have violated the ICL.

***Compensation***

The Guidelines provide that the amount of compensation payable will be the actual loss or damage suffered by the claiming party, less an amount reflecting the presence of any mitigating factors, including a business actor's cooperation with the KPPU, unintentional violation of the ICL, acts of contrition (including, for example, an early admission), and probability of going bankrupt (Mitigating Factors).[33]

***Fines***

The Guidelines provide that the calculation of the fine, which is payable by a business actor that has violated the ICL, will be completed by the KPPU:

*a* determining Figure 1, which in tender and procurement cases will be the price awarded to the business actor that won the tender or, otherwise, the total turnover attributable to the relevant good or service during the period of the infringement (in practice, the infringement period will be deemed to be the year preceding the violation);
*b* reducing Figure 1 by 90 per cent, giving Figure 2;

31 Article 47(2) of the ICL.

32 KPPU Regulation 4 of 2009 on Guidelines to Administrative Sanctions under Article 47 of the ICL, Appendix, Ch. II, p. 10-11, available at http://eng.kppu.go.id/wp-content/uploads/2010/03/Pasal-47-TINDAKAN-ADMINISTRATIF.pdf.

33 Ibid.

*c* adding to Figure 2 an amount that appropriately reflects the presence of any aggravating factors, including repeated violations, a leading role in violations and the hindrance of any investigation, giving Figure 3;

*d* adding to Figure 3 an amount aimed to achieve other sanctioning aims, including deterrence and ensuring that a business actor does not profit from its violations, giving Figure 4;

*e* deducting from Figure 4 an amount that appropriately reflects the presence of any Mitigating Factors, giving Figure 5; and

*f* adding or deducting an amount, as the case may be, from Figure 5 to bring the fine within the range of permitted fines of between 1 billion rupiah and 25 billion rupiah and, in all cases, to below 10 per cent of Figure 1.

#### ii Basic criminal sanctions

The ICL provides that a business actor that has violated certain Articles of the ICL may be fined between 1 billion rupiah and 100 billion rupiah, and its director or directors may be imprisoned for up to six months.[34]

#### iii Additional criminal sanctions

The ICL provides that should a basic criminal sanction be imposed, additional sanctions may be imposed in the form of:[35]

*a* a revocation of the business actor's business licence;

*b* a prohibition on the business actor, or its director or directors, being a director or commissioner for between two and five years; and

*c* an order requiring the cessation of certain activities by the business actor that causes loss to another.

## VI PROCEDURE

The KPPU, the District Courts, the Supreme Court, the police and the Public Prosecutor's Office enforce the ICL. Of these, the KPPU plays the most important role. The police assist with investigations and the Public Prosecutor's Office becomes involved when the unlikely prospect of criminal charges arises. The courts handle appeals against KPPU decisions, and cases involving ICL questions arising in its original jurisdiction.

The KPPU is composed of a panel of Commissioners (Commission) and a Secretariat. The Commission determines matters after conducting hearings, while the Secretariat investigates and prosecutes. The KPPU will erect a 'Chinese wall' between the Commission and the Secretariat and between units of the Secretariat, as necessary.

34 Article 48 of the ICL.

35 Article 49 of the ICL.

### i Investigations

The KPPU may commence an investigation after receiving a report or complaint,[36] or on its own initiative.[37] Any report must be in the Indonesian language, be submitted to the KPPU, list the Articles of the ICL alleged to have been violated, and enumerate such violations.

Investigations are seldom publicly announced, but the KPPU tends to announce investigations into business actors involved in the energy, SOE, infrastructure, health and food industries. This suggests that investigations will be announced where they involve matters affecting society at large or branches of production of strategic importance.

Business actors can be represented during investigations. There is no time limit on investigations, but KPPU Regulations provide that the unit in charge must report to the Commission within 60 business days of commencing an investigation, at which time the Commission may discontinue or extend the investigation.[38]

After the investigation is complete, the Secretariat will submit a report containing its findings to a Plenary Meeting of Commissioners (Plenary Meeting),[39] which will then consider whether the case should progress. The Secretariat's report and the deliberations of the Plenary Meeting are confidential.

(In 2015, the KPPU issued Guidelines[40] that allow it to review partnership agreements between large enterprise partners and micro, small and medium-sized enterprises, to determine whether such agreements and associated arrangements breach the ICL.)

### ii Hearings

If the Plenary Meeting decides that a case should progress, the Council of Commissioners will be established to carry out a preliminary examination, which must last no longer than 30 business days.[41] During the preliminary examination, the relevant business actor may be summonsed. The Secretariat will share the findings in the report it submitted to the Plenary Meeting with the business actor,[42] which must then respond within seven days by, *inter alia*, calling witnesses (expert or lay) and submitting documentary evidence.[43]

A further examination will then follow, during which the Council will examine witnesses, including experts and government officials appearing for either the Secretariat or the business actor. The Council must complete the further examination within 60 business days,[44] but this may be extended by up to 30 business days.[45]

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36 Article 38(1) of the ICL.

37 Article 36(c) of the ICL.

38 Article 38(1) of KPPU Regulation 1 of 2010 on Case Handling Procedures (Case Handling Procedures).

39 Article 40(1) of the Case Handling Procedures.

40 KPPU Regulation 1 of 2015 on Partnership Monitoring and KPPU Regulation 3 of 2015 on Partnership Case Handling Procedures (which implements Law 20 of 2008 on Micro, Small and Medium-sized Enterprises and Government Regulation 17 of 2013).

41 Article 39(1) of the ICL and Articles 42(1) and 45 of the Case Handling Procedures.

42 Article 45(3) of the Case Handling Procedures.

43 Article 43(1) of the ICL and Article 57(2) of the Case Handling Procedures.

44 Article 43(2) of the ICL and Articles 57(2) and (3) of the Case Handling Procedures.

45 Article 44(2) of the ICL.

### iii Decision

After the further examination, the Council has 30 business days in which to reach a decision. The Council's decision can be by consensus or of a majority. If the latter, any dissenting opinion should form part of the written decision. The Council will announce its decision in a public hearing.

### iv Appeal

The District Courts and the Supreme Court have jurisdiction to hear appeals of KPPU decisions. These courts tend to defer to the KPPU on questions of fact, but are less predictable on questions of law.

*District courts*

A business actor must file an appeal with the District Court within 14 business days of being notified of a KPPU decision,[46] lest it become final.[47]

A District Court panel of judges has 30 business days in which to consider an appeal.[48] The panel of judges may only consider the case file or docket and the text of the KPPU decision – it may not consider new evidence.

If the panel of judges requires that a further examination be completed by the KPPU, it can order the KPPU to examine further specified matters. In doing so, it must provide reasons and set a period in which the further examination must be completed.

The panel of judges must conduct a further hearing on the appeal within seven days of the KPPU filing a report containing its supplementary findings.[49]

*Supreme Court*

Either the KPPU or the business actor may file a further appeal with the Supreme Court within 14 days of being notified of a decision of the District Court.[50] If there is no appeal, the District Court's decision will be final.[51]

The Supreme Court must issue a decision within 30 business days of the appeal being filed,[52] but this requirement is often flouted due to case load imperatives.

46 Ibid.

47 Articles 44(3) and 46(1) of the ICL.

48 Articles 5(4) and (5) of Supreme Court Regulation 3 of 2005 on the Procedure for Filing Appeals of KPPU Decisions (Appeal Filing Regulation).

49 Articles 6(1) to (4) of the Appeal Filing Regulation.

50 Article 45(3) of the ICL.

51 Article 46(1) of the ICL.

52 Article 45(4) of the ICL.

***Appeal statistics***[53]

| | *District Court* | | *Supreme Court* | | | |
|---|---|---|---|---|---|---|
| | *Appeal from KPPU* | | *Appeal to the Supreme Court of Cassation* | | *Appeal for Judicial Review by the Supreme Court* | |
| | *Total* | *%* | *Total* | *%* | *Total* | *%* |
| *Upheld* | 67 | 59 | 63 | 71 | 14 | 88 |
| *Overturned* | 47 | 41 | 26 | 29 | 2 | 12 |

## VII PRIVATE ENFORCEMENT

The ICL does not provide for private enforcement.

A party that suffers loss because of a violation of the ICL may, however, file a written report with the KPPU that contains a complete and clear statement of the alleged violation and loss.[54] This may trigger an investigation by the KPPU and an award of compensation to the reporting party (in the form of an administrative sanction imposed on the business actor that violated the ICL). The KPPU is yet to award such compensation.

## VIII FUTURE DEVELOPMENTS

Parliament recently included a bill, which if passed will introduce significant amendments to the ICL, in the 2016 National Legislative Programme (it had also been included in the 2015 Programme). There is little certainty as to which of the proposed amendments will survive the legislative process, but it is likely that at least the following reforms will be achieved:

*a* The KPPU, the District Courts and the Supreme Court will have an expanded extraterritorial jurisdiction with respect to the ICL; the definition of 'business actor' will be expanded to include those domiciled outside Indonesia and who do not even engage in business activities in Indonesia, but whose conduct has a negative impact on the Indonesian market.

*b* The voluntary pre-M&A and mandatory post-M&A notification systems will be replaced with a mandatory pre-M&A notification system. The categories of M&A activities that must be the subject of such notification will be expanded to include asset acquisitions and the establishment of joint ventures.

c A 'leniency programme' will be introduced, under which the KPPU will have more discretion in the application of administrative sanctions, such that it will be able to waive or reduce penalties if a business actor has been proactive in disclosing a violation of the ICL.

*d* 'Changes of behaviour' will be incentivised, such that if a business actor notifies the KPPU of an ICL breach and takes action to remedy that breach, this may result in a KPPU investigation not commencing or an ongoing investigation being terminated.

*e* The KPPU will have greater powers, including the ability to search premises, and compel the attendance of witnesses and the production of documentary evidence.

53 2014 KPPU Annual Report, p.33.

54 Article 38(2) of the ICL and Articles 1(12), 2(3) and 11(4) of the Case Handling Procedures.

*f* The KPPU will be able to make interim orders including, for example, to enjoin a business actor from continuing with an alleged breach of the ICL for the duration of a KPPU investigation.

*g* Financial penalties that may be imposed on business actors found to have breached the ICL will be increased.

*h* Appeals from KPPU determinations will be referred to the Commercial Court, instead of the District Court.

If the Indonesian parliament approves each of these proposed amendments, the ICL will have moved closer to equivalent legal regimes in more highly developed jurisdictions, and business actors will need to pay significantly more attention to compliance with the ICL.

# Chapter 14

# ITALY

*Matteo Beretta and Gianluca Faella*[1]

## I INTRODUCTION

Abuse of dominance within the Italian market, or in a substantial part of it, is prohibited by Article 3 of Law 10 October 1990, No. 287 (the Competition Act), which closely resembles Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 3 does not provide a definition of abuse but lists examples of abusive conduct.[2]

In principle, Italian competition rules apply only to practices that do not affect intra-EU trade. As the Italian Competition Authority (ICA) and the Italian courts tend to interpret broadly the notion of effect on intra-EU trade, in most cases they apply EU rules. However, the choice of the applicable rules does not materially affect the outcome of a case, given that, pursuant to Article 1(4) of the Competition Act, Article 3 must be interpreted in accordance with well-established EU principles.

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2 In particular, it is prohibited to:
*a* directly or indirectly impose unjustifiable burdensome purchase or selling prices or other contractual conditions;
*b* limit or restrict production, market outlets or market access, investment, technical development or technological progress;
*c* apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; and
*d* make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The ICA has not issued formal guidance on abuses of dominance. However, the Commission Guidance on exclusionary abuses (the Guidance) may provide useful indications on the interpretation of Article 3.[3]

Article 3 applies also to public firms and to those in which the state is the majority shareholder. Pursuant to Article 8 of the Competition Act, antitrust rules do not apply to firms entrusted with the supply of services of general economic interest or holding a legal monopoly, insofar as this is indispensable to perform the specific tasks assigned to them.[4]

## II YEAR IN REVIEW

In 2015, the ICA closed three investigations regarding abuse of dominance. In one case, it found an infringement and imposed a fine.[5] In the other two cases, the ICA accepted the commitments offered by the dominant firm and closed the proceedings without establishing the alleged infringement.[6] At the beginning of 2016, the ICA issued another commitment decision in *E-Class/Borsa Italiana*.[7]

In May 2015, the Council of State confirmed a 2014 ruling of the Latium Regional Administrative Tribunal (TAR), which had upheld an ICA finding of abuse.[8]

The abuse cases in the period under review concerned, *inter alia*, refusal to deal, margin squeeze, discriminatory and exploitative practices, and misuse of rights and legitimate interests.

The 2015 decision-making practice confirms the ICA's increasing focus on the abusive exercise of rights or legitimate interests arising from contracts, sector-specific regulation or other rules, as shown by the *SEA* and *CONAI* cases.

In March 2015, the ICA imposed a fine on Società per azioni Esercizi Aeroportuali (SEA) for abusive conduct in the markets for the management and provision of airport facilities for commercial and general aviation, and ground-handling services for general aviation at Milan Linate airport.[9] SEA is the sole manager of Milan Linate and Milan Malpensa airports for both aviation activities (i.e., management, development and maintenance of infrastructures and handling services) and non-aviation activities (i.e., commercial and real estate services). According to the ICA, SEA abused its dominant position by preventing access to the market for aviation activities in Milan Linate airport by Cedicor, a Uruguayan company active in the management of airport infrastructures.

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3 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02.

4 Firms holding a legal monopoly must operate through separate companies if they intend to operate on other markets. When firms entrusted with the provision of services of general economic interest or holding a legal monopoly supply their subsidiaries on different markets with products or services over which they have exclusive rights, they must make these products or services available to their direct competitors on equivalent terms and conditions.

5 Decision of 25 March 2015, No. 25387, A474, *SEA/Convenzione ATA*.

6 Decisions of 15 July 2015, No. 25561, A473, *Fornitura acido colico*; 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

7 Decision of 3 February 2016, No. 25859, A482, *E-Class/Borsa Italiana*.

8 Council of State, May 2015, No. 2479.

9 Decision of 25 March 2015, No. 25387, A474, *SEA/Convenzione ATA*.

In 1961, SEA had granted ATA Trasporti (ATA) an exclusive subconcession to manage certain general aviation facilities. In 2013, ATA's main shareholder, a company then in liquidation, held a tender procedure to sell its 98.3 per cent stake in ATA, which Cedicor made a bid to acquire. The ICA contested that SEA had adopted three initiatives to hinder access to the market by Cedicor through the acquisition of ATA: firstly, SEA had tried to obstruct the procedure for the sale of ATA shares by contesting inefficiencies and lack of information by the adviser and the seller; secondly, it had terminated the subconcession agreement with ATA after it found out that Cedicor's offer for ATA shares was higher than its own; and thirdly, it had submitted a second bid, higher than the first, to win the tender. According to the ICA, SEA's conduct intentionally and irremediably altered competition for the market by preventing the entry of an efficient competitor, which was capable of offering a high quality service. The ICA dismissed the defence based on SEA's right to terminate the subconcession agreement, on the ground that, regardless of whether the termination was legitimate, the dominant firm had strategically exercised its alleged right of termination with the sole purpose of preventing Cedicor's entry (through ATA) in the market for general aviation services at Milan Linate airport. The ICA also rejected SEA's efficiency defence based on alleged synergies in the integrated management of general and commercial aviation activities by a single firm, because the alleged efficiencies were not considered sufficient to compensate the serious anticompetitive effects of the contested conduct.

In September 2015, the ICA accepted commitments offered by CONAI and COREPLA, two consortia active in the management of packaging special waste (i.e., waste produced by non-domestic users),[10] in proceedings concerning, *inter alia*, an alleged abuse by the dominant firm of its role in an administrative procedure necessary for allowing a competitor to enter the market. CONAI is a mandatory consortium that brings together packaging manufacturers and users, with a view to financing and organising the collection and recycling of packaging waste. In the plastic packaging segment, CONAI is active through COREPLA, a consortium representing plastic packaging manufacturers and users. Aliplast, a company specialising in the collection, recycling and recovery of plastic packaging, had created an autonomous system for managing packaging waste, except for a small portion that still needed to be processed through CONAI's infrastructure. Autonomous systems need to be duly authorised by the Ministry of the Environment in an administrative procedure featuring CONAI as an adviser.

The ICA contested that CONAI had implemented an exclusionary strategy by: abusing its advisory position through a number of objections with the exclusive purpose of hindering the authorisation of the new Aliplast system; refusing to quantify the fee owed to CONAI by Aliplast for the residual recycling activities, thus preventing the conclusion of an agreement that was an essential condition for authorisation; and disseminating disparaging remarks concerning Aliplast's system, which could negatively influence consumers.

In order to remove the ICA's concerns, the consortia offered a number of commitments. *Inter alia*, they undertook to: appoint an independent monitoring trustee to advise the Ministry of Environment in the recognition procedure; negotiate with autonomous systems to determine the fee for the portion of their packaging activities that continued to be handled by CONAI; publish on CONAI's website detailed information regarding the autonomous systems; and avoid influencing users on the legitimacy of such systems.

10 Decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

In July 2015, the ICA accepted the commitments offered by Industria Chimica Emiliana (ICE) in the context of an investigation concerning a more traditional type of abuse (i.e., a price-squeeze strategy implemented by a vertically integrated firm).[11] ICE was found to be dominant in the production and sale of cholic acid, an input used to manufacture pharmaceutical products. The ICA contested that this firm had implemented a price-squeeze strategy aimed at excluding downstream competitors by increasing the price of the intermediate product and offering selective price cuts to customers of a competitor in the downstream market. In order to remove the ICA's concerns, ICE undertook to sell the raw material used for the production of cholic acid at a price equal to the average price paid by ICE for the purchase of the raw material plus a given margin. The ICA held that this commitment would limit ICE's capability of engaging in exclusionary pricing policies because, in case of increase in the price of cholic acid, competitors could purchase the raw material at a competitive price to produce cholic acid directly or through another firm.

In February 2016, the ICA accepted commitments offered by the London Stock Exchange Holdings Italia and its subsidiaries Borsa Italiana, the Italian stock exchange, and BIt Market Services (BIMS), a company vertically integrated with Borsa Italiana, which is active in the provision of financial information.[12] Borsa Italiana supplies financial data to intermediaries and information providers (including BIMS) active in the downstream market for the provision of financial information. The ICA contested that Borsa Italiana had abused its dominant position by forcing BIMS's competitors to provide a detailed list of their customers and the type of data sold to them. This information enabled BIMS to learn the identity and needs of competitors' clients and to specifically target them, including through selective price cuts.

The parties offered both structural and behavioural remedies. In particular, they undertook to divest BIMS's business division in charge of supplying financial information services in the downstream market. In addition, the parties undertook to implement a set of behavioural remedies during the time needed for the divestiture of the financial information division, with a view to ensuring a certain degree of separation between the financial information division and Borsa Italiana, preventing possible discriminatory practices and limiting the possible exchange of sensitive information.

In May 2015, the Council of State upheld the TAR ruling of 8 May 2014, which had confirmed an ICA decision imposing a fine of approximately €103.8 million on Telecom Italia, the incumbent in the electronic communications sector.[13] In 2013, in *Wind-Fastweb/Condotte Telecom Italia*, the ICA fined Telecom Italia for having restricted other operators' access to its fixed network by rejecting an unjustifiably high number of competitors' requests for activation of wholesale services and treating them in a discriminatory fashion compared with those coming from its own internal divisions, as well as for having adopted an anticompetitive discounting policy for large business clients in the market for retail access to the fixed-telephone network, thereby squeezing competitors' margins.[14] In the assessment of the alleged margin squeeze, the ICA used as a benchmark not the average prices actually charged at the retail level, nor

11 Decision of 15 July 2015, No. 25561, A473, *Fornitura acido colico*.

12 Decision of 3 February 2016, No. 25859, A482, *E-Class/Borsa Italiana*.

13 Council of State, 15 May 2015, No. 2479; TAR, 8 May 2014, No. 4801.

14 See decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*.

the individual offers made to different customers, but the prices resulting from a hypothetical simultaneous application of the maximum discounts provided for by Telecom Italia's price lists for the various types of narrowband access services.

On appeal, the incumbent argued, *inter alia*, that it had complied with the pervasive access regulation adopted by the Italian Telecommunications Authority (AGCom), and that the data on rejections of requests did not support the ICA's claims. Furthermore, Telecom Italia maintained that it had not actually implemented the contested discount policy, which in any event had not led to any margin squeeze. The administrative court held that the ICA decision did not conflict with the regulatory framework. It noted that Telecom Italia owns an essential facility and, thus, it is under an obligation to grant access to its fixed network on fair, reasonable and non-discriminatory terms. According to the TAR, the evidence collected by the ICA showed that Telecom Italia had treated competitors' requests for activation of wholesale access services in a discriminatory manner compared with requests originating from its own commercial divisions. Furthermore, the TAR upheld the ICA's view that Telecom Italia had implemented a discount policy capable of preventing equally efficient competitors from operating at a profit.

The incumbent challenged the TAR ruling before the Council of State, but the latter upheld the findings of the lower court. According to the Council of State, Telecom Italia's constructive refusal to supply consisted in the specific procedures set out for the activation of services to its competitors, which were structurally different from those applicable to the requests submitted by Telecom Italia retail division. External requests were, *inter alia*, managed by an intermediary wholesale division and subject to preliminary formal verification. By contrast, internal requests were directly submitted to Open Access, the functionally separated division in charge of supplying access services, were not subject to the same formal verification and were based on more updated databases. In addition, competitors' requests that could not be satisfied were rejected, and had to be submitted again, while Telecom Italia's internal requests were simply suspended. According to the court, the differences in activation procedures resulted in more complexity and higher costs for competitors and, thus, amounted to discriminatory treatment. The Council of State rejected Telecom Italia's defence based on the compatibility of its procedures with the telecommunications regulatory framework, on the ground that sector-specific *ex ante* regulation and *ex post* antitrust enforcement are complementary tools and play different roles. As to margin squeeze, the Council of State upheld the ICA's view that Telecom Italia's discount policy for large business clients could not be replicated by as efficient competitors. The court also rejected Telecom Italia's claim that the discount policy had not been actually implemented. In this respect, the Council of State maintained that, based on EU case law, a discount policy does not need to have actual foreclosure effects, as the mere possibility of anticompetitive effects is sufficient for a finding of abuse.

In 2015, Italian civil courts also dealt with different cases concerning alleged abuses of dominance. Compared to the ICA, civil courts dealt with more traditional and established types of abuse, such as excessive and discriminatory prices, price squeezing and refusal to grant access to an essential facility.

In January 2015, the Court of Milan ruled that SEA had abused its dominant position by charging excessive and discriminatory prices for rent of premises for office use in Malpensa Airport.[15] As sole manager of Milan Malpensa airport, SEA rents airport premises in accordance

15 Court of Milan, 14 January 2015, No. 429.

with the rules set by the Italian Civil Aviation Authority. The latter determined, *inter alia*, the maximum rent applicable to providers of ground handling services for air carriers. Beta Trans, a company active in the provision of ground handling services for cargo air carriers, rented airport premises for ground handling activities as well as for office use. However, the prices charged by the dominant firm for the rent of premises for office use were higher than those set by the Italian Civil Aviation Authority. Beta Trans brought a civil action for damages caused by alleged excessive and discriminatory prices charged by SEA for the rent of premises for office use. SEA argued, *inter alia*, that the rent of airport premises for office use was not necessary for Beta Trans' activities, as confirmed by the fact that other ground handling providers located their offices in alternative premises near the airport. The Court of Milan rejected SEA's defence. According to the Court, substitutability should only be taken into account in the definition of the relevant market and the assessment of dominance. It is not for the dominant firm to decide whether providers of ground handling services should locate their offices inside the airport or in other locations.

In June 2015, the Italian Supreme Court annulled a ruling of the Rome Court of Appeal concerning the stand-alone civil action for damages initiated by 52 food wholesalers against Cargest, the sole manager of the Rome wholesale food market.[16] The claimants argued that Cargest, the only company allowed to lease the Rome food market commercial lots, imposed unfair and discriminatory conditions on its clients. According to wholesalers, there was no viable alternative market, as the others were characterised by higher transport costs and inadequate facilities. In March 2010, the Court of Appeal of Rome rejected the claim because there was insufficient evidence.[17] In particular, according to the Court of Appeal, the claimants had failed to prove the size of the relevant geographic market, which is a necessary preliminary step to establish an abuse of dominance.

The Supreme Court held that the lower court's ruling was based on a mechanical interpretation of the burden of proof principle. In stand-alone private enforcement cases, such a strict application of the burden of proof principle could hinder the effective exercise of the right to compensation. According to the Court, judges should take into account the information asymmetry between claimants and defendants in stand-alone civil actions. Competition law claims often require complex factual and economic analysis based on data in possession of third parties or the counterparty. The Court also made reference to the Damages Directive,[18] which provides for a set of rules aimed at facilitating private antitrust actions, but was not yet implemented at the time of the judgment. In light of the above, the Supreme Court concluded that civil courts should adopt a flexible interpretation of national procedural rules, with a view to ensuring an effective application of competition rules in private actions for damages. In particular, civil courts should effectively use the tools available under Italian law (including orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful to reconstruct the allegedly anticompetitive conduct.

In July 2015, the Court of Milan ruled that Vodafone had abused its dominant position in the fixed-to-mobile call termination market by implementing a margin-squeeze strategy to

16 Court of Cassation, 4 June 2015, No. 11564.

17 Court of Appeal of Rome, 8 March 2010, No. 991.

18 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.

the detriment of BT Italia.[19] The action for damages was based on the statement of objections issued by the ICA on 28 July 2006 in case A357, concerning alleged anticompetitive practices implemented by Telecom, Vodafone and Wind. In that case, the ICA closed the proceedings against Vodafone by accepting the latter's commitments, while it continued the investigation against the other investigated undertakings. As a consequence, BT Italia's civil action against Vodafone was not, strictly speaking, a follow-on action. Nonetheless, the Court stated that the conclusions reached by the ICA in the statement of objections and the infringement decision with regard to the other parties for similar practices should not be neglected, as they were at least capable of providing useful circumstantial evidence. Furthermore, a commitment decision implies at least that the contested conduct is considered likely. Based on the above, the Court made extensive reference to the ICA's findings to define the relevant market and establish the infringement. The Court also requested an expert opinion, which confirmed the ICA's findings.

In September 2015, the Court of Appeal of Milan partially annulled a ruling of the Court of Milan,[20] concerning an alleged abuse committed by Ryanair.[21] In 2013, the Court of Milan stated that Ryanair had abused its dominant position by refusing to grant an online travel agency (OTA) access to updated information on its flight tickets and by hindering its intermediation activity. The Court found that Ryanair was dominant in the upstream market for air transportation services, given its *de facto* monopoly in 49 intra-EU routes and its share exceeding 50 per cent in 19 other routes. In light of the very strong market position on several routes, the Court of Milan concluded that information on Ryanair tickets should ultimately be considered an essential facility, access to which was necessary for OTAs seeking to offer their services. The Court of Appeal stated that the first instance judge had not adequately proved that Ryanair was dominant and that its conduct was capable of restricting competition. The appellate court focused on the downstream market for travel agency services and noted that, as Ryanair held only a 10 per cent share of EU flights, there was no proof that it was capable of significantly restricting competition by retaining the right to directly sell its tickets to final customers.

## III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market. The ICA's general approach to market definition is consistent with the Commission's practice (in particular, the ICA typically focuses on demand-side[22] and supply-side substitutability[23]). Similarly, the ICA follows the EU notion of dominance.[24]

19 Tribunal of Milan, 28 July 2015, No. 9109.

20 Tribunal of Milan, 11 June 2013, No. 3603.

21 Court of Appeal of Milan, 17 September 2015, No. 3390.

22 See, e.g., decision of 28 June 2011, No. 22558, A415, *Sapec Agro/Bayer-Helm*.

23 See, e.g., decision of 17 December 1998, No. 6697, A 209, *Goriziane/Fiat Ferroviaria*.

24 See, e.g., decisions of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; 14 June 2000, No. 8386, A274, *Stream/Telepiù*; and 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

Market shares are a key factor in the assessment of dominance.[25] Market shares exceeding 40 per cent are normally considered an indication of dominance. However, firms holding market shares lower than 40 per cent may also be dominant if the remaining part of the market is composed of small competitors.[26] The stability of market shares is also important,[27] but the fact that the market share is decreasing does not necessarily preclude a finding of dominance.[28] In the assessment of dominance, the ICA and national courts may consider a number of additional factors, which give the firm concerned a competitive advantage or raise barriers to entry.

A dominant position may be held by one or more firms. In accordance with EU case law, collective dominance may be based not only on structural or contractual links between the companies concerned, but also on the economic interdependence among firms active in an oligopolistic market.[29]

Abuse of economic dependence in the contractual relationship with a single customer or supplier (relative dominance) is prohibited by Article 9 of Law No. 192/1998. This provision aims at protecting the interests of weak parties in contractual relationships. When the contested conduct affects competition on the market, the ICA may exercise its investigative and fining powers under the Competition Act, and it may apply both Article 9 of Law No. 192/1998 and Article 3 of the Competition Act.

## IV ABUSE

### i Overview

A dominant firm violates Article 3 only if it commits an abuse. Dominance itself is not an offence.

Dominant firms have a special responsibility not to impair undistorted competition in the relevant market.[30] As a consequence, conduct that would normally be lawful may be considered anticompetitive if engaged in by a dominant firm.

Article 3 applies to both anticompetitive conduct aimed at excluding competitors (exclusionary abuses) and the exploitation of dominant firms' market power (exploitative abuses).

The list of abuses provided in Article 3 of the Competition Act is not exhaustive and the ICA has often fined sui generis anticompetitive practices. The crucial challenge is to identify the practices that pose unacceptable competitive dangers. In this respect, the ICA has traditionally adopted a case-by-case approach, which does not seem to reflect a coherent theoretical framework.

25 See, for example, decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; TAR, 23 September 2008, No. 8481.

26 See, for example, decision of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*.

27 See, e.g., decision of 30 June 2010, No. 21297, A383, *Mercato del cartongesso*.

28 See, for example, decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

29 See decision of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*.

30 See, e.g., Council of State, 19 July 2002, No. 4001; TAR, 14 April 2008, No. 3163; decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; Council of State, 15 May 2015, No. 2479.

Behaviour is considered unlawful if it may hinder the (limited) level of competition still existing in the market or the development of that competition. To establish an abuse, it is sufficient to demonstrate a potential prejudice to competition. It is not necessary to prove that the conduct had actual anticompetitive effects.[31]

Abuse is an objective concept. An anticompetitive intent is not a prerequisite for a finding of abuse.[32] However, the existence of an exclusionary intent may play an important role in the assessment of an alleged abuse, in particular when the contested conduct is part of a plan aimed at eliminating competitors.[33] An exclusionary intent may also justify a finding of abuse when the dominant firm exercises a right in an objectionable manner to pursue an objective different from that for which the right was granted in the first place.[34]

A conduct does not infringe Article 3 if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm's or third parties' legitimate interests or leads to a cost reduction.[35]

### ii Exclusionary abuses

***Exclusionary pricing***

The ICA issued its first decision on predatory pricing in 1995 in *Tekal/Italcementi*.[36] In accordance with EU case law,[37] the ICA held that prices below average variable cost (AVC) must be presumed unlawful, while prices between AVC and average total cost (ATC) are unlawful if they are part of an anticompetitive plan. The contested conduct was considered abusive even though it was not proven that the dominant firm was able to recoup the losses incurred by selling at below-cost prices. The ICA's view is consistent with the principles established by the ECJ,[38] and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.[39]

In Caronte,[40] the ICA used different cost benchmarks. Instead of relying on AVC and ATC, the ICA focused on short-run average incremental cost (SRAIC) and LRAIC. According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least

31 See, e.g., Council of State, 15 May 2015, No. 2479; TAR, 30 August 2006, No. 7807; 20 October 2006, No. 10678.

32 See, e.g., Council of State, 19 July 2002, No. 4001.

33 See, for example, decisions of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

34 See Council of State, 12 February 2014, No. 693; 8 April 2014, No. 1673; TAR, 27 March 2014, No. 3398.

35 See, for example, decisions of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*, Bulletin 8/1999; 23 July 1993, No. 1312, A35, *Cesare Fremura/Ferrovie dello Stato*.

36 Decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

37 Case C-62/86, *AKZO/Commission*, 1991 ECR I-3359.

38 Case C-334/96, *Tetra Pak/Commission*, 1996 ECR I-5951.

39 *Brook Group v. Brown & Williamson Tobacco*, 509 US 940 (1993).

40 Decision of 17 April 2002, No. 10650, A267, *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*.

equal to SRAIC, but below LRAIC, are unlawful if they are part of an anticompetitive plan. However, a few years later, in *Mercato del calcestruzzo cellulare autoclavato*, the ICA made reference to average avoidable cost (which was considered equal to AVC) and ATC.[41]

More recently, in *TNT/Poste Italiane*,[42] the ICA used the LRAIC benchmark in the analysis of the pricing policies of the incumbent in the postal sector. However, the ICA adopted a strict approach in calculating LRAIC. The latter was considered essentially equal to average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR,[43] whose judgment was upheld by the Council of State.[44]

In a few cases, the ICA and national courts have held that even above-cost prices offered to strategic customers (selective discounts) may be abusive. This may be the case, in particular, if they are part of a broader exclusionary strategy, implemented through different abusive practices,[45] or the dominant firm uses privileged information, which it holds because of its status of incumbent and vertically integrated operator, but is not available to rivals, to implement win-back or retention policies.[46] Furthermore, according to the ICA and the TAR, a discount may be *per se* abusive, regardless of the relationship between price and cost, if it is the result of a privilege exclusively conferred on the dominant firm by sector-specific rules incompatible with EU rules.[47]

A vertically integrated firm, active in the supply of an input and a final product, may infringe competition rules if it sets its upstream or downstream prices so as to squeeze competitors' margins. For instance, in *Telecom*, the ICA held that the Italian incumbent in the electronic communications sector abused its dominant position by charging competitors more

41 Decision of 24 October 2007, No. 17522, A372, *Mercato del calcestruzzo cellulare autoclavato*.

42 Decision of 14 December 2011, No. 23065, A413, *TNT Post Italia/Poste Italiane*.

43 TAR, 25 June 2012, No. 5769.

44 Council of State, 6 May 2014, No. 2302. The Council of State held that the analysis of LRAIC was erroneous in several respects: (1) the predation analysis should have been carried out *ex ante*, on the basis of data and information available when the firm set its prices, and not *ex post*, on the basis of regulatory costs; (2) the ICA had not taken into account the increase in regulatory costs because of universal service obligations; (3) the ICA had assessed the profitability of the service over the first year-and-a-half of activity, without considering that initial losses in the launch of a new product may be inevitable; and (4) the ICA had wrongfully identified the incremental costs borne for the supply of the services concerned by allocating to these services resources used mainly for other services.

45 Decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; Court of Appeal of Milan, 16 May 2006.

46 Decision of 12 November 2008, No. 19249, A375, *Sfruttamento di informazioni commerciali privilegiate*; Court of Appeal of Milan, 16 May 2006.

47 Decision of 27 March 2013, No. 24293, Case A441, *Applicazione dell'IVA sui servizi postali*, Bulletin No. 16/2013; TAR, 7 February 2014, No. 1525.

than it charged its commercial divisions for the relevant inputs, thus reducing rivals' margins and excluding equally efficient firms.[48] A price squeeze may also be the result of discounts offered to retail customers.[49]

***Exclusive dealing***

Exclusive dealing obligations may constitute an abuse under Article 3 when the conduct may significantly foreclose access to the market. In *Diritti calcistici*,[50] the ICA found that Mediaset, the main Italian TV operator, violated Article 102 of the TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their home matches for the 2004 to 2007 seasons. Moreover, Mediaset negotiated with the same clubs exclusive pre-emption rights for the broadcasting of their matches through all platforms from 2007 to 2016. Through exclusivity, 'English clauses' and pre-emption rights, Mediaset rendered the relevant TV content *de facto* unavailable for a long period for its competitors.

The ICA has also held that loyalty discounts and rebates, conditioned upon the customer obtaining all or most of its requirements from a dominant supplier, or reaching a given target, may infringe competition rules, because they tend to eliminate or restrict the purchasers' freedom to choose their supply sources, thus hindering rivals' access to the market or development.[51] The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.[52]

Furthermore, according to the ICA, loyalty discounts may be anticompetitive because they imply discrimination between customers.[53]

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48 Decision of 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; see also decision of 23 October 2008, No. 19020, A376, *Aeroporti di Roma-Tariffe aeroportuali*.

49 See, e.g., decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by the TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479. See also decision of 15 July 2015, No. 25561, A473, *Fornitura acido colico*, concerning both an increase in the upstream price and selective discounts in the downstream market. On the above cases, see Section II, *supra*.

50 Decision of 28 June 2006, No. 15632, A362, *Diritti calcistici*.

51 See, for example, decisions of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*; 16 November 2004, No. 13752, A351, *Comportamenti abusivi di Telecom Italia*; 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*; 19 October 1994, No. 2379, A49, *Pozzuoli Ferries/Gruppo Lauro*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

52 In some cases, intent and the existence of an overall exclusionary strategy played an important role in the finding of infringement. See, for example, Council of State, 10 March 2006, No. 1271.

53 See, in particular, decisions of 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*; 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sud/Coca Cola Italia*.

The treatment of loyalty discounts is consistent with the traditional formalistic approach of the EU institutions. The ICA does not apply any price-cost test to establish whether a loyalty discount scheme is anticompetitive. It remains to be seen whether the ICA will apply the as-efficient test introduced by the Commission Guidance on exclusionary abuses in the future.

***Leveraging***

Article 3(d) of the Competition Act prohibits firms in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another (the tied product or service). Tying may also be obtained through price incentives, such as, in particular, bundled discounts and rebates. For instance, in *Albacom Servizio Executive*,[54] the ICA found that the incumbent in the telecommunications sector infringed Article 3 by making certain rebates on the price of a monopolised service conditional upon attaining certain traffic volumes in a liberalised service.

***Refusal to deal***

Refusal to deal may amount to an abuse when it may substantially weaken competition in the market where the dominant firm operates or in a different market and is not objectively justified. Refusal to deal encompasses a considerable range of practices, including the refusal to supply products or services, to provide information and to grant access to an essential facility. Practices such as refusal to begin negotiations, refusal to renew a contract or unilateral termination of a contract may be considered instances of refusal to deal. The imposition of onerous conditions by a dominant firm,[55] dilatory strategies,[56] and other forms of constructive refusal to deal,[57] might have the same effect as an outright refusal to deal. Differences in the processes for the management of requests for services submitted by internal divisions and by competitors may amount to a constructive refusal to deal if they entail more complexity and, possibly, higher costs for competitors.[58]

54 Decision of 29 May 1997, No. 5034, A156, *Albacom Servizio Executive*; see also decisions of 20 September 2000, No. 8692, A247, *Aeroporti di Roma-Tariffe del Groundhandling*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

55 See decision of 6 November 1997, No. 5446, A129, *Infocamere/Cerved*. A refusal to deal by a dominant firm is abusive only if it is capable of having a significant impact on the market. Evidence of a single refusal to supply may not be sufficient to find an abuse. See TAR, 21 February 2001, No. 1371.

56 See decision of 25 July 2012, No. 23770, A436, *Arenaways-Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri*. However, the decision was annulled by the TAR, 27 March 2014, No. 3398, according to which the ICA had erroneously held that the administrative procedures initiated by the dominant firm were merely dilatory.

57 See decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479.

58 Id.

The ICA defines the notion of essential facility in accordance with principles established by EU case law.[59] Intellectual property rights may also be considered essential facilities.[60]

The ICA has applied the principles on refusal to deal and essential facilities in a number of cases, especially in liberalised sectors.[61] In its decision practice, the ICA has made extensive reference to EU competition law principles. However, it has often adopted a broad and flexible interpretation of the requirements set by the ECJ's case law.[62]

A refusal to deal is not abusive if it is objectively justified. This may be the case, for instance, when the dominant firm does not have enough capacity to satisfy third parties' demand, the customer is insolvent or does not respect the contractual terms, or the firm requesting access does not meet the technical or security requirements needed to access an infrastructure.[63]

In principle, lack of capacity on a facility (capacity saturation) should constitute an objective justification.[64] In exceptional circumstances, however, a dominant firm may be obliged to invest in the development of the facility. Indeed, in Eni-TTPC,[65] the ICA held that the interruption of the expansion of a pipeline used for the international transport of gas and the termination of the 'ship or pay' agreements entered into by the firm managing the facility – a dominant firm's subsidiary – with independent shippers amounted to an abuse of dominant position. The ICA did not apply the essential facility doctrine since alternative infrastructures could be used to transport gas into Italy, and the dominant firm was not under an obligation to invest in the development of the pipeline. Nonetheless, the ICA held that the interruption of the expansion was abusive, due to the interference of the mother company in the subsidiary's

59 See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*.

60 See, for example, decisions of 8 February 2006, No. 15175, *Glaxo-Principi attivi*; 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341; Court of Milan, 4 June 2013, No. 7825.

61 See, for example, decisions of 17 March 1993, No. 1017, A11, *IBAR/Aeroporti Roma*; 16 March 1994, No. 1845, A56, IBAR/SEA; 10 January 1995, No. 2662, A71, *Telsystem/Sip*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*; 11 November 1996, No. 4398, A102, *Associazione Consumatori Utenti/Alitalia*; 30 October 1997, No. 5428, A178, *Albacom/Telecom Italia-Circuiti dedicati*; 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, upheld by Council of State, 15 May 2015, No. 2479; 19 February 2014, No. 24804, A443, *NTV/FS/Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri ad alta velocità*.

62 See, for example, decision of 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341.

63 See, for example, decision of 2 March 1995, No. 2854, A61, *De Montis Catering Roma/ Aeroporti di Roma*.

64 However, the ICA has normally rejected the defence in the light of the specific facts of the case: see, for example, decisions of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*; 6 June 1996, No. 3953, A107, *Fina Italiana/Compagnia Italpetroli*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*.

65 Decision of 15 February 2006, No. 15174, A358, *Eni-Trans Tunisian Pipeline*.

investment decisions. In a similar case,[66] the Commission adopted a different approach, as it explicitly relied on the essential facility doctrine. In particular, the Commission held that the different infrastructures used to transport gas into Italy, taken as a whole, constituted a single essential facility, and stated that the incumbent may have an obligation to invest in the development of an infrastructure, if a system operator not vertically integrated in the sale of gas would do so.

### iii Discrimination

Article 3(c) prohibits dominant firms from applying dissimilar conditions to equivalent transactions, thus placing a trading party at a competitive disadvantage. Charging different prices may be abusive only if it is not economically justifiable.[67]

In many cases, the ICA fined dominant firms for having favoured their subsidiaries or commercial divisions active in downstream markets to the detriment of competitors, by granting preferential access to certain resources,[68] or applying discriminatory conditions.[69] Non-price discrimination may also infringe Article 3.[70]

### iv Exploitative abuses

A firm may abuse its dominant position if it directly or indirectly imposes unfair selling or purchasing prices. To establish an exploitative abuse, it may be necessary to engage in an in-depth cost analysis, aimed at verifying whether the difference between the costs actually incurred and the price actually charged is excessive.[71] If this analysis cannot be carried out or is inconclusive, the ICA compares the prices imposed by the dominant firm with those charged by the same firm or competitors for the same product or service in other markets.[72]

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66 Commission decision of 29 September 2010, Case COMP/39.315, ENI.

67 For instance, in *Alitalia*, the ICA held that Alitalia's incentive schemes for travel agents were discriminatory because, in some cases, different commissions were granted to travel agents for reaching similar sales targets. Thus, the agreements placed some travel agents at a competitive disadvantage without an acceptable justification. See decision of 27 June 2001, No. 9693, A291, *Assoviaggi/Alitalia*. See also, *inter alia*, decisions of 17 March 1993, No. 1017, A11, *IBAR/Aeroporti Roma*; 10 April 1992, No. 452, A4, *Ancic/Cerved*.

68 See, for example, decision of 27 February 2014, No. 24819, A444, *Akron-Gestione rifiuti urbani a base cellulosica*.

69 See, for example, decisions of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*; 27 April 2001, No. 9472, A285, *Infostrada/Telecom Italia-Tecnologia ADSL*; 29 March 2006, No. 15310, A365, *Posta elettronica ibrida*; 24 February 2000, No. 8065, A227, *Cesare Fremura-Assologistica/Ferrovie dello Stato*.

70 See, for example, decisions of 27 April 2001, No. 9472, A285, *Infostrada/Telecom Italia-Tecnologia ADSL*; 29 March 2006, No. 15310, A365, *Posta elettronica ibrida*; 11 November 1996, No. 4398, A102, *Associazione Consumatori Utenti/Alitalia*.

71 See, for example, decisions of 23 October 2008, No. 19020, A376, *Aeroporti di Roma-Tariffe aeroportuali*; 26 November 2008, No. 19189, A377, *Sea-Tariffe aeroportuali*; 16 March 1994, No. 1845, A56, *IBAR/SEA*.

72 In that case, it is for the dominant firm to justify the price differential by showing objective differences between the situation in the markets concerned. See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*. See also decision of

The ICA may also apply both the aforementioned tests in the assessment of prices charged by the dominant firm.[73] In some cases, the ICA fined the dominant company for having charged prices remunerating activities or services that were not rendered.[74] In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.[75]

## V REMEDIES AND SANCTIONS

### i Sanctions

Pursuant to Article 15 of the Competition Act, the ICA may impose on firms fines of up to 10 per cent of their total turnover. However, fines actually imposed by the ICA are normally significantly lower than the above-mentioned cap.

In setting the amount of the fine, the ICA normally applies the principles set out by the Commission guidelines.[76]

If a firm fails to comply with an order to cease an abusive conduct, the ICA may impose a fine of up to 10 per cent of the firm's total turnover. If the original infringement decision imposed a fine, the new sanction is at least twice the previous fine, up to 10 per cent of the turnover. If a firm repeatedly violates an order of the ICA, the latter may suspend the firm's activities for up to 30 days.

### ii Behavioural remedies

Pursuant to Article 15(1) of the Competition Act, if the ICA finds a violation of antitrust rules, it orders the companies concerned to put an end to the infringement. The ICA typically asks the company involved to desist immediately from the anticompetitive conduct, to enact positive measures to restore conditions of effective competition in the affected markets within a certain time-limit, and to report on its progress.

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28 July 1995, No. 3195, A48, *SILB/SIAE*.

73 See, for example, decisions of 15 November 2001, No. 10115, A306, *Alitalia/Veraldi*; 10 April 1992, No. 452, A4, *Ancic/Cerved*.

74 See, for example, decision of 23 May 2007, No. 10763, A299, *International mail express/Poste Italiane*.

75 Examples of unfair trading conditions include the imposition of a contractual clause that prohibits customers from reselling products bought from a supplier (decision of 10 April 1992, No. 452, A4, *Ancic/Cerved*), the refusal, by a dominant firm providing toll payment services, to reimburse cards not used, or only partially used, after their expiration (decision of 26 July 2007, No. 17069, A382, *Autostrade/Carta prepagata Viacard*), and the request of payment of unpaid bills of former customers as a condition to enter into new agreements for the supply of electricity or communications services (decisions of 10 October 2007, No. 17481, A390, *Enel Distribuzione/Attivazione subordinata a pagamento morosità pregresse*; 21 August 2008, No. 18692, A398, *Telecom-Morosità pregresse*).

76 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 OJ (C 210) 2.

According to Article 14-bis of the Competition Act, in urgent cases, where there is a risk of serious and irreparable damage to competition and a cursory examination of the facts reveals the existence of an infringement, the ICA may order interim measures on its own motion.

### iii Structural remedies

The Competition Act does not expressly empower the ICA to impose structural remedies. As a matter of principle, however, the administrative courts' case law seems to leave the door open to the imposition of structural remedies in competition law cases, subject to a strict proportionality requirement.[77]

## VI PROCEDURE

The ICA may start proceedings after assessing the information at its disposal or brought to its attention by third parties, such as public authorities, consumer associations and competitors. The ICA may also start antitrust proceedings following a general sector investigation. Antitrust investigations are often triggered by third-party concerns, but this is not always the case.

The decision to start proceedings, which is published in the ICA's Bulletin and website, contains the essential elements of the alleged infringement. The ICA serves the decision upon the parties concerned (i.e., the parties whose conduct is at issue and third parties who submitted complaints or reports). The decision to start proceedings is sometimes served upon the firm under investigation during an unannounced inspection.

Companies under investigation have the right to:

*a* be heard by the ICA within the time limit indicated in the decision to open proceedings;
*b* obtain a final oral hearing before the end of the investigation;
*c* submit briefs and documents; and
*d* access the case file.

Within 30 days of publication of the decision to start proceedings in the Bulletin, interested third parties (individuals, consumer associations, competitors, or other bodies whose interests might be directly and immediately harmed by the alleged infringement or any measures adopted as a result of the investigation) may request to participate in the proceedings. Complainants and interveners may access the case file and submit briefs and documents. In addition, they may be heard by the ICA officials and be allowed to participate in the final oral hearing, if the latter is requested by the firms under investigation.

Following the opening of the proceedings, the ICA can exercise extensive investigative powers, such as the power to:

*a* require specific documents or information;
*b* carry out unannounced inspections at business premises (as opposed to residential premises);
*c* interview the companies' legal representatives;
*d* image computer hard drives by using forensic IT tools;

77 See, in particular, TAR, 27 February 2007, No. 1745; 15 January 2007, No. 203.

*e* require explanations about any documents or information supplied by the company concerned; and

*f* secure premises overnight by seal.

The ICA may impose fines on firms that fail to provide the information or exhibit the documents requested or, intentionally or negligently, supply incorrect or misleading information.

The Italian legal system does not provide for special rules on legal privilege in antitrust proceedings. In its decision practice, the ICA generally follows the principles and criteria established by EU case law.

Pursuant to Article 22 of Regulation (EC) No. 1/2003, the ICA may seek the assistance of other national competition authorities to carry out investigative activity in their jurisdiction on its behalf.

In urgent cases, the ICA may order interim measures, which cannot be renewed or extended. If the addressee of the interim measures does not comply with the decision, the ICA may impose a fine of up to 3 per cent of the annual turnover.

The investigations may last for several months and often more than one year. When the ICA considers that it has acquired sufficient evidence, it issues a statement of objections (SO), by which it notifies the companies concerned and any complainants of its objections, at least 30 days before the closing date of the investigation. The SO contains an extensive elaboration of the reasons underlying the ICA's assessment of the case.

If the companies being investigated request to be heard by the ICA, a final hearing takes place, typically on the date of closure of the investigation. After the final hearing, the ICA issues a decision. If the ICA finds that the contested conduct is abusive, it orders to put an end to the infringement within a given time limit. If the infringement is serious, the ICA can impose a fine.

Under Article 14-ter of the Competition Act, firms may offer commitments aimed at removing the ICA's competition concerns, within three months from the opening of proceedings. After assessing the suitability of such commitments, including by means of a market test, the ICA may make them binding on the firms concerned and close the proceedings without ascertaining any infringement or imposing a fine. Commitment decisions have become a frequently used enforcement tool.

The ICA's decisions are subject to judicial review by the TAR. The parties may file an appeal within 60 days from receipt of the notifications of the decision. The parties can ask the TAR for a stay of execution of the ICA's decision. Hearings for interim measures are usually granted within a short time of the filing of a notice of appeal. A hearing on the merits of a case usually takes place within one year of the filing of an appeal. If the appeal is denied, the party may appeal to the Council of State.

ICA's decisions are subject to full judicial review with respect to the imposition of fines. Accordingly, administrative courts may also change the amount of the fine. However, they cannot increase the fine, since this would violate the *non ultra petita* rule.[78]

In principle, the judicial review of substantive findings is limited to a control of legality. Accordingly, courts must assess whether the ICA based its conclusions on accurately stated

78 See Council of State, 2 March 2009, No. 1190.

facts and supported its decision on adequate and coherent grounds.[79] The administrative courts have clarified that the judicial review of substantive findings is strong, effective and penetrating, and also covers the economic analysis carried out by the ICA.[80] However, when complex assessments carried out by the ICA remain questionable, the administrative court cannot substitute its own assessment for that of the ICA.[81]

In *Menarini*, in light of the judicial review actually exerted by the administrative courts, the European Court of Human Rights held that the Italian administrative enforcement system is compatible with the right to full and effective access to an independent and impartial tribunal established by Article 6(1) of the European Convention on Human Rights (ECHR).[82]

## VII PRIVATE ENFORCEMENT

Victims of abusive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution or injunctive relief.

Damages for breach of antitrust rules may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which 'any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages'. The Italian Supreme Court has clarified that consumers also have standing to bring damages actions in tort for breach of the Competition Act.[83]

A collective action system has been recently introduced in the Italian legal system.[84] Pursuant to Article 140-bis of the Consumer Code, in case of anticompetitive practices affecting a number of consumers or users, any of them has standing to file a class action with the competent court. At the end of the first hearing, the court decides whether the conditions for the certification of the class action are met.[85] If the class action is admitted, a notice about the lawsuit is published and all consumers or users who claim to have a right homogeneous to that for which the class has been established can join it. The opt-in declaration must be filed with the register of the competent court within a certain time.[86] Consumers and users who opt-in do not assume the role of parties to the proceedings and, thus, do not have procedural powers. If the court eventually finds that the class action is well founded, it orders the defendant to pay a certain sum to each member of the class or, alternatively, establishes the criteria on the basis of which these sums must be calculated.

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79 See Council of State, 19 July 2002, No. 4001 and, more recently, TAR, 10 March 2003, No. 1790.

80 See, for example, Council of State, 6 May 2014, No. 2302; 20 February 2008, No. 597; 8 February 2007, No. 515.

81 See, e.g., Council of State, 6 May 2014, No. 2302; 24 September 2012, No. 5067.

82 ECHR, Case No. 43509/08, *A. Menarini Diagnostics/Italy*.

83 Supreme Court, 4 February 2005, No. 2207.

84 See Article 140-bis of Legislative Decree No. 206/2005 (Consumer Code). The collective action is applicable only with respect to infringements committed after 15 August 2009.

85 The collective action can be rejected by the court for a number of reasons. For instance, it can be dismissed when the consumer or user concerned has interests conflicting with those of the proposed class or does not seem to be able to protect adequately the class's interests.

86 Individuals can decide not to join the class and file a separate lawsuit on their own.

In addition, pursuant to Articles 139 and 140 of the Italian Consumer Code, consumer associations registered with the Ministry for Productive Activities have standing to request cease-and-desist orders against certain practices that may harm consumer interests, and appropriate measures for correcting or eliminating the detrimental effects thereof.

Damages are limited to the plaintiff's actual losses (i.e., 'out-of-pocket' losses plus loss of profits). Punitive or exemplary damages are not available in the Italian legal system. Plaintiffs can only claim damages that they actually incurred. Where a precise amount cannot be determined, the court may also calculate damages on an equity basis.[87]

The calculation of damages based on loss of income is especially difficult when the injured company could not enter the market due to the abusive conduct. In *Telsystem*,[88] the court commissioned an expert report on losses suffered by a potential first mover into the sector for leased-lines services, which failed to enter this new market because of the dominant firm's refusal to grant access to certain essential facilities. The damage liquidation was based, *inter alia*, on the advantage that the plaintiff would have had as first entrant into the sector for leased-lines services. However, the court considered also that, in a free market economy, monopoly rent, such as that of a first mover, tends to be neutralised by competition within a certain time frame.

Contractual clauses amounting to an abuse of dominant position may be found void. In Avir, the Court of Appeals of Milan stated that the clauses provided for by a gas supply agreement, which imposed an excessive price, were void because they were incompatible with Article 3(a) of the Competition Act, and granted restitution of the abusive overcharge paid by the customer.[89]

As a matter of principle, civil courts do not have the power to permanently enjoin the defendant from repeating the anticompetitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to Article 2598 of the Italian Civil Code.

A plaintiff may obtain interim remedies, including temporary injunctions and any other remedy that the court may deem appropriate to preserve the plaintiff's rights until a final judgment is issued. To this end, the claimant must provide sufficient factual and legal grounds to establish a *prima facie* case, as well as the risk of imminent and irreparable damage.

In some cases, the Italian Supreme Court stated that findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of the alleged infringement, damage and causal link. In principle, the presumption is rebuttable. However, the nature of privileged evidence of the ICA's findings prevents the defendant from arguing against the very same facts and grounds that the ICA relied upon to find a violation of antitrust rules.[90] In a judgment delivered in 2014, the Supreme Court stated that, in principle, the ICA's findings are not binding on civil courts and there is no legal category of privileged

87 Court of Appeal of Naples, 28 June 2007, No. 2513.

88 Court of Appeal of Milan, 18 July 1995 and 24 December 1996.

89 Court of Appeal of Milan, 16 September 2006.

90 Supreme Court, 20 June 2011, No. 13486. As a consequence, the defendant can rebut, for instance, the presumption of a causal link by alleging and proving different and specific factors, which were *ex se* capable of causing the damage or contributed to its causation, but it cannot rely on factors already examined and dismissed by the ICA. See Supreme Court, 10 May 2011, No. 10211.

evidence distinct from that of legal proof.[91] Nonetheless, the Court confirmed that the findings contained in an ICA decision have 'high evidentiary value' in proceedings before civil courts.[92] According to lower courts, commitment decisions may also have evidentiary value, as they imply at least that an abuse was considered likely on the basis of the investigation carried out by the ICA.[93]

As to stand-alone private actions, the Supreme Court stated that, in light of the information asymmetry between claimants and defendants and the complexity of antitrust cases, civil courts should not adopt a strict application of the burden-of-proof principle.[94] To ensure an effective application of competition rules in private actions for damages, national courts should use the procedural tools available under Italian law (such as orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful for establishing the alleged anticompetitive conduct.

## VIII FUTURE DEVELOPMENTS

The effects-based approach to abuse of dominance cases does not seem to have established itself in Italian decision practice and case law. The ICA's and national courts' decisions frequently rely on certain traditional statements of EU case law, which reflect the formalistic and structural approach adopted in the past. They usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects on the basis of an abstract analysis, without carrying out a comprehensive economic assessment of the impact of the practice. The transition towards an effects-based approach will require a stronger and more penetrating judicial review by administrative courts. The approach of administrative courts in the review of antitrust decisions still seems erratic. In some cases, such as *TNT/Poste Italiane*, they have engaged in an in-depth review of the decision, also taking into account grounds of appeal raising complex economic issues. In other cases, however, the administrative courts seemed to limit themselves to reiterating the ICA's views, also through extensive references to the contested decision, or have simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should have been dismissed. A more stringent judicial review of antitrust decisions is necessary not only to foster the transition towards an effects-based approach but also to guarantee full compliance with the fundamental right of access to an independent and impartial tribunal established by Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights in *Menarini*.[95]

Many cases decided by the ICA and national courts in the past few years have concerned highly regulated sectors. The interaction between competition law and sector-specific

91 Supreme Court, 28 May 2014, No. 11904.

92 In the case at hand, the Court held that the ICA decision was sufficient to prove the alleged infringement, its capability to harm customers and the existence of damage to customers in general.

93 Tribunal of Milan, 28 July 2015, No. 9109.

94 Court of Cassation, 4 June 2015, No. 11564.

95 Judgment of 27 September 2011, *A. Menarini Diagnostics SRL v. Italy*, Application No. 43509/08.

regulation seems to give rise to an increasing risk of conflicts of jurisdiction and interferences between different authorities. In some cases, the application of competition rules has led to the imposition of obligations incompatible with sector-specific rules, which has often been criticised by administrative courts. In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations. The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation also raises delicate issues as to the interference and overlapping between the two sets of rules.

The *Wind-Fastweb/Condotte Telecom Italia* case is a notable example of the risk of conflicts and inconsistencies between the two sets of rules. Access regulation in the electronic communications sector in Italy is based on the equivalence of output principle, according to which access services offered by the incumbent to alternative operators must be comparable to the services it provides to its retail division in terms of functionality and price, but they may be provided through different systems and processes. By contrast, in its 2015 ruling,[96] the Council of State seemed to consider that differences in supply processes (provided for by sector regulation) are problematic in themselves, because they inevitably entail a different treatment of external and internal requests for access services.

In the past few years, the ICA and Italian courts have also shown more activism in the assessment of new types of abuse. Some decisions belong to the controversial line of cases concerning the misuse of rights and legitimate interests arising from sector-specific rules, through the initiation of administrative or judicial proceedings aimed at obstructing competitors' activity. In Pfizer, the Council of State clarified that this type of abuse – which has been inspired by EU case law[97] – is:

> *[…] nothing but the specification of the broader category of abuse of right, whose precondition is the existence of a right which is used artificially, for a purpose which is incoherent with that for which that right is granted: in the case at issue, the exclusion of competitors from the market.*[98]

Even the exercise of contractual rights, such as the right to termination of a contract, has been considered abusive on the ground that it was strategically exercised with the only purpose of excluding a competitor.[99]

The misuse of rights and legitimate interests lies at the boundary of antitrust liability. An abusive exercise of a right or legitimate interest may be found when the contested conduct is characterised by an additional element that is intrinsically objectionable, such as the provision of false or misleading information to a regulatory authority, or when it is part of a

96 Council of State, 15 May 2015, No. 2479; TAR, 8 May 2014, No. 4801.

97 In particular, in *AstraZeneca*, the Commission and the General Court held that the firm concerned had abused its dominant position by obtaining a supplementary protection certificate on the basis of misleading information and representations provided to the competent authorities. See Case C-457/10 P, *AstraZeneca v. Commission*, ECLI:EU:C:2012:770.

98 Council of State, 12 February 2014, No. 693.

99 Decision of 25 March 2015, No. 25387, A474, *SEA/Convenzione ATA*.

broader exclusionary strategy, implemented also through other anticompetitive practices.[100] The distinction between legitimate exercise and abuse of right becomes much more complex, however, when a dominant firm merely exercises its rights in administrative or judicial proceedings to (artificially) protect its position and interests.

The ICA and administrative courts have often emphasised the dominant firm's alleged exclusionary intent, which seems to be a crucial factor in the assessment of the alleged abuse;[101] however, the distinction between abuse and legitimate exercise of right should not be based merely on the dominant firm's intent. Reference to the dominant firm's exclusionary intent opens the door to considerable uncertainty and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition, a firm's intent is not in itself sufficient to distinguish legitimate from anticompetitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a sense, to prevail against, and eventually to exclude, its competitors. Moreover, in many cases, the rationale behind the rules invoked by the dominant firm is just to exclude or limit competition from other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as those allowing competitors to access a facility or to carry out an economic activity only within certain limits and under certain conditions.[102]

The judgment delivered by the TAR in *Arenaways* seems to confirm that, as a general rule, firms may not be deprived of the chance to exercise their rights and legitimate interests, even though this may negatively affect competitors' access to the market; however, the boundaries between legitimate exercise and abuse of right remain unclear and need to be clarified by the competent authorities in the coming years.

As to the enforcement policy, in the last few years the ICA has adopted a more rigorous approach in the assessment of commitments offered by parties. In the past, the ICA often used the commitment procedure to exercise *lato sensu* regulatory functions, by negotiating and making legally binding measures aimed at improving the competitive conditions or at benefiting consumers, even in the absence of a clear and direct link between the commitments and the competitive concerns identified by the ICA. From the introduction of commitments procedures, in 2006, to December 2010, the ICA made extensive use of commitment decisions, which represented around 85 per cent of decisions concluding abuse of dominance cases (28 out of 33), but this trend reversed a few years ago, also due to some rulings by the administrative courts, which have constrained the ICA's discretion in commitment procedures. In the period from 2011 to 2014, the ICA issued commitment decisions only in slightly more than 30 per cent of investigations concerning abuses of dominance.[103]

In 2015, commitment decisions represented the majority of abuse of dominance cases closed by the ICA. The latter accepted the commitments offered by the parties in two out of

100 See, e.g., decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

101 Council of State, 12 February 2014, No. 693. See also, *inter alia*, Council of State, 8 April 2014, No.1673.

102 A narrower interpretation of the concept of abuse of dominance is necessary, in particular, in cases concerning the exercise of fundamental rights enshrined in the EU Charter of Fundamental Rights or Member States' constitutional tradition, such as the right of access to justice.

103 Two out of six, three out of nine, one out of five and one out of two, respectively.

three cases, and issued an additional commitment decision at the beginning of 2016. However, compared to in the past, the ICA now seems to pay more attention to the nexus between the competitive concerns and the commitments offered by the parties. Furthermore, the fact that lower courts tend to consider that commitment decisions may also have evidentiary value may reduce the incentive of firms to offer voluntary remedies.[104] It remains to be seen whether negotiated enforcement will again play a leading role in the future.

Finally, the private enforcement system will be subject to important changes following the implementation of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. *Inter alia*, the rules implementing the EU directive will have to clarify definitively that a finding of infringement of Article 102 of the TFEU in a final decision by the ICA or a review court must be deemed irrefutably established in actions for damages brought before the civil courts. According to the EU directive, however, the binding effect of a finding of abuse should cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. For other aspects, such as the existence of damages and the causal link, the principles established by national case law will still be relevant.

104 Tribunal of Milan, 28 July 2015, No. 9109.

# Chapter 15

# KENYA

*Dominic Rebelo and Ciru Longden*[1]

## I INTRODUCTION

The Kenyan competition regime was previously regulated by the Restrictive Trade Practices, Monopolies and Price Control Act of 1988, which established the Monopolies and Prices Commission as the regulator. The regulatory regime was criticised as being convoluted and ineffective and was subsequently overhauled in 2010 with the enactment of the Competition Act (the Act).[2] The Act's primary purposes are to promote and safeguard competition in the national economy, to protect consumers from unfair and misleading market conduct, and to establish and provide for the powers and functions of the Competition Authority of Kenya (CAK) and the Competition Tribunal.

To help market participants understand the CAK's mandate and the factors that it will take into consideration when exercising its powers, the CAK has issued the following guidelines the titles of which reflect their primary purpose:[3]

*a* Balancing Public Interest Guidelines;
*b* Guidelines on the Control of Unwarranted Concentration of Economic Power;
*c* Guidelines on Relevant Market Definition;
*d* Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act; and
*e* Consolidated Guidelines on Substantive Assessment of Mergers under the Competition Act.

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2 Competition Authority of Kenya, 'Competition Policy and Law', www.cak.go.ke/index.php/history-competition/96-competition-policy-and-law.html; Act Number 12 of 2010.

3 Competition Authority of Kenya, 'Statute and Regulations', www.cak.go.ke/index.php/the-competition-act-no-12-of-2011.html.

The CAK has also published a detailed four-year strategic plan for 2013 to 2017.[4] Highlighted in the policy are the following five key areas of focus for the CAK:

*a* enforcement of competition and protection of consumers;
*b* research, advocacy and awareness creation;
*c* mobilisation and optimal utilisation of resources;
*d* infrastructure and human capital development; and
*e* visibility and corporate image.

The CAK is aware that as a relatively new regulator, market participants may be genuinely unaware of its existence and mandate. Hence, a driving factor behind CAK policy is the development of awareness. The general lack of awareness originated from the failure of the Monopolies and Prices Commission – the CAK's predecessor – to regulate competition in any discernible fashion. Therefore, the CAK has undertaken the task of sensitising consumers and businesses as to its existence and mandate.

We have noted over the past year that there has been some traction in raising the profile of the CAK, partly as a result of several high-profile cases (mentioned below) and media reports of jurisdictional disputes with other established industry regulators.[5]

## II YEAR IN REVIEW

Unfortunately the CAK is yet to publish its annual report for 2014–2015. Nevertheless, we have observed significant developments in the regulator's activities in the market, which are described in more detail below. This chapter also highlights some key cases reported in the Competition Authority Annual Report for 2013–2014 (the 2013–2014 Annual Report).

The CAK conducted a preliminary investigation (see Section VI.i, *infra* in relation to the CAK's investigation process) into a horizontal agreement between two leading supermarket companies Tuskys Mattresses Limited (Tuskys) and Ukwala Supermarkets Limited (Ukwala). The companies had purportedly omitted to seek CAK approval for the agreement.

The companies entered into an arrangement for Tuskys to manage three Ukwala stores for a period of nine months. Tuskys' management role included setting prices of stock, rebranding and payroll. The CAK found that there was collusive pricing and limiting market outlets as all the stores involved were based in Nairobi where Tuskys already had a significant market presence. The companies were fined 5.3 million Kenyan shillings. As per the 2013–2014 Annual Report, the fine was based on 'the affected turnover, the duration of the conduct and mitigating factors (as presented by the parties)'.[6]

On the telecommunications front, the growth of Kenya's mobile money industry has been the source of global media attention.[7] Of particular note has been the success of Safaricom

4 Competition Authority of Kenya, 'Strategic Plan 2013/14 – 2016/17', www.cak.go.ke/index.php/resource-centre/publications.html.

5 Business Daily article 'Safaricom gets crucial support in battle with CA' 27 April 2015 www.businessdailyafrica.com/Corporate-News/Safaricom-gets-crucial-support-in-battle-with-CA/-/539550/2698158/-/52irq8/-/index.html.

6 Competition Authority of Kenya Annual Report 2013–2014, pages 23–24.

7 See World Bank article 'Mobile payments go viral: M-PESA in Kenya' 24 March 2010 http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK

Limited's (Safaricom) (Kenya's largest mobile subscriber service) mobile phone-based money transfer service, M-Pesa. The M-Pesa service was launched in 2007 and by late 2009 40 per cent of Kenya's adult population was using the service.

The M-Pesa service requires Safaricom mobile customers to sign up to the service and then pay money into their M-Pesa account through an M-Pesa agent. Agents are usually convenience shop or kiosk owners, and supermarkets. Customers can then make and receive payments from other M-Pesa subscribers. Money can also be withdrawn at any of the M-Pesa licensed agents. Most service providers (e.g., tradesmen, restaurants, taxi companies) have an M-Pesa account, hence the popularity of the service.

Following a complaint from Airtel Networks Kenya Limited (Airtel) (Kenya's second largest mobile subscriber service) an investigation was launched into Safaricom's business practices. It was alleged that Safaricom required its M-Pesa agents not to offer any money transfer services from any other provider. If an agent was found to do so they were threatened with termination of their M-Pesa agency contract.[8] The CAK therefore investigated this complaint on the basis that there was a likely abuse of a dominant position and that Safaricom had engaged in restrictive trade practices.

The preliminary findings of the CAK were that Safaricom had abused its dominant position and engaged in restrictive trade practices and the CAK invited Safaricom to make written submissions or oral representations in its defence. In response, Safaricom submitted a settlement proposal to the CAK, which, pursuant to Section 38 of the Act, terminated the ongoing hearing. In response to this turn of events Airtel filed a judicial review application challenging the termination of the hearing. The matter did not go to a full hearing as the parties agreed to an out of court settlement bringing the judicial review application to an end.

The CAK and Safaricom then entered into a further settlement agreement with Safaricom agreeing to remove all restrictive trade clauses in its agency contracts with immediate effect.

From a strategic perspective it should be noted that the Act is fairly new and yet to be subjected to judicial interpretation. As demonstrated in the *Safaricom* matter, the courts did not have the opportunity to provide judgement on substantive matters. It is therefore yet to be seen whether the courts will develop a strict or a liberal interpretation of the Act.

## III MARKET DEFINITION AND MARKET POWER

### i Dominance

According to the Act, dominance can be attained either by way of market share or market power. Market power is defined as the power of a firm to control prices, to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers.

Section 23(1) of the Act defines a dominant undertaking as an undertaking that:

*a* produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or

:22551641~pagePK:146736~piPK:146830~theSitePK:258644,00.html and the *Economist* article: 'Why does Kenya lead the world in mobile money?' 27 March 2013, available at www.economist.com/blogs/economist-explains/2013/05/economist-explains-18.

8 Competition Authority of Kenya Annual Report 2013–2014, page 24.

*b* provides or otherwise controls not less than half of the services that are rendered in Kenya or any substantial part thereof.

The Finance Act 2014 broadened the definition of a dominant undertaking by inserting subsection 23(2), which provides that:

> *Notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking–*
> *a though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power; or*
> *b controls less than forty per cent of the market share but has market power.*

Section 4(2) sets out the additional factors to be considered in determining dominance to include:

*a* the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and

*b* the economic circumstances of the relevant market including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.

To provide further clarity to market participants, the CAK published the Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act (the RTP Guidelines), which detail the factors the CAK will consider when determining if an undertaking is dominant. These include:

*a* the potential and actual competition;

*b* barriers to entry into the market;

*c* the degree to which countervailing market powers can impact the undertaking's ability to exercise its power in a market;

*d* product differentiation;

*e* the stability of market shares; and

*f* the ability of the undertaking to act independently of its customers and competitors.[9]

**ii Collective dominance or relative dominance**

The Act does not provide for collective or relative dominance, but collective actions by undertakings may be captured under the prohibited restrictive trade practices. There are also specific provisions relating to the arrangements trade associations may have under the Act.

In 2015 the CAK was reported to have imposed a fine of 721,715 Kenyan shillings on a trade association found to have engaged in price fixing and unfair trade practices.[10] The facts as reported are that the Association of Kenya Reinsurers, through a circular, advised

9 Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act, page 25.

10 Mwaniki Wahome, 'Authority Fines Group for Underhand Deals', *The Daily Nation* (15 April 2015), www.nation.co.ke/business/Authority-fines-group-for-underhand-deals/-/996/2687164/-/dclii7/-/index.html.

its members on minimum applicable premiums on the renewal of the National Intelligence Service Group (NIS) Life Scheme for 2013/2014. NIS made a complaint to the CAK, which found that the circular amounted to collusion.[11]

In addition, the 2013–2014 Annual Report mentions several trade associations and industries being investigated for price fixing, such as the Shipping Logistics Service Providers, the daily newspaper industry and the LPG sector. In 2016 the CAK has also conducted dawn raids on firms believed to have been involved in suspected price collusion seeking to seize board reports, company presentations, pricing data and other business information related to pricing.

It is likely that during the course of 2016 the CAK will publish its decisions with regard to the outcome of these investigations.

### iii Market definition

Section 4(1)(c) defines the term 'market' as a market in Kenya or a substantial part of Kenya and refers to the range of reasonable possibilities for substitution in supply and demand between particular kinds of goods or services and between suppliers or acquirers of those goods and services.

The Competition Authority Guidelines on Relevant Market Definition (the Market Definition Guidelines) take an economics-based approach in defining the relevant market. A market, for competition law purposes, has two dimensions: product market and geographical market.[12]

A product market 'constitutes all the goods and/or services which are regarded as reasonably interchangeable or substitutable by the consumers, by reason of the products' characteristics, their prices and their intended use'.[13] On the other hand, a geographical market is 'the area within which undertakings concerned are involved in the supply and demand of goods or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'.[14]

The Market Definition Guidelines provide for a demand-side substitution approach and a supply-side substitution approach in defining a product market; however, demand substitutability is the key factor considered in market definition. The demand-side substitution approach seeks to identify the alternative products that consumers may turn to when there is an increase in the price of a particular product. The supply-side substitution approach seeks to identify whether undertakings would start supplying a new product were prices to rise.[15]

The Market Definition Guidelines give a practical example of the application of the demand-side approach in the alcoholic beverages (wines) sector to determine whether different flavours of wines belong to the same market. The question to determine would be whether consumers of flavour 'A' would switch to other flavours in the event of a permanent

11 Ibid.

12 Competition Authority of Kenya, 'Guidelines for Market Definition', paragraph 7, www.cak.go.ke/index.php/guidelines/market-definition.html.

13 Guidelines for Market Definition (No. 14) paragraph 8.

14 Ibid., paragraph 9.

15 Ibid., paragraph 21.

price increase of 5 to 10 per cent. All other flavours to which a sufficient number of consumers would switch, to the extent that the price increase for flavour 'A' would no longer be profitable due to resulting loss of sales, would form part of the same market.

## IV ABUSE

### i Overview

The Act does not offer a specific definition of 'abuse', but lists instances where abuse may be seen to have occurred. The list of instances set out is not exhaustive. The Act provides that abuse of a dominant position includes:

*a* directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

*b* limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;

*c* applying dissimilar conditions to equivalent transactions with other trading parties;

*d* making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; and

*e* abuse of an intellectual property right.[16]

We note that the Act makes reference to abuse by dominant undertakings only. Therefore, not every undertaking found to have been involved in one of the above instances will be deemed to have committed an abuse unless the undertaking is dominant in the relevant market. Conversely, the CAK has confirmed that being dominant is not illegal *per se* – rather, it is the abuse of a dominant position with which they are concerned[17] (see Section III, *supra*, concerning the test for dominance). The RTP Guidelines provide that the CAK bears the burden of proof. Furthermore, the RTP Guidelines categorise abuse of dominance into two categories: exploitative and exclusionary abuses.

As previously noted, however, the Act is fairly new and consequently has not been subject to judicial interpretation. The CAK has not been established for long enough or published decisions in sufficient detail to create a body of case law that would guide market participants significant guidance on the interpretation of the relevant provisions. As things stand, the Act has supplied the CAK and the courts with a guideline as opposed to an exhaustive list of abuses, monopolisation, monopoly maintenance or illegal unilateral conduct. Additionally, the CAK and the courts will recognise *'sui generis* abuses' that would be applicable under the general rules of international law as well as any treaty or convention that Kenya has ratified.[18] This would include conventions and treaties against discrimination as well as unfair economic practices under international law.[19]

16 Competition Act, Section 24(2)(e) Part III C.

17 Competition Authority of Kenya Annual Report 2012–2013 page 22.

18 This is pursuant to Article 2(5) and (6) of the Constitution of Kenya, 2010.

19 One such example is the Treaty Establishing Common Market for Eastern and Sothern Africa to advance the economic integration of Eastern and Southern Africa adopted

***Restrictive trade practices***

When discussing abuse and the types of conduct that constitute abuse under the Act, consideration should be given to the provisions relating to restrictive trade practices.

The Act makes it an offence for undertakings to engage in restrictive trade practices, providing that 'agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part'.[20]

The restrictive trade practices provisions apply to any agreement, decision or restrictive practice that:

*a* directly or indirectly fixes purchase or selling prices or any other trading conditions;

*b* divides markets by allocating customers, suppliers, areas or specific types of goods or services;

*c* involves collusive tendering;

*d* involves a practice of minimum resale price maintenance;

*e* limits or controls production, market outlets or access, technical development or investment;

*f* applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

*g* makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts;

*h* amounts to the use of an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use; or

*i* otherwise prevents, distorts or restricts competition.[21]

The types of agreements, decisions or concerted practices that may be deemed restrictive trade practices are similar to those deemed abusive by undertakings in a dominant position. The key distinction between a restrictive trade practice and an abuse of a dominant position is that the test for a restrictive trade practice looks at the object or effect of the contract, thus arguably utilising an effects-based test and not making such arrangements a *per se* breach of the relevant sections of the Act.

In addition, the CAK has emphasised under the RTP Guidelines that the CAK considers that the words 'object' and 'effect' are disjunctive, hence, while the burden of proving that a restrictive trade practice has occurred falls on the CAK, the CAK need only prove one element of the test.

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on 5 November 1993, which Kenya ratified on 8 December 1994. The treaty sets out various principles including accountability, economic justice and popular participation in development and the recognition and observance of the rule of law.

20 Competition Act, Section 21(1) Part III A (emphasis added).

21 Competition Act, Section 21(3) Part III A.

**ii Exclusionary abuses**

As noted from the foregoing list, the Act prohibits conduct by a dominant undertaking that directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions. It also prohibits undertakings from restricting production, market access and development through predatory practices. These prohibitions also appear in the restrictive trade practices provisions. The restrictive trade practices provisions make it clear that such practices apply to both horizontal and vertical arrangements, whereas the latter forms of agreement are generally excluded in western jurisdictions from being considered anticompetitive by regulators.

The CAK published Exemption Guidelines for Horizontal Practices in 2012[22] which provide guidance on the grounds on which the CAK may exempt an agreement that is anticompetitive. The exclusions will be generally based on compelling public policy reasons, which include demonstrating that the agreement maintains or promotes exports or improves production, distribution of goods or services, or will produce technical or economic progress.

***Predatory pricing***

This offence is captured under both the provisions on abuse of a dominant position and restrictive trade practices. Both prohibit an undertaking from directly or indirectly imposing unfair purchase or selling prices or fixing the purchase price in a manner that restricts or prevents competition.[23]

There is a current investigation into predatory pricing behaviour by Fly 540 Aviation Ltd, which forced Kenya Airways and Jambojet to exit the market for certain flight routes. The outcome of this investigation is yet to be published as at the date of publication.[24]

There was a case decided in 2012 relating to predatory pricing that arose from a complaint made by Telkom Kenya (which is the sole landline telephone services provider in Kenya) against Airtel Kenya (Airtel) and Essar Telekom Kenya (Essar) (both mobile phone providers). Telkom alleged that the off-net calling rates of Airtel and Essar were predatory as they were below cost. The CAK conducted an investigation into the matter and found that the allegations were not substantiated.[25] Unfortunately, the reported decision is only a summary and does not provide significant detail on the analysis of the facts and evidence presented.

We are hopeful that the *Fly 540* case may result in a detailed decision that will guide practitioners and market participants.

***Exclusive dealing and leveraging***

In relation to other forms of exclusionary abuses such as loyalty rebates, exclusivity contracts and price tying the Act prohibits such arrangements under various provisions. For example Section 21(3)(g) in relation to restrictive trade practices and Section 24(2)(d) both state that

22 Competition Authority, 'Guidelines for Exemption', www.cak.go.ke/index.php/status-regulations/guidelines/exemptions.html.

23 Competition Act, Sections 21(3)(a) and 24(2)(a).

24 Competition Authority of Kenya Annual Report 2013–2014, page 88.

25 Competition Authority of Kenya Annual Report 2012–2013, page 49.

if an undertaking makes the conclusion of a contract subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts, then this will be deemed anticompetitive.

We would emphasise that if the offence is in relation to abuse then the test that must first be met is in relation to dominance, while for restrictive trade practices the Act requires the practice to have the object or effect of reducing competition.

*Refusal to deal*

The Act prohibits abuse of intellectual property rights, which would arguably include the refusal to grant a licence, but this provision has yet to be tested in the Kenyan courts. There is a current investigation into Multichoice (a leading video entertainment and internet company) on whether Multichoice engaged in an abuse of dominance through content exclusivity. The outcome of this investigation is yet to be published as at the date of publication.[26]

### iii Discrimination

The Act prohibits conduct by a dominant undertaking and any agreement or concerted practice that applies dissimilar conditions to equivalent transactions with other trading parties.[27] There is a reported case where the Kenya Association of Travel Agents (KATA) complained that the International Air Transport Association (IATA) was engaging in discriminatory behaviour and refusing to deal with it with regard to default insurance. The CAK investigated the matter and found the allegations to be true and issued a cease-and-desist order.[28]

### iv Exploitative abuses

Exploitative abuses are generally prohibited under the restrictive trade practices provisions of the Act. An investigation into major oil marketers based on the allegation that such marketers were engaging in limiting or controlling production, market outlets access, technical development and investment, was closed because of a lack of evidence. However, given the CAK's recent use of dawn raids as a means of obtaining information, future investigations may be more likely to unearth evidence that could lead to prosecutions or fines.

## V REMEDIES AND SANCTIONS

### i Sanctions

The Act contains two main potential sanctions: fines and prison sentences. For an abuse of dominance or an offence relating to restrictive trade practices, such fine can be up to 10 million Kenyan shillings and the potential imprisonment for up to five years.

The CAK is further empowered, where it finds that an undertaking has violated any provisions of the Act (including abuse of dominance) after investigations, to:

*a* restrain the undertaking or undertakings from further engaging in the conduct;

26 Competition Authority of Kenya Annual Report 2013–2014, page 86.

27 Competition Act, Sections 21(3)(f) and 24(2)(c).

28 Competition Authority of Kenya Annual Report 2012–2013, page 48.

*b* direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
*c* impose a financial penalty; or
*d* grant any other appropriate relief.

The Act does not set out any factors that may be considered in adjusting fines and sentences upward or downward.

**ii Behavioural remedies including interim measures**

The Act limits application of interim measures to instances where there is a violation of a prohibited restrictive trade practice. There is no rationale given for this limitation and it is arguable that this could have been a drafting oversight.

The CAK is empowered to grant interim relief where it believes, on reasonable grounds, that it is necessary to act as a matter of urgency for the purpose of preventing serious and irreparable damage to any person or category of persons or protecting the public interest pending conclusion of investigation.[29]

**iii Structural remedies**

The Act provides for structural remedies only where there is an 'unwarranted concentration of economic power', which is defined as the existence of cross-directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than 40 per cent.

The CAK is under an obligation to keep the structure of production and distribution of goods and services in Kenya under review to determine where concentrations of economic power exist, the detrimental impact of which on the economy outweighs the efficiency advantages of integration in production or distribution. This has been seen in the report produced on the sugar industry.[30]

Where the CAK finds that a person holds an unwarranted concentration of economic power in any sector it may order such person to dispose of such portion of its interests in production, distribution or the supply of services as it deems necessary to remove the unwarranted concentration; however, no order should be issued that has the effect of subdividing a manufacturing facility whose degree of physical integration is such that the introduction of independent management units controlling different components reduces its efficiency and substantially raises production costs per unit of output.[31] We are not aware of any case to which the CAK has applied this provision.

29 Competition Act, Section 37(1).

30 African Competition Forum, 'Competition in the Regional Sugar Sector: The Case of Kenya, South Africa, Tanzania and Zambia' (2014) [26], http://unctad.org/meetings/en/Contribution/CCPB_RPP2014_Study_Sugar_ACF_en.pdf.

31 Competition Act, Section 52(4).

## VI PROCEDURE

### i Investigations

Section 31 of the Act empowers the CAK to initiate investigations into any conduct or proposed conduct that is alleged to constitute or may constitute an infringement of prohibitions relating to an abuse of dominance, on its own motion or upon receipt of information or complaint from any person, including a government agency. The CAK during the course of 2014–2015 increased the number of officers among its staff who deal with investigations. So far this appears to have led to a small increase in reported cases and advisory opinions issued by the CAK, however, we expect an increase in reported investigations during the course of 2016 as the CAK becomes bolder in its use of its powers to investigate.

Upon conclusion of an investigation, if the CAK proposes to make a decision that there has been an abuse of dominance, it is required to give a written notice of the proposed decision to each undertaking that may be affected by the decision. The notice should contain the following:

*a* the reasons for the proposed decision;
*b* the details of any relief that the CAK may consider to impose; and
*c* inform each undertaking that it may make written representations to the CAK and indicate whether it requires an opportunity to make oral representations.

Unfortunately, these notices are not published and therefore there is limited guidance for practitioners on how the CAK may view any particular commercial arrangement. This issue has been raised by stakeholders to the CAK, which is considering whether to change its position.

### ii Settlement

The CAK may at any time, during and after an investigation into an alleged infringement of the prohibitions of the Act, enter into an agreement of settlement with the undertaking or undertakings concerned. The agreement may include an award of damages to the complainant and any amount proposed to be imposed as a pecuniary penalty.

### iii Appeals

The Act provides that a person aggrieved by a determination of the CAK should appeal to the Competition Tribunal, but the Tribunal is not yet fully functional and hence parties have been appealing directly to the High Court. Under the provisions of the Act, an aggrieved party has to appeal to the Tribunal within 30 days of the CAK's decision.[32] It is unclear at present whether this time frame is applied to an appeal to the High Court.

### iv Leniency

Effective from 1 October 2014, the Act at Section 89A states that an undertaking will qualify for a leniency programme if it voluntarily discloses the existence of an agreement or practice that violates the Act and cooperates with the CAK in the investigations. Such undertaking may not be subject to all or part of a fine that could be imposed under the Act.

32 Competition Act, Section 40(1).

The CAK is yet to issue the guidelines setting out the details of the leniency programme, as required under the new Section 89A of the Act.

## VII PRIVATE ENFORCEMENT

The Act confers the power of investigation and enforcement on the CAK and does not empower the CAK to delegate the function. Consequently, no private right of action exists at this time. A person with a grievance must file a complaint to the CAK, which will then investigate the matter.

## VIII FUTURE DEVELOPMENTS

Due to the Act's relative novelty, lack of supporting jurisprudence and the continuing evolution of the enforcement agenda of the CAK, the provisions of the Act relating to restrictive trade practices and abuse of dominance will doubtless continue to evolve. While the CAK is seeking to codify several of its current guidelines with a view to providing increased certainty to the market, the timeline for such codification remains unclear.

# Chapter 16

# MEXICO

*Luis Gerardo García Santos Coy, Mauricio Serralde Rodríguez and Jorge Kargl Pavía*[1]

## I INTRODUCTION

### i Statutory framework

In Mexico, antitrust matters are governed mainly by Article 28 of the Political Constitution of the United Mexican States (the Constitution), the Federal Law of Economic Competition (the Competition Law)[2] and the Regulatory Provisions of the Competition Law (the Regulations).[3]

As a result of an amendment to the Constitution, passed in June 2013 (the Telecommunications Act), the Federal Institute of Telecommunications (IFT) was created as an autonomous constitutional body with exclusive jurisdiction over competition issues in the telecommunications and broadcasting sectors; likewise, the former Federal Competition Commission (the former Competition Commission) was dismantled and a new Federal Economic Competition Commission (COFECE) created, also as an autonomous constitutional body, with exclusive jurisdiction over competition matters in all areas and industries other than the broadcasting and telecoms sectors. The IFT and the COFECE

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2 The first Mexican competition law was enacted in 1993, and was subject to several amendments. On 2014, a competently new Competition Law was enacted, which became effective on 7 July 2014.

3 Both the Federal Economic Competition Commission and the Federal Institute of Telecommunications issued their own Regulations to the Competition Law, the first issued on 10 November 2014, and the second on 12 January 2015. It should be noted that, other than the Competition Law and the Regulations, there is no statutory guidance with respect to relative monopolistic practices; nevertheless, both the COFECE and IFT encourage economic agents to approach them to discuss, either formally or not, any questions they may have with respect to a specific matter.

(together, the Antitrust Authorities) are the agencies in charge of enforcing the Competition Law, and in doing so, preventing and investigating anticompetitive conducts and vertical restraints.

The Competition Law is applicable to any private individuals or entities, profit or non-profit, government entities at national, state or municipal levels, associations, commercial chambers and associations, trusts or any other forms of involvement in an economic activity (economic agents).

In this regard, the Competition Law provides that monopolies, monopolistic practices and barriers which reduce, damage, hinder or condition in any way free and open competition in the production, processing, distribution or commercialisation of goods and services are forbidden in Mexico. For such purposes, the Competition Law establishes the specific provisions and proceedings applicable to the investigation of relative monopolistic practices (abuse of dominance), absolute monopolistic practices (cartel activity), concentrations (mergers and acquisitions), barriers to entry and the determination of the existence of essential inputs, and the determination of market power on behalf of an economic agent.[4] For purposes of this chapter, we will only look at relative monopolistic practices.

Relative monopolistic practices are similar to conduct analysed under the rule of reason in other jurisdictions, since for such conduct to be illegal, certain requirements must be met (as opposed to cartel activity, which is *per se* illegal) and, on a general basis, are carried out in vertical relationships within the production chain (between non-competing agents). Such requirements and practices are further detailed in Section IV, *infra*.

### ii Antitrust Authorities

The supreme authority of each of the Antitrust Authorities is vested in its plenum, composed of seven commissioners, each with a term of office of nine years.[5] The commissioners are appointed by proposal of the President of Mexico,[6] and must be ratified by the Senate. Each Antitrust Authority also has a president, appointed by the Senate, for a four-year term. In

4 The proceeding to determine barriers to entry and essential inputs is new in the Mexican antitrust regime (similar to that in the UK regime). Such proceeding allows the Antitrust Authorities to: (1) issue recommendations to governmental authorities in order to eliminate legal provisions which unduly limit free and open competition, (2) order the corresponding economic agent to eliminate a specific barrier to entry, (3) impose asymmetric regulations with respect to an essential input; and (4) order the divestiture of assets or stock as necessary in order to eliminate any anticompetitive effects, which will only be imposed in those cases in which other remedies are not enough to eliminate the identified anticompetitive effects.

5 It should be noted that, upon the creation of both Antitrust Authorities, each of their commissioners were appointed for terms of three, four, five, six, seven, eight and nine years in order for their replacement to be staggered. As from the first time in which each new replacement is appointed, each commissioner will be appointed for a term of nine years.

6 The process for the appointment of commissioners is the following. All candidates shall successfully pass a test prepared by an evaluation committee (comprised by the heads of the Bank of Mexico, the National Institute for Evaluation of Education and the National Institute of Statistics and Geography) with the opinion of at least one education institution and in accordance with best practices. The evaluation committee then sends to the President

most cases, decisions by the plenum are adopted by the majority vote of the commissioners, except for those cases in which a qualified majority is required, such as the designation of the technical secretary and the investigative authority and the issuance of an injunctive relief.

Each of the Antitrust Authorities has a specific investigative authority in charge of all investigations for anticompetitive behaviour, including relative monopolistic practices, absolute monopolistic practices and illegal concentrations (mergers). These new investigative authorities (similar to a prosecutor) are in charge of conducting the investigation, as well as acting as prosecutor in the formal administrative procedures (following the formalities of a trial) in those cases involving conduct in which the Antitrust Authorities have gathered sufficient evidence of the existence of illegal conduct pursuant to the Competition Law.

Neither of the Antitrust Authorities has issued any specific key policy statement with respect to the investigation and prosecution of relative monopolistic practices – in fact, none of their annual programmes expressly refer to such anticompetitive practices.[7] Notwithstanding the foregoing, and although none of these actions are aimed directly at preventing the existence of relative monopolistic practices, some actions provided for in the Antitrust Authorities' annual programmes will doubtless lead to the identification of potential relative monopolistic practices and therefore, cause investigations in this regard to be carried out.

## II YEAR IN REVIEW

Because of substantial changes to Mexican antitrust legislation and the relatively recent creation of the Antitrust Authorities, many investigations initiated by the former Competition

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of Mexico a list with three to five candidates for each available position. The President of Mexico then selects from such list the definitive candidate and sends it to the Senate for its ratification.

It should be noted that the Constitution also sets out the impediments to be a commissioner, such as, not having been Secretary of the State, Federal Attorney General, senator, federal or local representative, governor of any state or Chief Minister of the Federal District, within the year prior to appointment.

7 COFECE's annual programme for 2016 includes specific actions aimed to: (1) establish an electronic system for the notification procedure; (2) publish a technical document for the analysis of non-compete clauses; (3) publish a document containing the FAQs on the Leniency Programme; (4) push for the elimination of barriers to competition through *ex officio* opinions and the publish a report regarding the main barriers to competition within the local markets; and (5) develop workshops for government officials on economic competition matters in public acquisitions (COFECE, 2016 Work Programme, available at www.cofece.mx).

IFT's annual programme for 2016 focuses on encouraging convergence in the telecommunications and broadcasting sectors, consumer and audience protection, institutional strengthening, developing regulatory policies and guidelines, encouraging deployment of infrastructure and developing a spectrum policy. Such a plan does not include any specific statements with respect to the investigation of relative monopolistic practices or any other type of anticompetitive behaviour (IFT, 2016 Work Programme, available at www.ift.org.mx/sites/default/files/pat-2016-acc.pdf).

Commission are still ongoing; nonetheless, during the past year some important decisions in connection with several investigations have been issued by the Antitrust Authorities. The following chart contains a description of the investigations into relative monopolistic practices that have been concluded by the Antitrust Authorities since October 2014:

| *Recent investigations* | | |
|---|---|---|
| *Antitrust Authority* | *(File) Type of case* | *Resolution* |
| COFECE | File DE-026-2009. Investigation involving resale price maintenance, imposition of resale conditions and refusal to sell in the market of bulk distribution of magazines in the Mexico City area. | Closed due to lack of evidence. |
| COFECE | File DE-017-2013. Investigation involving refusal to deal and increasing competitors' costs in the market of the provision of storage and shipping services of non-crystallising honeys and their liquid-derived products. | Closed due to lack of evidence. |
| COFECE | File DE-030-2011. Investigation involving tied sales and refusal to sell in the market of exportation of Mexican avocados to the United States of America. | Originally, the case was closed due to the acceptance of remedies offered by the economic agent. Nonetheless, the economic agent failed to implement the remedies and was fined with 36.8 million pesos. |

On the other hand, the most recent investigations initiated by the Antitrust Authorities into relative monopolistic practices and to determine the existence of barriers to entry and essential inputs are the following:

| *Ongoing investigations* | | |
|---|---|---|
| *Antitrust Authority* | *Type of case* | *Case/market* |
| COFECE | Relative monopolistic practices | File DE-002-2015 – Generation, processing and commercialisation of credit information. |
| COFECE | Relative monopolistic practices | File DE-006-2014 – Production, distribution and commercialisation of gases in general. |
| COFECE | Relative monopolistic practices | File DE-002-2015 – Distribution and commercialisation of special maritime diesel. |
| COFECE | Relative monopolistic practices | File DE-003-2015 – Logistics and maritime transportation of merchandise. |
| COFECE | Relative monopolistic practices | File DE-015-2013 – Automobile parking spaces for the provision of ground transportation to and from the Mexico City International Airport. |
| COFECE | Existence of barriers to entry and essential inputs | File IEBC-001-2015 – Provision of air transportation services in the Mexico City International Airport. |
| COFECE | Existence of barriers to entry and essential inputs | File IEBC-002-2015 – Provision of public cargo transportation services in the State of Sinaloa. |
| COFECE | Existence of barriers to entry and essential inputs | File IEBC-001-2016 – Production, distribution and commercialisation of malt barley seed and grain in the brewing industry. |
| IFT | Relative monopolistic practices | File UCE/DE-003-2014 – Sale of advertising space in broadcasting TV in Mexico. |
| IFT | Relative monopolistic practices | File UCE/DE-001-2014 – Commercialisation of telecommunications services, provision of internet services and distribution and commercialisation of contents transmitted through internet and pay TV. |

| | | |
|---|---|---|
| IFT | Relative monopolistic practices | File E-IFT/UC/DGIPM/PMR/0008/2013 – Provision of pay TV services in the state of Sinaloa. |
| IFT | Relative monopolistic practices | File E-IFT/UCE/DGIPM/PMR/0006/2013 – Distribution and commercialisation of electronic airtime recharges for mobile services in Mexico. |

It is also important to mention that during the past year the specialised federal courts have issued several decisions involving procedural aspects of the investigations carried out by the Antitrust Authorities: in principle, the courts have supported the fact that economic agents subject to investigations by the Antitrust Authorities cannot challenge any of their actions until a final resolution is issued. This means that even if an economic agent considers that a specific action by the Antitrust Authorities is contrary to the Constitution or implies a violation to the economic agent's constitutional rights, the agent must wait until a final decision is issued by the Antitrust Authorities, without any injunctive relief being available until then.

Last, it is important to bear in mind that until now, it has been unclear what policy the Antitrust Authorities will follow with respect to the types of relative monopolistic practices that will be prosecuted. There are also certain aspects that remain unclear, such as the status of privilege in client–attorney communications and the guarantee against self-incrimination.

## III MARKET DEFINITION AND MARKET POWER

Similar to other jurisdictions, in Mexico, the definition of relevant market broadly encompasses two concepts: (1) the relevant product market, which refers to the goods and services involved in a specific analysis; and (2) the geographical market, which is the geographical area in which such goods and services are offered.[8]

### i Relevant product market

The relevant product market includes all products or services that are considered substitutes. This is determined based on a substitutability test that may be supported by econometric and statistic tests.

8 Pursuant to Article 58 of the Competition Law, the following shall be taken into account in defining the relevant market:

*a* the possibility of substituting a product or service for others, domestic or foreign, taking into account any technological capabilities, the extent to which consumers have access to substitute products and the time required for such substitution;

*b* the distribution cost of the product itself, of its relevant inputs; of its supplements and of substitutes from other regions and from other countries, including freight, insurance, tariffs and non-tariff restrictions, restrictions imposed by economic agents or by their associations, and the time required to supply the market from such regions;

*c* the cost and probabilities that users or consumers have to reach out to other markets; and

*d* federal, state or international legal provisions which limit access on behalf of users or consumers to alternative supply sources or access by suppliers to alternative customers.

Whether a product or service is a substitute for another product or service and hence, should be deemed a relevant product, is determined on a case-by-case basis, usually concerning the price, the product's or service's characteristics, and its intended purpose.

It is not uncommon for the Antitrust Authorities to carry out substitutability tests in terms of demand-side and supply-side substitution, as well as the potential competition (i.e., the introduction of new technologies).

Because of the relatively recent creation of the Antitrust Authorities, there are still a limited number of precedents; therefore, it is not always possible to foresee what criteria will be applied when defining a specific relevant market. Nevertheless, the former Competition Commission issued several decisions across a wide number of industries that may be helpful in anticipating the approach that the current Antitrust Authorities may follow in a specific case.

### ii Geographical market

The geographical market refers to the region, zone or place in which the relevant product is commercialised under similar distribution or provision conditions, without facing significant barriers both from the demand side and the supply side. This implies that the geographical market will correspond with the area in which an economic agent may increase the price of a product or service without attracting sellers from other areas, and without causing consumers to move to other areas to acquire the relevant product. A geographical market may be as broad as a global market or as limited as a specific zone or region within a city.

The elements that determine the scope of the geographical area include legal restrictions, transportation costs and tariffs, and the life cycle of a product, among others. These elements determine the ability of consumers to move to another area or of suppliers to enter into a specific area.

The Antitrust Authorities also analyse the volume of imports and exports of a specific product, as well as their destination and origin, in order to determine whether a geographical market should be defined as national or international; more restrictive geographical markets are usually defined in those cases involving services that, due to their nature, are only provided in specific areas.

### iii Market power

In Mexico there is no specific market share threshold at which the existence of market power on behalf of one or more economic agents is presumed, and this must be analysed on a case-by-case basis: a high market share does not necessary imply the existence of market power, whereas a low market share does not necessary imply the absence thereof.

The Competition Law provides that in order to determine whether one or more economic agents have market power, the Antitrust Authorities must take into consideration (1) their market share and whether they can set prices or limit supply in the relevant market without their competitors being able to countervail such power; (2) barriers to entry; (3) the existence and power of their competitors; (4) access by the economic agents and their competitors to input sources; and (5) the economic agent's recent behaviour.

Additionally, the Antitrust Authorities take into account the products' or services' positioning in the relevant market, the lack of access to importations or the existence of high importation rates, and the existence of relevant price differences that consumers may face when reaching out to other suppliers.

The Competition Law provides for the possibility of joint market power (a concept introduced in the former Competition Law in 2011). When determining the existence of joint market power on behalf of independent economic agents, the FECC considers whether the corresponding economic agents differentiate themselves from the other agents participating in the relevant market, taking into account factors that favour common incentives or interdependent strategic behaviour, or that such economic agents show a similar behaviour (the IFT has not issued any regulations in this regard). It should be noted, however, that there are no legal precedents on this specific subject, neither by the former Competition Commission nor by the Antitrust Authorities and therefore, it is still unclear the criteria that such authorities will follow when analysing this provision.

## IV ABUSE

### i Overview

Relative monopolistic practices (abuse of dominance) refer to certain behaviour on behalf of one or more economic agents that (1) falls within any conduct defined as such in the Competition Law; (2) is carried out by one or more economic agents which, individually or jointly, have market power in the same market as that in which the conduct takes place; (3) has or may have as purpose or effect, to improperly displace other economic agents from the relevant market or related markets, to materially hinder them from entering the market, or to establish exclusive advantages in favour of one or more economic agents.

In Mexico, conduct classified as relative monopolistic practices include exclusionary abuses, discrimination and exploitative abuses, all of which are addressed further below.

The Competition Law provides that a relative monopolistic practice will not be deemed illegal as long as the conduct generates efficiencies and has a positive impact on free and open competition, outweighing the conduct's anticompetitive effects resulting in benefits to consumers, in which case such conduct should be considered as competitive on the merits and therefore legal pursuant to the Competition Law.

In this regard, the Competition Law recognises as efficiency gains:

*a* the introduction of new products or services;

*b* the utilisation of leftovers, defective products or perishable products;

*c* cost reductions derived from the creation of new production techniques and methods, asset integration, increases in the production scale and the production of different products or services with the same production factors;

*d* the introduction of technological advances that produce new or improved products or services;

*e* the combination of productive assets or investments and their recoup that improves the quality or increases the usages for the products or services;

*f* improvements in quality, investments, and their recoup, opportunity and service that have a positive impact within the distribution chain; and

*g* any other factors that demonstrate the contribution to consumer welfare derived from the conduct outweighing its anticompetitive effects.

It should be noted from (g) that the list of efficiencies provided under the Competition Law is not exhaustive and so economic agents may submit evidence of additional efficiencies generated by an investigated conduct.

**ii Exclusionary abuses**

Relative monopolistic practices in the form of exclusionary abuse are tied sales; exclusive dealing; refusal to deal; boycotts; predatory pricing; exclusivity or discounts, incentives or benefits subject to exclusivity; cross-subsidisation; any conduct carried out by one or more economic agents whose direct or indirect purpose or effect is to increase other economic agents' costs, hinder their productive processes or reduce the demand for their products; denial of access to or price discrimination of an essential input; and margin squeeze.

***Tied sales***

This refers to the sale or transaction subject to the purchase, acquisition, sale or the obligation to provide a different product or service, usually different or distinguishable, or upon the basis of reciprocity. Tied sales must necessarily include a main product or service and a tied product or service, in which case the displacement or material hindering in prejudice of other economic agents must occur with respect to the commercialisation of the tied product or service.

***Exclusive dealing***

This refers to the sale of a product or service subject to the obligation not to use, acquire, sell, commercialise or provide the products or services produced, processed, distributed or commercialised by a third party.

***Refusal to deal***

This refers to a unilateral refusal to sell, commercialise or provide to a specific economic agent, products or services available and normally offered to third parties. It should be noted that on a general basis, this conduct requires that the economic agent refusing to deal does not have a valid justification for such a refusal in order to be deemed as illegal.

***Boycott***

This refers to an agreement among several economic agents or an invitation to these to exert pressure against an economic agent or to refuse to sell, commercialise or acquire products or services to or from such economic agent with the purpose of dissuading it from engaging in a specific conduct, retaliating against it or compelling it to act in a specific way.

***Predatory pricing***

This refers to the sale of products or services at prices lower than their variable median cost or lower than their total median cost but higher than their variable median cost, when there is evidence to assume that such losses will be regained through future price increases.

Specifically, when the Antitrust Authorities[9] analyse this conduct with respect to multi-product companies, such authorities will also consider the distribution of the total median cost and the variable median cost between sub-products or co-products, for which the technical characteristics of the production, distribution or commercialisation process will be taken into account, as well as the economic principles applicable to the determination of costs. The median cost should be calculated for the period of time in which the conduct has been analysed. Additionally, in the event an investigation has been triggered as a consequence

9 Note that the IFT has not initiated an investigation involving predatory pricing.

of a claim filed by a party, such party must provide the basis for the cost calculation referred to in its claim. Finally, the Antitrust Authorities should also consider that the corresponding economic agents may regain their losses when, in addition to having market power in the relevant market, there are arguments that they will maintain such market power when regaining such losses.

***Discounts, incentives or benefits subject to exclusivity***

This refers to the granting of discounts, incentives or benefits on behalf of producers or suppliers to purchasers subject to an obligation not to use, acquire, sell, commercialise or provide the products or services produced, processed, distributed or commercialised by a third party. This also refers to an obligation imposed by a purchaser on a producer or supplier not to sell, commercialise or supply to a third party the products or services subject to the transaction.

***Cross-subsidisation***

This refers to the use of profits made by an economic agent from the sale, commercialisation or provision of a product or service to finance the losses derived from the sale, commercialisation or provision of a different product or service.

***Margin squeeze***

This refers to the reduction of margins between the access price to an essential input provided by one or more economic agents and the price of the product or service offered to end consumers by those same economic agents, using for its production the same input.

**iii Discrimination**

Relative monopolistic practices in the form of discrimination consist of imposing different prices or sale conditions with respect to different customers or suppliers that should be considered in equal or equivalent conditions.

**iv Exploitative abuses**

Exploitative abuses are described by the Competition Law in the form of resale price maintenance and territory or customer allocation among non-competing economic agents. It should be noted that in Mexico excessive pricing is not considered illegal *per se*.

***Resale price maintenance***

This refers to the imposition of prices or other conditions upon a distributor or supplier with respect to the provision, commercialisation or distribution of products or services.

**Territory or customer allocation**

This refers to agreements between economic agents that are not competitors among themselves to fix, impose or establish exclusive commercialisation of distribution of products or services based on subject, geographical area, or determined time periods, including the division, distribution or allocation of customers or suppliers, as well as to the imposition of an obligation not to produce or distribute products or provide services for a determined or determinable period of time. It should be noted that should this conduct be carried out by competing economic agents, it will not be considered a relative monopolistic practice but rather an absolute monopolistic practice (cartel activity).

## V REMEDIES AND SANCTIONS

### i Sanctions

For participating in a relative monopolistic practice, a penalty of up to 8 per cent of the economic agent's turnover within the last year in which the conduct was committed may be imposed, excluding revenues originating from sources outside Mexico, as well as taxable income if it is subject to preferential tax treatment. When imposing a fine, the Antitrust Authorities will take various elements into account to determine the seriousness of the violation, such as the damaged caused, the indications of intent, the corresponding market share, the size of the affected market, the duration of the conduct, the corresponding economic agent's financial capacity and, if applicable, any obstruction to the Antitrust Authorities' actions.

### ii Behavioural remedies

In those cases in which the Antitrust Authorities find an economic agent guilty of a relative monopolistic practice, in addition to the fine previously mentioned, the Antitrust Authorities may impose upon the corresponding economic agent an obligation to cease the sanctioned conduct.

The Antitrust Authorities may also impose injunctive relief during the investigation of relative monopolistic practices in cases in which the investigative authority considers that continuation of the conduct may cause damage that is difficult to repair or may cause difficulties in guaranteeing the efficiency of the investigation. Such injunctive relief may consist, *inter alia*, of an order to suppress the conduct and an obligation to engage in or refrain from a specific conduct related to the investigation.

Finally, economic agents subject to an investigation of relative monopolistic practices may offer remedies consisting of cessation of such conduct to restore free and open competition to terminate the investigation by the Antitrust Authorities early, and even to reach a settlement obtaining a reduction to the applicable fine or not be fined at all. An economic agent may only apply for this benefit once every five years, and such application must be filed before an order of probable responsibility is issued by the Antitrust Authorities (such order is further addressed in Section VI, *infra*).

### iii Structural remedies

In the event of repeated offences, the Antitrust Authorities may order the divestiture or sale of assets, interests or shares of the economic agents in order to eliminate the anticompetitive effects.

## VI PROCEDURE

The Competition Law establishes an administrative procedure for the investigation of relative monopolistic practices that may be initiated *ex officio* by the Antitrust Authorities, at the request of the President of Mexico (directly or through the Ministry of Finance), at the request of the Bureau of Consumer Protection, or as a consequence of a claim filed by any party, even if it is not affected by the practice. It should be noted that the Competition Law provides that, to start an investigation, the Antitrust Authorities require the existence of an objective cause.

Investigations carried out by the Antitrust Authorities with respect to relative monopolistic practices are divided into two stages: the investigation stage and the administrative procedure.

In the investigation stage, the investigative authority must gather all evidence required to prove the existence of illegal activities. Such investigation stage may last between 30 and 120 business days from the date on which the order to begin the investigation was issued, a term that may be extended for up to four additional terms of between 30 and 120 business days.

During the investigation stage, the Antitrust Authorities may gather documents and information by written requests for information from parties that may have information useful to the investigation. Such requests usually include details of the relevant businesses, market data, information about the alleged infringement and copies of relevant documents.

The Antitrust Authorities may also carry out surprise visits (dawn raids) and request the use of the public forces for such purposes. Likewise, pursuant to the Competition Law, the Antitrust Authorities are authorised to seize documents or devices, as well as to question the economic agent's employees and officers.

The administrative procedure in the form of a trial is where the parties will be able to defend themselves against the allegations resulting from the investigative authority and any findings resulting from the investigation. During this second stage, both the investigative authority and the economic agent will be considered parties to the procedure.

The administrative procedure in the form of a trial begins within 60 business days of the conclusion of the investigation stage, in which the investigative authority must submit an opinion for the consideration of the plenum to either begin the trial phase or close the investigation.

In the event the plenum orders the beginning of the administrative procedure in the form of a trial, the Antitrust Authority will issue an order of probable responsibility to the accused economic agents (similar to a statement of objections), who then have 45 business days to submit arguments in their defence and to provide the relevant evidence.

The investigative authority then has up to 15 business days to respond to the agents' arguments. Once these 15 business days elapse, the Antitrust Authority will determine whether the evidence should be dismissed or admitted, and will schedule a date for production of the admitted evidence (such production should be made within 20 business days of the evidence being admitted).

Once the production of the admitted evidence has been carried out, both the agents and the investigative authorities will have 10 business days to submit their closing arguments, after which the Antitrust Authority should issue a final resolution within the next 40 business days.

Final decisions issued by the Antitrust Authorities may only be challenged by economic agents by way of a constitutional appeal (*amparo*) before a federal specialised court with no injunctive relief available to them, except for those cases in which the COFECE imposes fines or orders a divestiture, in which cases a constitutional appeal will suspend application of the COFECE's determination until a definitive ruling is issued by the courts (this suspension does not apply to decisions issued by IFT).

## VII PRIVATE ENFORCEMENT

The Competition Law provides that a person who has suffered damages or lost profits as a consequence of a monopolistic practice (including relative monopolistic practices) may file a civil claim for damages before the federal courts once a decision by the Antitrust Authorities is final. In this regard, the statute of limitations for filing such claim will be suspended as of the date in which the order to begin an investigation has been issued.

Furthermore, a decision by the Antitrust Authorities finding an economic agent guilty of engaging in illegal conduct will also provide evidence of the responsibility of such economic agent for the purposes of the civil claim.

These civil claims may be filed either as individual or class actions, pursuant to the provisions of the Federal Code of Civil Proceedings. With respect to class actions, these may be filed by the Bureau of Consumer Protection, the Antitrust Authorities, the common representative of a class, non-profit organisations related to competition matters, or the Federal Attorney General.

Private enforcement is still an emerging area in Mexico, and there have been only a few cases of civil action deriving from the commission of relative monopolistic practices and, to our knowledge, none has been successful; this means that there is an absence of case law or criteria as to the calculation of damages and lost profits.

## VIII FUTURE DEVELOPMENTS

We are facing exciting times in competition-related matters in Mexico. Competition is one of the key elements of the agenda of the current federal administration. In particular, as a consequence of the issuance of the relatively new Competition Law, the creation of the Antitrust Authorities, the enactment of new regulations and criteria, a new special investigative authority and recently created specialised courts, a significant increase has taken place in the activity of legal practitioners, and there are many new things to learn and challenges to come.

The success of the new legislation in creating a better environment for developing economic competition in Mexico is being tested on a daily basis, and it continues to depend on the Antitrust Authorities' ability to establish new structures and enforce the law, and the conduct of the newly created specialised courts. The recently created Antitrust Authorities still face significant challenges. This is a completely new era for competition policy in Mexico, and we look forward to the success of COFECE and IFT, as promoting and fostering competition is essential for the future of the country.

During 2015–2016, COFECE issued the following documents involving enforcement of the antitrust regulation with respect to relative monopolistic practices:

*a* guidelines for engaging in an investigation of relative monopolistic practices and illegal concentrations;

*b* guidelines for the investigation of monopolistic practices;

*c* guidelines for the exchange of information among economic agents (containing a specific section on relative monopolistic practices);

*d* guidelines for the offering of remedies for the granting of a reduction in fines; and

*e* a document regarding the determination of guarantees to suspend the application of injunctive relief.

# Chapter 17

# NETHERLANDS

*Erik Pijnacker Hordijk*[1]

## I INTRODUCTION

### i Legal framework

In the Netherlands, the statutory framework with respect to abuse of dominance consists of two articles in the Dutch Competition Act (DCA). The prohibition on abuse of dominance is laid down in Article 24 of the DCA, which has been modelled after Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 25 of the DCA provides for the possibility of an exemption from the application of Article 24 of the DCA in respect of undertakings entrusted with the operation of services of general economic interest (insofar as the application of Article 24 of the DCA would obstruct such operation), and thus substantively resembles Article 106(2) of the TFEU.[2]

The legislature expressly intended for the decision practice of the European Commission (the Commission) and the case law of the EU courts to govern the application of Articles 24 and 25 of the DCA.[3] Furthermore, the legislature indicated that the DCA should be neither more nor less lenient than the EU competition rules.[4]

An abuse within the meaning of Article 24 of the DCA may be exclusionary or exploitative in nature. The examples of such abuses that are listed in Article 102 of the TFEU are not listed in Article 24 of the DCA but can be found almost verbatim in the explanatory memorandum to the DCA.[5]

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1 Erik Pijnacker Hordijk is a partner at De Brauw Blackstone Westbroek NV.

2 Although such an exemption has to be applied for and granted by the ACM to take effect under Article 25 of the DCA.

3 Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 71.

4 Ibid.

5 Ibid.

There is a little substantive policy guidance supplementing the above-mentioned statutory framework on abuse of dominance; for example, in the form of guidelines of the Authority for Consumers and Markets (ACM), the successor to the Dutch Competition Authority (NMa).[6] One of the few policy documents containing substantive guidance on abuse of dominance, in particular with respect to dominant positions on (the demand or supply-side of) purchasing markets, is the 2004 'Vision document' on purchasing power.[7] With respect to the healthcare sector in particular, the Guidelines on Healthcare Groups also provide for specific guidance on purchaser dominance.[8]

In as far as public or state-owned enterprises operate as 'undertakings' within the meaning of the DCA, they are bound by the same rules as private enterprises.[9] As of 1 July 2012, the DCA has been supplemented with certain special rules applicable to public enterprises, but these do not specifically relate to abuse of dominance.[10]

Finally, there is special regulation comprising rules on market power in respect of the telecommunications sector (telephone and internet services), the electricity and gas sectors, the postal sector and the transportation sector. These regimes are all supervised by the ACM as well. For the healthcare sector, pursuant to the Healthcare Market Regulation Act, the Dutch Healthcare Authority is tasked with supervision of healthcare companies with 'significant market power'.[11]

### ii Enforcement practice and policy

The Netherlands ranks among the countries with the lowest number of abuse of dominance interventions (i.e., decisions by the national competition authority establishing an infringement). That is the conclusion of a study by economic research organisation, SEO, commissioned by the Dutch Ministry of Economic Affairs, Agriculture and Innovation and presented in 2012 (the SEO study).[12] In the study period of 2005 to 2009, only one out of 18 investigations relating to abuse of a dominant position resulted in an intervention, and

6 The ACM is the result of the merger between the Dutch Competition Authority, the Dutch Consumer Authority and the Independent Post and Telecommunications Authority. The ACM has assumed the powers and tasks of these previously independent enforcement authorities from 1 April 2013.

7 Visiedocument Inkoopmacht (2004). The document is available (in Dutch) at: www.acm.nl/nl/download/bijlage/?id=7749.

8 Richtsnoeren Zorggroepen (2010). The document is available (in Dutch) at: www.nza.nl/104107/136998/Richtsnoeren_Zorggroepen.pdf.

9 See, for example, the decision of the NMa of 12 September 2002 in Case No. 2493 (*Vereniging Eigen Huis v. Gemeente Amsterdam*), in which the municipality of Amsterdam was held to be an undertaking insofar as it was involved in the sale of land.

10 'NMa to monitor market law and government'; see: www.acm.nl/nl/publicaties/publicatie/10776/NMa-start-toezicht-Wet-Markt-en-Overheid/. A transitional exemption period of two years applies with respect to activities already started at the moment this legislation came into force.

11 The Health-care Market Regulation Act is available (in Dutch) at: www.nza.nl/regelgeving/wetgeving/wmg.

12 The study is available (in English) at: www.seo.nl/uploads/media/2011-63_An_international_comparison_of_the_abuse-of-dominance.pdf.

that intervention was eventually overturned in court review.[13] At the time of writing, there has been only one additional intervention since the study period. The imposition of a fine in this case was reversed by the ACM subsequent to an administrative review procedure.[14]

The aforementioned study sought to explain the relatively low enforcement rate of abuse of dominance cases in the Netherlands, but failed to arrive at any conclusive observations;[15] however, it is probably linked to the prioritisation policy of the ACM and the NMa before that, in combination with the ACM's historically strong focus on cartel enforcement. The ACM is not obliged to investigate every suspected infringement or complaint. It sets its priorities on the basis of economic significance, consumer interest, severity of the infringement and likely efficiency of an intervention.[16] Demonstrating harm is generally less expensive in the case of a cartel than for an abuse case, as the latter would normally require an analysis as to the (potential) effects on competition, and is thus likely to involve higher levels of resources. Moreover, as the ACM has pointed out itself in an official reaction to the SEO study,[17] because of the leniency programme (which is not applicable to unilateral conduct), cartel cases are generally easier to prove than abuse cases. When its resources have to be allocated between cartels and an abuse of dominance case, the ACM, therefore, apparently prefers to pursue the former. Finally, the ACM has suggested that the relatively elaborate special regulation in respect of sectors operated by former state monopolies has rendered the generic abuse of dominance framework less relevant in the Netherlands.[18]

## II YEAR IN REVIEW

As previously explained, there are generally very few abuse of dominance interventions in the Netherlands, and in 2015, no violations were established by the ACM. There is generally also very little private enforcement of the prohibition on abuse of dominance in the Netherlands. The above-mentioned SEO study, for example, found that there have been only 42 court cases that featured a claim of abuse of dominance in the five-year study period of 2005 to

13 Case No. 3353, decision of the NMa of 6 March 2008; and the decision of the Trade and Industry Appeals Tribunal of 7 October 2010 (case AWB 07/596, LJN: BN9947) (*CR-Delta*).

14 Case No. 4296_1, decisions of the NMa of 5 January 2011 (174), 21 January 2011 (197) and the decision on appeal of the NMa of 30 June 2011 (214) (*GasTerra*).

15 The study mentions that the following hypotheses could not be proven: (1) differences in the tools and resources available to the five competition authorities and their deterrent effects; (2) whether Dutch firms have violated the abuse of dominance provision to a lesser extent, as compared to other jurisdictions; and (3) the explanation that the Dutch Competition Authority NMa chose to intervene in few abuse of dominance cases in the period studied, or resolved a relatively high number of cases informally.

16 Prioritisation policy of the ACM, available (in Dutch), Stcrt.2016 No. 14564 of 18 March 2016.

17 Reaction of the ACM to the SEO study, available (in Dutch) at www.rijksoverheid.nl/documenten-en-publicaties/brieven/2012/11/23/reactie-nma-op-rapport-seo-over-misbruik-economische-machtspositie.html.

18 Ibid., paragraph 3.

2009 (claims that in most cases only served as an ancillary argument), none of which led to an actual finding of infringement of the abuse of dominance prohibition.[19] A number of recent abuse cases raised considerable media attention.

In November 2014, the District Court of Rotterdam dismissed a €1 billion claim for damages by container trans-shipment company Europe Container Terminals (ECT) against the Rotterdam Port Authority. ECT claimed that the Port Authority abused its dominant position by building two new harbour sites, thereby creating disproportionate overcapacity. According to ECT, the Port Authority demonstrated its dominant position on the market for the leasing of harbour plots by 'locking' ECT into the harbour: ECT's substantial investments and long-term lease contract prevented it from switching to a competing port. ECT alleged that this proved that the Port Authority could act independently of ECT, but the court found the dominance claim insufficiently substantiated, particularly since the ACM came to a different conclusion on the Port Authority's market position in a 2005 report. According to the report, the long-term lease contracts protected existing tenants from price increases, as well as from the risk of contract termination before investments could be recouped. The Port Authority also had to compete with other harbours in order to obtain new tenants. Furthermore, the Port Authority faced sufficient countervailing power by large international market players, such as ECT, in its negotiations with existing and new tenants. Based on these factors, the court ruled that ECT had failed to prove that the Port Authority had a dominant position on the market for the leasing of harbour plots. The court added that the facts as presented by ECT did not show that the Port Authority had the ability to act independently in its dealings with ECT. This ruling confirms that damages claims based on abuse of dominance must be thoroughly substantiated, also in regard to establishing a dominant position.

In December 2014, the ACM closed its investigation into possible abuse of dominance by pharmaceutical manufacturer AstraZeneca. In December 2011, the ACM sent a statement of objections to AstraZeneca, suspecting it of having abused a dominant position by charging considerably higher prices for its heartburn drug Nexium sold for use outside hospitals (extramural) than when sold inside hospitals (intramural). As a result of the 'hospital-influence effect' – patients tend to continue the use of the same drug that they have been administered by their hospitals, and physicians are inclined to prescribe the same drug – AstraZeneca allegedly faced little competition with regard to patients that had been first put on Nexium while hospitalised, and could thus offset the losses incurred by offering Nexium to hospitals at a deep discount with higher extramural prices. The ACM concluded, however, that AstraZeneca had not violated the prohibition on abuse of dominance because it could not be sufficiently determined that AstraZeneca had indeed occupied a dominant position. In its decision, the ACM distinguished an intramural market and extramural market consisting of users who, as a result of the hospital influence effects, should be considered captive to Nexium. AstraZeneca did not have a dominant position on the intramural market, since it held a market share of less than 40 per cent. In regard of the extramural market, AstraZeneca's arguments regarding substitution, therapeutic effectiveness and switching behaviour had raised reasonable doubts as to whether a group of Nexium users would indeed be bound to Nexium through the hospital influence effect on such a scale that, with regard to this group, AstraZeneca was able to behave independently of its

19 SEO study, p. 15.

competitors. In April 2014, the ACM published a commitment decision relating to a possible abuse of a dominant position. Following an investigation by the ACM into potential abuse of dominance, Buma – the Dutch collecting society for composers and music publishers – offered commitments to introduce a music copyright management system that will provide composers and songwriters with more options in the management of their music copyrights. According to the ACM, music copyright owners do not always need Buma's services for music played over the internet because online sales tend to be easier for individuals to process. The new system will enable composers and songwriters to choose which (online or offline) rights they wish to transfer to Buma.

In June 2015, the ACM confirmed it conducted dawn raids at the premises of Dutch Railways NS and its subsidiaries QBuzz/Abellio to investigate a possible abuse of dominance in the context of the EU tender process for a public-transport concession issued by the province of Limburg (southern region of the Netherlands). This investigation has not been completed yet. However, in a decision made in March 2015, the ACM concluded that Dutch Railways NS had violated the Dutch Railway Act, following a complaint by railway company Veolia. The Dutch Railway Act requires NS to make competitors, such as Veolia, a reasonable offer for certain essential facilities, which NS allegedly had failed to do in Veolia's case. In addition, the ACM found that NS passed competitively sensitive information of Veolia on to its subsidiary Abellio, which participated in the same tender process. Some of the more recent decisions by the ACM and NMa and the Dutch courts, in which claims of abuse of dominance were dismissed, also contain interesting points on certain substantive aspects. These cases are discussed below.

**i Predatory pricing: Sandd/PostNL**

In May 2012, the ACM confirmed its 2009 decision that formerly public postal service monopolist PostNL (formerly TNT Post) did not abuse its position on the Dutch postal service market, thereby rejecting a complaint by PostNL's competitor Sandd.[20]

Sandd had claimed, *inter alia*, that the 'free' use of PostNL's network by its 'price fighting' subsidiary Netwerk VSP distorted competition on the Dutch postal (addressed mail) market. Sandd argued that the predation assessment should consist in comparing Netwerk VSP's prices and costs, whereby the remuneration paid by Netwerk VSP for the use of PostNL's network should be considered costs of Netwerk VSP. The ACM rejected that argument, as it held that PostNL constituted an 'economic unit' with its subsidiary. Given that the average prices charged for the addressed mail service of Netwerk VSP was above the long-run average incremental costs (LRAIC) of PostNL (including Netwerk VSP) the ACM concluded – in line with the Commission's guidance on abusive exclusionary conduct – that there was no evidence of abusive pricing and rejected Sandd's complaint.[21] The District Court of Rotterdam upheld the ACM's decision in administrative appeal. The Court dismissed Sandd's argument that the LRAIC was not an appropriate test to determine abuse in the postal market, as it is based on a comparison with an 'equally efficient competitor'. Sandd argued that new entrants to the postal market obviously cannot operate as efficiently as the

20 Case No. 6207, decision of the NMa of 21 May 2012.

21 See paragraph 67 of the Commission's Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

former monopolist. However, the court considered that the ACM was right to make such a comparison, as otherwise a less efficient competitor would be able to force a dominant company to raise its prices to the detriment of the end user, merely because it is less efficient.[22]

### ii Excessive pricing: NPO/Platform Makers

In April 2012, the ACM rejected a complaint against the Dutch Public Broadcasting Service (NPO), the representative body of Dutch public broadcasters, by Platform Makers, a representative body for (musical) authors and performers. Platform Makers submitted that the NPO occupied a dominant position on the 'broadcasting market' and that it had abused this position by forcing authors (composers and text writers) of musical works for use in broadcasts to accept 'excessive' commercial conditions (i.e., excessively low prices or royalties).[23]

The ACM considered that the NPO and the public broadcasters were active on a market for the purchasing of musical works. Referring to the 'Vision document' on purchasing power, the NPO held that in situations of purchasing power the effects on consumers should play a central role in the legal assessment, as more favourable prices obtained through purchasing power may also result in benefits for the consumer (and may, thus, ultimately not be anticompetitive). It indicated that to carry out such an assessment would require significant resources.[24]

Next, the ACM turned to a provisional assessment and submitted that it was unlikely that the NPO would occupy a dominant position on the purchasing market of musical works, as the musical authors had sufficient other sales channels, such as the various commercial broadcasters, but also producers and even the gaming industry. In addition, the ACM indicated that in view of the abundance of strong competitors on the downstream market, it was likely that purchasing benefits would be passed on by the NPO to consumers in the form of, *inter alia*, programmes of higher quality. In view of this provisional assessment and the expected level of resources required for making the necessary analyses in this case, the ACM decided, in accordance with its prioritisation policy, that it would not pursue the case.[25]

### iii Discriminatory and excessive pricing: Fresh FM/Buma

In May 2012, the Trade and Industry Appeals Tribunal (CBb), the highest administrative court in cases on appeal of decisions from the ACM, confirmed an earlier dismissal by the ACM of a complaint by Fresh FM, a Dutch radio broadcaster, against Buma, the Dutch collecting society for composers and music publishers.[26]

22 Decision of the District Court of Rotterdam of 26 September 2013, ECLI:NL:RBROT:2013:7337.

23 Case No. 7213, decision on appeal of the NMa of 27 April 2012.

24 Ibid., p. 4.

25 Ibid., p. 6; this was confirmed in administrative appeal by the District Court of Rotterdam on 5 December 2013, ECLI:NL:RBROT:2013:9461.

26 Decision of the Trade and Industry Appeal Tribunal of 24 May 2012, AWB 09/1302, LJN: BW6327.

Fresh FM claimed that Buma had abused its dominant position by discriminating between regional commercial radio broadcasters and other broadcasters in terms of tariffs charged, as well as by charging excessively high tariffs to these commercial regional broadcasters.

The ACM provisionally investigated the potential exclusionary effects of the alleged discriminatory pricing. It concluded that Buma clearly had no incentive to exclude Fresh FM or any commercial stations from the market, as these parties operated as Buma's customers (just as much as other broadcasters). The ACM also investigated whether the tariffs were potentially excessive. Based on an international price comparison it decided that they were not. The ACM thus rejected Fresh FM's complaint, and reconfirmed its dismissal in administrative appeal.[27]

On ultimate appeal to the court, the CBb upheld the ACM's decision, as – in short – Fresh FM had not submitted (sufficient) evidence contradicting the ACM's findings. The CBb emphasised that to consider a certain behaviour abusive, while it is not necessary to demonstrate actual effects, the claimant at least needs to show that the targeted conduct tends to restrict competition or that the conduct is capable of having that effect. Fresh FM had not done this. This approach, which is consistent with the *Tomra* jurisprudence of the General Court (GC) and the European Court of Justice (ECJ),[28] had already been propagated by the CBb in its decision in the *CR-Delta* case in 2010.[29]

**iv Vexatious litigation: Chipshol/Schiphol**

In August 2012, the ACM issued a decision in a case between the land development company Chipshol and Schiphol Airport. Chipshol claimed that Schiphol had abused its dominant position by unduly influencing several governmental decisions and procedures to the detriment of Chipshol. Chipshol alleged that it was prevented from developing its land in the area of the airport as a result of the abuse.[30]

The ACM assessed Chipshol's complaint against the criteria that the General Court had laid down in its judgment in *ITT/Promedia*.[31] In this judgment the General Court considered that the bringing of an action could qualify as an abuse of a dominant position if such an action: (1) cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party; and (2) is conceived in the framework of a plan whose goal is to eliminate competition.[32] Although according to the ACM, Schiphol had influenced the governmental decisions, it found no evidence that Schiphol did so not to establish its rights (i.e., pursue and defend its interests regarding aviation safety) but merely to frustrate Chipshol. Therefore, according to the ACM, Schiphol's conduct did not fulfil the conditions of *ITT/Promedia*. Since Schiphol's conduct could not qualify as

27 Case No. 3295, Decision of the NMa of 10 May 2007 (78), and decision on appeal of the NMa of 2 April 2008, (133).

28 General Court of the EU 9 September 2010, Case T-155/06 (*Tomra/Commission*) and European Court of Justice 19 April 2012, Case C-549/10P (*Tomra /Commission*).

29 Decision of the Trade and Industry Appeal Tribunal of 7 October 2010, AWB 07/596, LJN BN9947 (*CR-Delta*).

30 Case No. 7194, Decision of the NMa of 20 August 2012 (75).

31 General Court of the EU 17 July 1998, Case T-111/96 (*ITT Promedia/Commission*).

32 Ibid., para. 11.

abuse, the question of whether Schiphol has a dominant position in the relevant market could be left unanswered. The CBb confirmed the ACM's line of reasoning in its ruling of November 2015.[33] According to the Court, the ACM performed a sufficiently thorough investigation to conclude that Schiphol's actions did not constitute abuse.

### v Refusal to deal: NVM/HPC

In June 2012, the Amsterdam Court of Appeal handed down a decision in a case between the Dutch Association of Real Estate Agents (NVM) and the (bankruptcy trustee of) software company HPC. HPC submitted that the NVM had illegally refused access to technical specifications necessary for third-party software packages to interface with a widely used software system supplied by the NVM. The Court first of all considered that the case law of the EU courts should be 'guiding' in applying Article 24 of the DCA. It then proceeded to assess the cumulative criteria of *Bronner*[34] to determine whether the alleged (constructive) refusal to deal should be held abusive. It ruled that HPC had not been able to convincingly demonstrate (1) that all competition had been eliminated by NVM's alleged refusal; and (2) that having access to the specifications was the only way of building a market presence, in view of, *inter alia*, the fact that HPC had been active on the market with a market share of about 20 per cent. It therefore rejected the abuse of dominance claim.[35] The Dutch Supreme Court upheld the Court of Appeal's ruling and, referring to EU case law, rejected the plaintiff's argument that not all competition will need to be eliminated for it to constitute abuse.[36] According to the Supreme Court, the Court of Appeal rightly deduced that competition by HPC, and thus competition on the market, was not completely eliminated by NVM's behaviour, given HPC's 20 per cent market share.

### vi Conclusion

The recent case law has been too fragmented to be able to deduce any clear trends from it with respect to the substantive issues covered in these cases; however, if the decisions and rulings mentioned above make one thing clear, it is that both the ACM and the courts in the Netherlands have tried to adhere closely to the Commission's and EU Courts' application of the concept of abuse of dominance, and have been following the Commission's lead in emphasising the importance of an effects-based analysis and attaching much value to economic evidence in abuse cases.

## III MARKET DEFINITION AND MARKET POWER

In the Netherlands, the concepts of market definition and market power are applied in a manner that is substantially similar to the approach of the Commission and the EU Courts; therefore, please see the European Union chapter for more detailed information on European practice.

33 Decision of the Trade and Industry Appeal Tribunal of 8 November 2015, ECLI:NL:CBB:2015:314.

34 European Court of Justice 26 November 1998, Case C-7/97 (*Bronner*).

35 Decision of the Amsterdam Court of Appeals of 12 June 2012, LJN: BX0460.

36 Decision by the Dutch Supreme Court of 24 January 2014, ECLI:NL:HR:2014:149.

### i Market definition

As to market definition, the ACM and the courts tend to follow the principles embodied in the Commission's Notice on the definition of the relevant market and the standard jurisprudence of the EU Courts.[37]

### ii Market power

The definition of dominance is provided in Article 1(i) of the DCA and is modelled on the definition commonly applied in the EU, and as coined by the ECJ in the United Brands case:[38]

> *a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users.*

The methodologies and standards of proof employed in practice in determining whether a market position fits this definition of dominance also closely follow European practice. Market shares are considered an important indicator, although not decisive on their own. Additional factors have been taken into account, such as the existence of intellectual property rights, the level of concentration of the market, and barriers to entry.[39] The ACM and the courts will normally also look for contraindications, such as countervailing power.

A good example is the 2011 decision of the ACM in the case *Automark/Carglass*. When assessing the market position of Carglass, which had a market share of over 40 per cent in the relevant market, the ACM took into account the countervailing purchasing power of (large) insurers, the fact that a competitor had recently won market share, and the fact that there were realistic opportunities for entry on the market. The ACM therefore concluded that in spite of its high market share, Carglass did not occupy a dominant position and dismissed the complaint of Automark.[40]

Some years ago, the ACM indicated – as part of an OECD survey on abuse of dominance – that the likelihood of a false negative (allowing an anticompetitive conduct to materialise) seems to be limited in cases of firms with low market shares. It therefore proposed using a market share-based safe harbour for unilateral conduct (up to 30 per cent market share), as such a provision would promote legal certainty.[41] There is, however, no case law in which the NMa or the ACM has actually (explicitly) employed this safe harbour threshold.

37 Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372/5.

38 European Court of Justice 14 February 1978, Case C-27/76 (*United Brands/Commission*).

39 This also follows from the Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 25.

40 Case No. 6561, decision of the NMa of 17 August 2011.

41 OECD Policy Roundtables, Guidance to Business on Monopolisation and Abuse of Dominance (2007), available (in English) at: www.oecd.org/competition/abuse/40880976.pdf.

## IV ABUSE

### i Overview

As with the concepts of market definition and market power, the ACM and the courts tend to closely follow the case law of the Commission and EU courts on the concept of abuse. There are no substantive areas in which Dutch practice may be said to clearly deviate from European practice. Still, over the years, some noteworthy decisions have been handed down with respect to the various types of abuse within the abuse of dominance spectrum itemised below.

### ii Exclusionary abuses

***Exclusionary pricing***

The *Sandd* case discussed already in detail in Section II, *supra*, provides a good example of the current legal and policy views of the ACM with respect to exclusionary (predatory) pricing.

***Exclusive dealing***

*Loyalty rebates*

In the *CR Delta* case, the ACM held, *inter alia*, that certain rebates granted by the (dominant) Dutch 'cattle improvement co-operative' on its insemination services were of a loyalty-inducing nature and therefore anticompetitive. This view was later confirmed by the District Court of Rotterdam.[42] However, the CBb ruled (in 2010) that despite the obvious loyalty-inducing aim of the rebates, the ACM should have examined whether the rebates were capable of having anticompetitive effects before concluding that the rebates were illegal (referring to the *Tomra* jurisprudence of the ECJ). According to the CBb, the rebates were not capable of having such effects, as the rebates only accounted for a very small (merely 'symbolic') part of the total costs. Moreover, according to the CBb, competitors were able to (profitably) match the prices charged by CR-Delta, which according to the CBb, clearly indicates the absence of any exclusionary effects of the rebates. For these reasons, the CBb overturned the decision of the ACM.

The question is whether the CBb has perhaps too vigorously applied an effects-based approach in this case. Some commentators have pointed out that in respect of 'classic' loyalty rebates, the more form-based doctrine following from *Michelin II* and *Hoffmann-LaRoche* still applies (i.e., that once the anticompetitive aim of a loyalty rebate has been established, the anticompetitive effects can be presupposed and no longer have to be demonstrated).[43] In any event, given the particular facts of the case (in which the loyalty rebates were very small), the approach of the CBb does not seem to have led to an unreasonable outcome.

*Other exclusionary acts*

In early 2011, the ACM ruled that GasTerra, a Dutch company active in the trade and supply of natural gas, had used supply conditions in its contracts with energy distributors

42 Decision of the Trade and Industry Appeal Tribunal of 7 October 2010, AWB 07/596, LJN BN9947 (*CR-Delta*).

43 R Elkerbout, 'Annotatie bij de uitspraak van het College van Beroep voor het bedrijfsleven 7 oktober 2010, AWB 07/595, LJN: BN9947', *Actualiteiten Mededingingsrecht*, No. 9/10 2010, pp. 217–220.

in the Netherlands that discouraged these distributors from combining their offer with gas obtained from other wholesale suppliers, thereby impeding the creation of competition in the wholesale gas market. However, on administrative appeal the ACM became convinced that the lack of differentiation on the distributors' side was attributable to a number of other factors as well. For example, after the market had been liberalised, it simply took quite a while before alternatives to GasTerra's products and services became available. In addition, there may have been practical and legal obstacles to the introduction of contracts that would offer energy companies more freedom. The ACM therefore arrived at the conclusion that it could not be established that GasTerra had abused its dominant position.[44]

***Leveraging***

Over the past 15 years the ACM has performed only two in-depth investigations focused on alleged tying. In one of those cases, KPN, the former state monopolist in telecommunications, filed a complaint against four major cable television companies for alleged abuse of their (regional) dominant position by, *inter alia*, tying their analogue packages to their digital packages. The ACM dismissed the complaint because it found that the analogue and digital packages were part of one and the same market and therefore there could be no case of tying.[45]

***Refusal to deal***

On the subject of refusal to deal, the recent NVM/HPC case already discussed in Section II, *supra*, confirms that the Dutch courts closely follow the *Bronner* criteria in their assessment of such cases.

On the subject of refusal to license, there is an interesting body of case law in which different Dutch courts have applied the relevant EU concepts differently.

It concerns a long-standing dispute between the largest Dutch daily, *De Telegraaf*, and the National Broadcasting Organisation (NOS) together with the public broadcasting organisations that the NOS represents. De Telegraaf claimed, in a complaint to the ACM in 2001, that the refusal of the broadcasters to provide De Telegraaf with television programming schedules for use in a weekly television guide, amounted to an abuse of a dominant position. The ACM sided with *De Telegraaf*, and the decision was subsequently confirmed by the District Court of Rotterdam.[46]

In the parallel civil (summary) proceedings initiated by NOS and public broadcasters against *De Telegraaf* and relating to the same subject matter, the courts, all the way up to the Supreme Court, arrived at the same conclusion: they found that NOS abused its dominant position by refusing to supply the programming schedules.[47] With respect to the argument raised by the broadcasters before the Supreme Court that the Court of Appeals had not

44 Case No. 4296_1, decisions of the NMa of 5 January 2011 (213), 21 January 2011 (197) and the decision on appeal of the NMa of 30 June 2011 (214) (*GasTerra*).

45 Case No. 5702, decision of the NMa of 20 July 2007 (207).

46 Case No. 501.o119, decision of the NMa of 3 October 2001 and Decision of the District Court of Rotterdam of 22 June 2000, LJN: ZF1130.

47 Decision of the President of the District Court of 's-Gravenhage of 5 January 1999, KG 98/1539, LJN: BM3036; decision of the Court of Appeal of 's-Gravenhage of 30 January 2001, 99/1.65, LJN: AA9717; and decision of the Supreme Court of 6 June 2003, C01/183HR, LJN: AF5100.

properly considered whether the weekly guide of *De Telegraaf* would satisfy the 'new product' criterion of the Magill case, the Supreme Court responded that the Court of Appeals had done enough by establishing that there would be a certain demand for the *De Telegraaf* weekly guide.[48]

However, after this Supreme Court decision in the civil suit, the CBb overturned the ACM's decision and the District Court's ruling in the administrative proceedings. With reference to, in particular, the criteria set out in the *IMS Health* decision that had just been handed down by the ECJ,[49] it held that *De Telegraaf*'s weekly television guide should not be considered a 'new product' (there were already weekly television guides on the market, published by various broadcasting organisations) and that the refusal by NOS therefore did not prevent the introduction of a 'new product'.[50] The preliminary relief judge of the District Court of Amsterdam arrived at a similar conclusion in a similar case in 2005, between commercial broadcaster SBS and publisher Quote Media.[51]

Perhaps the different rulings of the CBb and the Supreme Court in the case of *De Telegraaf v. NOS* could be explained by the fact that, unlike in the Magill case, the 'new product' criterion was clearly presented as a cumulative criterion in IMS Health, which was issued only after the Supreme Court's decision. But still it remains doubtful whether, in view of Magill alone, the Supreme Court was right to endorse the lack of a more specific assessment of the new product criterion by the Court of Appeals and considering it satisfied by referring to the existence of a demand for the product.

In 2012 there was a new development in this dispute. *De Telegraaf* started publishing a weekly television guide, containing the programming data of the public broadcasters, claiming on the basis of the 2012 ECJ decision *Football Dataco* that the data was not protected by IP rights.[52] The preliminary relief judge of the Amsterdam District Court disagreed and, on application of the broadcasters, issued an injunction against *De Telegraaf*. Briefly touching on *De Telegraaf*'s counterargument of abuse of dominance by NOS, the judge indicated that it felt bound by the 2004 CBb ruling on this legal issue (in which, as explained above, *De Telegraaf*'s claim of abuse of dominance was rejected).[53]

It will be interesting to see whether and how the issue will be dealt with in subsequent judicial instances or in proceedings on the merits, in view of the fact that the refusal to license doctrine has of course undergone some important developments since *IMS Health* and the 2004 decision of the CBb. Most importantly, many claim that the 'new product' criterion has been seriously 'diluted' by the *Microsoft* case (in which, in short, a similar but 'improved' product was considered to satisfy the criterion as well).[54]

48 Decision of the Supreme Court of 6 June 2003, C01/183HR, LJN: AF5100, paragraph 3.11.

49 European Court of Justice 29 April 2004, Case C-418/01 (*IMS Health*).

50 Decision of the Trade and Industry Appeal Tribunal of 15 July 2004, AWB 03/132, LJN: AQ1727 (*NOS/NMa*).

51 Decision of the President of the District Court of Amsterdam of 28 July 2005, LJN: AU0253 (*SBS/Quote Media*).

52 European Court of Justice 1 March 2012, Case C-604/10 (*Football Dataco*).

53 Decision of the President of the District Court of Amsterdam of 13 June 2012, 518640 / KG ZA 12-774 SR/JWR, LJN: BW8334.

54 General Court of the EU 27 June 2012, Case T-167/08 (*Microsoft/Commission*).

### iii Discrimination

In addition to the *Fresh FM* case that was described in Section II, *supra*, *EasyJet v. NV Luchthaven Schiphol* is an interesting example of a case on discriminatory pricing.[55]

Upon a complaint by Easyjet, the ACM investigated whether Schiphol abused its dominant position by discriminating between transfer customers and passengers that board for the first time at Schiphol in terms of prices. The ACM concluded that this price differentiation did not amount to discrimination as it did not consider these two services as 'equivalent services'. The decision was upheld by the court in November 2010. The court indicated furthermore that price discrimination will only constitute abuse if it can be established that there was competitive harm. The court found that Easyjet, the party with the burden of proof, failed to prove competitive harm.[56]

### iv Exploitative abuses

The most high-profile investigation of the ACM involving, *inter alia*, excessive pricing has been the *Interpay* case. In this case, the ACM investigated whether Interpay had abused its dominant position on the market for network services for PIN transactions in the Netherlands by charging excessive tariffs to its customers (retailers). Interpay was the only supplier on that market.[57]

To determine whether Interpay's conditions were excessive, the ACM proceeded to assess Interpay's 'return on invested capital' between 1998 and 2001. It compared this return to a benchmark return on Interpay's equity and borrowed capital. The ACM concluded that the return made by Interpay between 1998 and 2001 was five to seven times higher than the calculated benchmark return. According to the ACM, this result was disproportionate. The ACM therefore concluded that the tariffs employed by Interpay amounted to an abuse of a dominant position.[58]

In administrative review, the banks (the shareholders in Interpay) heavily challenged the calculation method of the ACM, supported by economists. One of the main arguments was that the ACM had failed to appreciate the fact that the banks had been investing in the 'PIN project' for many years prior to the period that the ACM had used for its return on investment calculation. Accordingly, the ACM had failed to take into account a large amount of costs (that would have substantially lowered the calculated return on investment).[59]

Furthermore, the banks argued that by only basing its judgment on the return comparison, the ACM fell short of the requirements pursuant to EU (case) law, which prescribes that while an international price comparison is not required, in any event there has to be a direct assessment of the level of the prices itself.[60]

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55 Decision of the District Court of Rotterdam of 25 November 2010, AWB 09/2949 MEDED-T1, LJN: BO5063 (*Easyjet v. NV Luchthaven Schiphol*).

56 Ibid., paragraphs 2.1.9–2.1.11, 2.4.5–2.4.7, 2.11.

57 Case No. 2910, decision of the NMa of 28 April 2004 (700).

58 Ibid., paragraphs 145, 202, 219–221.

59 Case No. 2910, decision on appeal of the NMa of 21 December 2005 (864), paragraphs 10, 12.

60 Ibid.

The ACM's standing advisory committee in review proceedings agreed with the banks on these points. Subsequently, the ACM, it its decision in administrative review, referencing 'too much work and too expensive to carry out the research for further investigation' withdrew the part of the fine that was based on abuse of dominance.[61]

In December 2015, the CBb confirmed that the ACM had been right to reject the complaint by VVR, a travel association. VVR had complained that airlines KLM and SLM abused their dominant position by charging excessive prices for flights from Amsterdam to Paramaribo and back.[62] No other airlines are active on this route. The ACM found that tourism is still limited, and because most passengers on this route are VFR-passengers (Visiting Friends & Relatives) flying to Suriname for the holiday season, the flights leave completely booked but return empty. New entrants would be attracted, and competition thus increased, if airlines could charge high prices and thus make profit. The ACM's research showed that the profits gained by KLM and SLM were not high, and therefore concluded that their flight rates were not excessive. VVR's complaint was rejected by the ACM and rightly so, according to the CBb.

## V REMEDIES AND SANCTIONS

The DCA and the laws underlying the various sectoral regimes supervised by the ACM, comprise the basis for the ACM to issue fines for infringements of the rules set out in the respective acts, including Article 24 DCA.[63] The fines are administrative – and not criminal – in nature, although the procedural rules that have been applicable to the imposition of fines since 1 July 2009 do take into account the fact that administrative fines are considered a 'criminal charge' in the meaning of Article 6 of the European Convention on Human Rights.[64]

In addition to the statutory law, the ACM relies on policy rules concerning the determination of fines, the '2014 ACM Fining Policy Rule' issued by the Ministry of Economic Affairs.[65] The fine calculation method applicable to infringements of the cartel prohibition and the abuse of dominance prohibition that follows from these guidelines resemble the EU approach (as laid down in the Fining Guidelines of the Commission)[66] in several respects, but not entirely. According to the Fining Policy Rule, the basic fine is calculated as a percentage (zero to 50 per cent) of a company's sales of products or services covered by the infringement

61 Ibid., paras 15–16, 21–26.

62 Decision of the Trade and Industry Appeal Tribunal of 22 December 2015, ECLI:NL:CBB:2015:407.

63 See Act establishing the Authority for Consumers and Market (2012/2013, Nos. 1 and 2, 33 186).

64 These rules, laid down in the General Administrative Law Act, comprise the 'right to remain silent' and the *ne bis in idem* principle.

65 Policy rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets. Unofficial English version available at: www.acm.nl/en/publications/publication/13315/Policy-rules-regarding-fines-and-leniency/.

66 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210, 1 September 2006.

during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating factors. Fines may go up to a maximum of €450,000 or, if greater, 10 per cent of the worldwide annual turnover of the undertaking concerned.

The ACM may impose an order subject to periodic penalty payments; for example, when undertakings fail to cooperate during the investigation process. Such an order may also be imposed in the form of a structural measure, as referred to in Article 7 of Regulation 1/2003, if that measure is proportionate to the violation committed and is necessary to actually end the violation.[67]

The ACM can also fine individuals up to €450,000. Such fines can be imposed if it is established that these persons have expressly ordered the abuse to be committed or, alternatively, have failed to take adequate preventive measures and by doing so deliberately accepted the risk that the abuse would be committed.[68]

No abuse of dominance interventions in the Netherlands have resulted in the closing of an investigation with remedies,[69] but in theory, it should be possible to agree to 'commitments' in respect of an abuse of dominance infringement. In this context, the ACM recently indicated that it is considering using the instrument of commitments more frequently in the future.[70] If an abuse case were to be resolved through remedies, a behavioural remedy would generally seem more appropriate than a structural remedy.

## VI PROCEDURE

### i Investigation and sanctioning phase

The ACM may examine infringements of Article 24 *ex officio* or on the basis of a complaint. The ACM will apply its prioritisation policy in deciding whether or not to pursue a case (see Section I, *supra*).

There is no fixed time limit for an investigation. It may take months, but usually longer. The investigation is carried out by a case team at the ACM Competition Directorate. If an infringement is established and it is subsequently decided to pursue the case, a report will be issued. This type of document is similar to a statement of objections. The addressed undertaking (and other interested parties, such as complainants) will have the opportunity to present its views on the allegations in the report, in writing and at an oral hearing.[71] The legal department of the ACM presides at the oral hearing. The department acts partly as an internal review body 'independent' of the case team of the Competition Directorate. It has no involvement with the investigation and the drafting of the report and is tasked with the preparation of the decision subsequent to the oral hearing. Ultimately, however, the board of the ACM decides whether to issue a (fining) decision.

67 Dutch Competition Act, Article 56 and Article 58a.

68 ACM Policy Guidelines Administrative Fines, pp. 4–5.

69 In any event not outside the sectoral regimes.

70 Reaction of the ACM to the SEO study, see footnote 18.

71 Article 59 of the DCA in combination with the rules laid down in Chapter 5 of the General Administrative Law Act.

The stage from the launch of the investigation until the issuance of a decision (establishing an infringement) can take a long time in the Netherlands. The duration is rarely less than a year.

### ii Appeal

Decisions of the ACM may first be submitted to administrative review before an 'independent' administrative review committee (administrative review), which will render an opinion to the ACM. The subsequent (renewed) decision of the ACM may be appealed to the District Court of Rotterdam. Ultimate appeal lies with the CBb. Parties may agree with the ACM to directly appeal the ACM's decision before the District Court, so that there is no need to follow the administrative review procedure.

Because of the elaborate appeal procedure in the Netherlands, as described above, it often takes a very long time (i.e., more than three years) from the date of the decision of the ACM until the date of the decision of the appellate court, the CBb.

### iii Informal guidance

There are no formal procedures for obtaining guidance on individual cases. It is possible to informally sound out the opinion of the ACM (e.g., in a meeting), but the added value of such consultations is generally questionable. As the ACM will never agree to refrain from taking on a specific case, there is always the risk of divulging too much information.

### iv Upcoming amendments

The Act increasing the maximum fine that the ACM can impose is set to enter into force on 1 July 2016. Fines for abuse of dominance will go up to a maximum of €900,000 or, if greater, 10 per cent of the worldwide annual turnover of the undertaking concerned.

## VII PRIVATE ENFORCEMENT

Third parties can base an action for damages or injunctions before the civil courts directly on Article 24 of the DCA (as with Article 102 of the TFEU).[72] There is no specific regime for enforcement of competition law infringements. General Dutch tort law applies to such actions. Pursuant to Dutch tort law, claimed damages can only be compensatory in nature: there is no such thing as punitive or 'treble' damages in the Netherlands. The *EMS/Equens* ruling by the District Court of Central Netherlands is one of the rare cases in which damages were actually awarded for an infringement of the prohibition on abuse of dominance. In this case, the District Court of Central Netherlands ruled that Equens abused its dominant position in the market for network services for credit card transactions by making it more difficult for customers to switch to acquirers other than its own subsidiary PaySquare.[73] The case was

72 For example, in *KPN v. NL.tree* (22 March 2006), the District Court of The Hague ordered KPN to withdraw internet access offers to educational institutions that were deemed to be predatory and to amount to price squeeze. The court also ordered KPN to desist from making abusive offers in the future.

73 Decision by the Court of Central Netherlands of 10 July 2013, ECLI:NL:RBMNE:2013:3245.

brought before the court by European Merchant Services (EMS), a customer of Equens and a competitor of PaySquare. The court first established the dominance of Equens on the market for network services for payment transactions by considering that customers could not easily switch networks, since 70 per cent of the payment terminals used by customers were based on a protocol managed by Equens. The court subsequently ruled that Equens had abused its dominant position by introducing a 'queue procedure', pursuant to which customers could only switch to another acquirer with PaySquare's assistance. PaySquare would subsequently use the time it would take to disconnect the customer's payment terminal to make a counter offer, and as a result, the switch was often prevented or delayed. The court thereupon ruled, however, that Equens would have to pay EMS only €77,000 in damages, based on lost profits.[74]

As discussed in Section II, *supra*, private enforcement of Article 24 of the DCA is attempted relatively frequently in the Netherlands, but the attempts are mostly unsuccessful. The claimants often fail to meet the evidentiary thresholds. As explained above, Dutch courts tend to follow EU practice and trends, and therefore attach much weight to economic evidence. Claimants only rarely make the effort of building a convincing economic narrative to support a claim of abuse of dominance (which leaves one wondering why they so often bring the argument in the first place). In 2013, the district court of East Brabant assessed the anticompetitive effects of a bonus programme by Mars, where Mars enticed vendor petrol stations to prominently display its products by offering them compensation relative to their turnover in Mars products.[75] The programme also included a one-off bonus for a more prominent display of Mars products. Competitor Nestlé argued that the incentive programme breached competition rules, as it could not match Mars' incentive programme without suffering structural losses. According to Nestlé, Mars' dominant position on the market caused the bonus programme to result in market foreclosure by pushing competing products off the market. The district court compared the incentive programme to a category management agreement, looking at its impact on product placement and the promotion of chocolate products at petrol stations. In line with the European Commission's guidelines on vertical restraints, the court observed that category management agreements do not have an anticompetitive object, but may have anticompetitive effects, particularly where the category captain is able, because of its influence over the distributor's marketing decisions, to limit or disadvantage the distribution of products of competing suppliers. Significant anticompetitive effects may arise for final products at the retail level if a non-dominant supplier ties 30 per cent or more of the relevant market. For a dominant company, even a modest tied market share would suffice. The court found the incentive programme to have anticompetitive effects, not only because of Mars' market share of at least 50.6 per cent in the out-of-home market for chocolate products, but also because of its ability to use its incentive programme to increase its market share at competitors' expense. Equally efficient competitors would not be able to match the Mars incentive programme without suffering structural losses. It would be impossible for Nestlé, for example, to recoup its variable costs if it introduced a similar incentive programme. The court ordered the appointment of an expert who will

74 Decision by the Court of Central Netherlands of 30 December 2013, ECLI:NL:RBMNE:2013:7536.

75 Decision by the District Court of East Brabant of 7 August 2013, ECLI:NL:RBOBR:2013:4356.

need to establish whether these anticompetitive effects can be considered appreciable by comparing Mars' and Nestlé's chocolate product sales and market shares at petrol stations that participated in the incentive programme with those that did not. The outcome of this assessment is still pending.

## VIII FUTURE DEVELOPMENTS

As to future developments, the written reaction of the ACM to the SEO study referred to in Section II, *supra*, seems to imply that we should not expect an increase in abuse of dominance interventions in the coming years. Apparently, the prioritisation focus of the ACM will remain with cartel enforcement, which it deems more 'cost-effective'.[76]

In this same document, the ACM 'pledged' to provide 'more transparency to third parties' with respect to the concept of 'abuse of dominance'. This pledge seems a little odd in view of the fact that it is already abundantly clear that the ACM (pursuant to the DCA and applicable case law) is to follow EU practice as closely as possible in defining dominance and related concepts and that there is, therefore, little room for any (own) interpretation of the ACM that would require clarification.[77]

It appears that we should not expect any major developments regarding enforcement in the next few years, and the same is likely to hold true for private enforcement.

76 Reaction of the ACM to the SEO study, see footnote 18.

77 Ibid.

# Chapter 18

# PORTUGAL

*Nuno Ruiz and Ricardo Filipe Costa*[1]

## I INTRODUCTION

Article 11 of Law 19/2012 of 8 May (the Competition Act) prohibits the abuse, by one or more undertakings, of a dominant position in the domestic market or in a substantial part of it. Article 11 gives a number of examples of abuses, including:

*a* imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

*b* limiting production, markets or technical development to the detriment of consumers;

*c* applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

*d* making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and

*e* refusing access to a network or to other essential facilities.

Article 12 of the Competition Act also prohibits the abuse of economic dependence to the extent that such a practice affects the way the market or competition operates. This is the case where one or more undertakings abuse the economic dependence under which any of their suppliers or customers may find themselves as a result of no equivalent alternative being available. The Competition Authority has seldom applied this rule.

The Competition Act is applicable to state-owned undertakings and to undertakings to which the state has granted special or exclusive rights. Undertakings that have been legally entrusted with the management of services of general economic interest are subject to competition law to the extent that it does not create an obstacle to their specific mission.

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The 2012 Competition Act significantly enhanced the Competition Authority's capacity for action, having strengthened its powers of inspection, sanction and supervision.

In the performance of its duties, the Competition Authority is guided by the public interest in the promotion and defence of competition and may therefore establish its priorities accordingly regarding the matters that it is called upon to investigate. The Competition Authority may act on its own initiative or upon complaint. However, it only has the duty to open infringement proceedings whenever the public interest is at stake.

Tackling exclusionary abuses of dominant position is among the Competition Authority priorities for 2016.

So far the Competition Authority has issued no formal guidance on the application of Article 11 of the Competition Act. It has stated, however, that national rules on the abuse of a dominant position will be applied in accordance with the decisions of the European Commission and with the rulings of the Court of Justice of the European Union.

It is interesting to note that in its decisions the Competition Authority tends to consider the abuses as infringing both Article 11 of the Competition Act and Article 102 of the TFEU.

## II YEAR IN REVIEW

### i Market intelligence

On 31 December 2015, the Competition Authority fined Associação Nacional das Farmácias (ANF) and three companies part of the ANF Group (Farminveste – SGPS, SA, Farminveste – Investimentos, Participações e Gestão SA and HMR – Health Market Research, Lda) a total of €10.3 million for collective margin-squeezing in market intelligence services.

The Competition Authority concluded that the ANF Group operated in the market for sale of pharmacies' commercial data, through Farminveste – Investimentos, Participações e Gestão S.A. and, since 2009, with the creation of HMR – Health Market Research, also in the market for output of pharma market studies based on that data.

In view of the ANF Group's activity in both markets, the Competition Authority concluded that between 2010 and 2013 the prices charged by the ANF Group for pharmacies' commercial data (upstream market), when compared to those charged for pharma market studies based on that data (downstream market) did not leave an equally efficient competitor active in this latter downstream market a sufficient margin to cover its other production costs.

### ii Football broadcasting rights

December 2015 saw the beginning of a fully fledged war for the broadcasting rights to the Portuguese football premier league between the NOS Group and the PT Group, the two main players in the Portuguese pay-TV market, as well as in the markets for the increasingly pervasive multiple-play services.

Broadcasting rights to football matches in Portugal are marketed on an individual basis (club by club). The NOS Group, which in addition to leading the Portuguese markets for pay-TV and multiple-play services, also jointly controls Sport TV, the dominant player in the market for premium sports channels in Portugal, secured a significant set of broadcasting rights, most notably to home matches played by Benfica, Sporting and Braga football clubs.

The Competition Authority issued a press release in mid-February to inform that it was assessing the matter under its supervisory powers. In view of Sport TV's dominance in

the market for premium sports channels and the possible disappearance of its sole competitor Benfica TV as a premium sports channel in the future, dominance issues are expected to play a pivotal role in the Competition Authority's analysis.

## III MARKET DEFINITION AND MARKET POWER

Both the Competition Authority and the Portuguese courts use the same criteria as the European Commission and the European Court of Justice when dealing with concepts such as 'relevant market', 'dominant position', 'unilateral conduct' and 'collective dominance'. The approach to market definition and to market power may be more or less economics-based depending on the requirements of the case.

As a general policy statement, the Competition Authority expressed the view that, to determine the existence of an abuse of dominant position, it is necessary, first, to ascertain that the allegedly dominant undertaking indeed holds a dominant position. This requires the identification of the relevant product (or service) and geographic market(s).

Similarly to the EU institutions, for the Competition Authority an undertaking may be in a dominant position when, because of its position of economic strength, it has the ability to behave to an appreciable extent independently of its competitors, its suppliers and its clients. This position may be due to the characteristics of the undertaking (its market share, financial capacity or vertical integration) or to market characteristics (barriers to entry or expansion, network effects or legal obstacles to entry).

## IV ABUSE

### i Overview

The Competition Authority broadly defines the abuse of a dominant position as an unlawful exploitation by one or more undertakings of their market power having an anticompetitive object or effect and resulting in harm to customers or in the exclusion of competitors.

Since the Competition Act does not provide an exhaustive list of abuses the Competition Authority tends to have an effects-based approach and not to revert to *per se* abuses. This allows for the recognition of the existence of less common or *sui generis* abuses in some decisions (see the *OTOC* case). However, the existence of *per se* abuses is not excluded.

In theory the Competition Authority acknowledges the distinction between an abusive conduct and competition on the merits but, in practical terms, it deviates sometimes from such distinction (see the *Ducts* and *Broadband* cases). The courts have been more consistent in establishing a frontier between the abuse of market power and competition on the merits (see the *Ducts* case).

For the Competition Authority, holding a dominant position confers on the undertaking concerned a special responsibility, the scope of which must be considered in light of the specific circumstances of the case.

Therefore, conduct that would be deemed lawful when carried out by a non-dominant undertaking may constitute an infringement when adopted by a dominant undertaking.

### ii Exclusionary abuses

The Competition Authority has dealt with exclusionary abuses in some cases. The *Ducts* case concerned a refusal to deal, in particular, a refusal of access to essential facilities. The *Leased*

*Lines* and *Broadband* cases concerned predation and margin squeezing, this latter having also been the issue in the *Market Intelligence* case. The abuse identified in the OTOC case could be viewed as exclusive dealing. Leveraging was the subject matter of the *Sugalidal* case.

### iii Discrimination

Discrimination was discussed mainly in three cases: the *Leased Lines*, the *Broadband* and the *Sport TV* cases. In said decisions the Competition Authority took the view that, as a rule, volume rebates should not be considered as a form of unlawfully restricting competition. However, the issue of discriminatory pricing was raised taking into consideration the circumstances of the case: the dominant firm was the sole beneficiary of the higher discounts.

### iv Exploitative abuses

Exploitative abuses were discussed in the *Origination Prices* case. The investigation and the warning letter sent to all three mobile operators in Portugal proved that the Competition Authority does not set aside the possibility of intervening in situations of excessive pricing.

## V REMEDIES AND SANCTIONS

### i Sanctions

A fine of up to 10 per cent of the turnover of the year immediately preceding the final decision by the Competition Authority may be imposed in cases of abuse of a dominant position. Daily penalty payments may also be imposed in cases of non-compliance with a Competition Authority decision determining the adoption of any specific measures or remedies (see the *Sugalidal* case).

The Competition Authority issued Guidelines on fining methodology in December 2012, which are in line with the European Commission's Guidelines on the subject.

The Competition Act also provides for accessory penalties; namely, the publication of an extract from the Competition Authority's decision in the official gazette as well as in one of the highest circulation newspapers in the relevant geographic area (national, regional or local), and in the case of infringements connected with public procurement, exclusion of participation in public tenders for up to two years.

### ii Behavioural remedies

Infringement decisions often impose behavioural measures appropriate to bring the infringement to an end and to avoid persisting violations of competition rules.

### iii Structural remedies

Infringement decisions can impose structural measures necessary for halting the prohibited practices or their effects. According to the Competition Act structural measures can only be imposed when there is no behavioural remedy that would be equally effective or, should it exist, it would be more onerous for the party concerned than the structural measures themselves. The Competition Authority has to date never imposed structural measures.

## VI PROCEDURE

The Competition Authority may act on its own initiative or upon a complaint. Apart from informal contacts there are no procedures aimed at ensuring that undertakings obtain guidance on individual cases.

Complaints must be submitted according to a specific form approved by the Competition Authority. If the Competition Authority deems that a complaint is either groundless or does not fall within its competition policy priorities, it must inform the complainant. The same applies whenever, once an investigation has been initiated, the Competition Authority concludes that there is no reasonable likelihood of an infringement decision being adopted. In both cases, the complainant may file comments and, in case the Competition Authority does not change its view, appeal the Competition Authority's decision to close the case.

In case the Competition Authority opens an investigation and further decides to pursue the case, it must issue a statement of objections and give the defendant the opportunity to express its views, to produce exculpatory evidence and to request for additional investigation to be conducted.

In infringement proceedings, the burden of proof of any justification lies with the undertakings or associations of undertakings accused of breach of competition law.

As a rule, inquiries should be concluded within 18 months and, in the event of a statement of objections, the final decision should be adopted within 12 months of its issuance.

The Competition Act allows the defendant to negotiate with the Competition Authority with a view to defining the conditions necessary to closing the investigation and to obtain a fine reduction, upon condition of acknowledging liability for the infringement. The Competition Act also allows the defendant to start negotiations with a view to closing the investigation without acknowledging liability, upon commitments to cease the practices object of investigation.

In the *Sugalidal*, *Origination Prices* and *Sport TV rights* cases, the Competition Authority has preferred to obtain a swift commitment related to the change of behaviour of the undertakings rather than to pursue a lengthy investigation that would lead to the application of a penalty but would be unable to quickly solve the competition problem.

Various antitrust proceedings have been closed with commitments in the past year, especially with respect to vertical restrictions. Such arrangements are thus expected to become more frequent also in proceedings for abuse of dominance.

Whenever investigations indicate that an abuse is on the point of causing serious and irreparable harm to competition, the Competition Authority can, at any phase in the proceedings, issue an interim measure ordering the undertaking to immediately suspend the practice or to adopt any other temporary measure needed for restoring competition, or required for the final decision on the case to be effective. These urgent measures may remain in force for a period of no longer than 90 days, unless 90-day extensions are granted, duly substantiated, the Competition Authority having to issue its decision in the proceedings within 180 days.

## VII PRIVATE ENFORCEMENT

In Portugal, private antitrust enforcement has played a modest role until now. However, damages deriving from abuse of a dominant position may be recovered in civil courts. Civil courts are also competent to decide on whether interim relief should be granted and on the type of conduct that should be expected from a dominant firm.

There are no special rules for calculating damages deriving from abusive conduct. Compensation is aimed at putting the plaintiff in the position he or she would have been in had the tort not taken place.

The decision of the Competition Authority in the *Broadband* case has been used in two follow-on actions for damages. One is still pending and the other was dismissed because of the statute of limitations.

A follow-on action has also been filed against Sport TV following its sanctioning by the Competition Authority for discriminatory conduct. The lawsuit – the very first damages class action for competition law infringement in Portugal – is still pending a court decision. Whether collective actions will provide effective compensation for consumers harmed by antitrust practices remains thus to be seen.

At the present stage Portuguese courts are not bound by Competition Authority decisions, even in cases where they have been reviewed and confirmed by the Competition Tribunal and the Lisbon Court of Appeal. The implementation of the EU Directive on antitrust damages actions shall provide an incentive to the filing of further damages actions, by making the Competition Authority's decisions binding on courts.

The draft Act for the Implementation of the EU Directive on antitrust damages actions was under public consultation between 26 April and 27 May 2016.

## VIII FUTURE DEVELOPMENTS

The Competition Law was updated in 2012. There are a number of unsettled points of law that still require clarification and that the Competition Authority has often been requested to issue guidelines on, notably as regards access to the file and confidentiality.

With the upcoming implementation of the EU Directive, private enforcement is not only expected to undergo a major overhaul but also to become an ever-increasing driving force of competition law enforcement in Portugal.

# Chapter 19

# SLOVENIA

*Andrej Fatur and Helena Belina Djalil*[1]

## I INTRODUCTION

The statutory provision dealing with the behaviour of dominant firms is Article 9 (Prohibition of the Abuse of a Dominant Position) of the Slovenian Prevention of the Restriction of Competition Act (PRCA),[2] which entered into force on 26 April 2008. Its main wording corresponds to Article 102(1) of the Treaty on the Functioning of the European Union (TFEU) and provides that 'the abuse of a dominant position in the market by one or more undertakings in the territory of the Republic of Slovenia or in a substantial part of it shall be prohibited'. Article 9(4) of the PRCA also lists the same examples of infringements as Article 102(2) of the TFEU.

The Competition Protection Agency (CPA) is an independent administrative authority and has powers to investigate abuse of dominance cases (in administrative proceedings) and impose fines of up to 10 per cent of the infringing companies' worldwide turnover (in minor offence proceedings). The CPA has not adopted formal guidance on the way in which it applies Article 9 of the PRCA, nor has it adopted guidelines on the setting of fines for breaches of Slovenian antitrust law. Therefore, guidance on the application of the current rules can be gathered mostly from case law of the CPA and the Slovenian courts.

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2 ZPOmK-1 (Official Gazette of the Republic of Slovenia No. 36/08), ZPOmK-1A (Official Gazette of the Republic of Slovenia No. 40/09), ZPOmK-1B (Official Gazette of the Republic of Slovenia No. 26/11), ZPOmK-1C (Official Gazette of the Republic of Slovenia No. 87/11), ZPOmK-1D (Official Gazette of the Republic of Slovenia No. 57/12), Act Amending the Courts Act (Official Gazette of the Republic of Slovenia No. 63/13), ZPOmK-1E (Official Gazette of the Republic of Slovenia No. 33/14) and ZPOmK-1F (Official Gazette of the Republic of Slovenia No. 76/15).

The European Commission's guidance on Article 102 of the TFEU, as well as European Commission's and European courts' decisional practice, also provide useful information for the application of Article 9.

Article 9 of the PRCA applies to undertakings. The PRCA defines the concept of 'undertaking' as any entity that is engaged in economic activities, regardless of its legal and organisational form and ownership status. An 'economic activity' means any activity that is performed on the market for payment. Accordingly, state-owned enterprises, public entities and other legal entities subject to public law and performing economic activities are also subject to the PRCA. An undertaking also means an association of undertakings that is not directly engaged in an economic activity but that affects or may affect the behaviour in the market of undertakings as defined above.

Under Slovenian competition law in the PRCA, no sectoral exemptions exist in terms of dominance. Article 9 of the PRCA applies to all undertakings, irrespective of the industry sector to which they belong.

## II YEAR IN REVIEW

In October 2015, the provisions of the PRCA were subject to amendments that concerned, in particular, unfair competition, and had no effect on antitrust law.

As regards administrative proceedings, in 2015 there was very little enforcement activity by the CPA in the area of abuse of dominance, at least according to publicly disclosed information. Since 2015, the CPA has initiated one new case, which is still open. The *IKO* case was initiated against IKO, the supplier of TV channels with sports content in Slovenia, for alleged abuse of its dominant position with regard to limiting and hindering access to sport TV channels by retail TV operators. The CPA adopted no prohibition or commitment decisions, and no fines have been imposed since the end of 2014.

To date, Article 9 has mostly been used in regulated industries; in particular, telecommunications and energy. In 2012, the CPA issued two decisions with regard to the abuse of dominant position. The first case, *Mobitel/Telekom Slovenije (Itak Džabest)*,[3] related to the telecoms sector with the established infringement of Article 9 and Article 102 of the TFEU in the retail mobile market. The second case concerned the abuse of a dominant position by the electricity distribution system operator SODO.[4] In 2013, the CPA reached another two infringement decisions. One of these, *Telekom Slovenije (ISDN/ADSL)*,[5] is also related to the Slovenian national telecommunication incumbent, and it has been issued in new proceedings after the Supreme Court found procedural errors in the first decision and sent it back to the CPA for re-examination. The case concerns Telekom Slovenije customers who were forced to lease ISDN connections to purchase ADSL broadband internet access, although they did not need it and it was not technically necessary. The other decision was adopted in the media

3 The CPA's decision No. 306-14/2009 of 13 February 2012. See also the Supreme Court's decision No. G 9/2012 of 26 November 2013.

4 The CPA's decision No. 306-5/2011 of 9 August 2012.

5 The CPA's decision No. 3072-2/2004 of 25 October 2013. See also the Administrative Court's decision No. I U 1871/2013 of 9 December 2014 and the Supreme Court decision No. X Ips 58/2015 of 15 July 2015.

sector (*Pro Plus* case). In *Pro Plus*, the CPA adopted a prohibition decision in April 2013,[6] finding that Pro Plus (Produkcija Plus), a leading broadcasting and internet media company in Slovenia that is part of the multinational enterprise CME, abused its dominant position in the market for TV advertising through exclusivity clauses and conditional loyalty rebates. The decision was upheld by the Supreme Court in December 2013.[7]

In 2015, the CPA announced the issuance of two prohibition decisions in the administrative proceedings on the basis of Article 9 of the PRCA and Article 102 of the TFEU (*Geoplin*[8] and *Telekom Slovenije*).[9] Neither of these decisions is as yet finalised.

The CPA concluded in *Geoplin* that Geoplin, the incumbent gas importer and supplier in the Slovenia, abused its dominant position on the market of gas supply to large industrial customers by concluding long-term contracts with industrial customers connected to the transmission network, which included contracted quantities of gas to be taken over for the whole contract period as well as the obligation to take delivery of minimum quantities. Since penalties and other fees were also set out in long-term contracts for the quantities that have not been taken over, preventing industrial customers from using surplus quantities or reselling them, the CPA held that such industrial customers were entirely tied to Geoplin. The CPA set a deadline for Geoplin of three months for the removal of the prohibited clauses from the long-term contracts with industrial customers. For failure to comply with the CPA's decision the CPA stated that Geoplin may be subject to a stand-alone minor offence proceedings in which a fine up to 10 per cent of the annual turnover of the undertaking involved could be imposed.

In the second case, *Telekom Slovenije*, the CPA held that the incumbent operator Telekom Slovenije abused its dominant position on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure by various individual conducts that jointly represent a single and continuous infringement of Article 102 of the TFEU and its equivalent in the PRCA.

As regards the court review in 2015, two of the CPA's cases have been repealed by courts. In *Geoplin*, the Administrative Court referred the case back to the CPA for

6 Case No. 306-90/2009. The CPA's decision of 24 April 2013 in administrative proceedings is available (in Slovene) on the CPA's website (www.varstvo-konkurence.si).

7 Case No. G 7/2013. The Supreme Court's decision of 15 April 2014 is available (in Slovene) on court's website (www.sodisce.si).

8 See press release of the CPA, 14 January 2015: 'Geoplin abused its Dominant Position on the Market of Gas Supply by Prohibited Contractual Clauses'. Public version of the CPA's decision is not available yet. Operative part of the CPA's decision No. 306-43/2012/62 of 23 December 2014 is available (in Slovene) on CPA's website (www.varstvo-konkurence.si). See also the Administrative Court's decision No. I U 203/2015 of 13 May 2015.

9 See press release of the CPA, 16 February 2015: 'Slovenian Competition Protection Agency concluded with the assessment of abuse of dominant position by Telekom Slovenije'. Public version of the CPA's decision is not available yet. Operative part of the CPA's decision is available (in Slovene) on CPA's website (www.varstvo-konkurence.si).

re-examination.[10] Further, although the Administrative Court upheld the CPA's decision in *Telekom Slovenije* (ISDN/ADSL), the Supreme Court annulled the Administrative Court's decision and referred the case back to the Administrative Court.[11]

## III MARKET DEFINITION AND MARKET POWER

Article 9(2) of the PRCA defines 'a dominant position' as a position of an undertaking or several undertakings when they can, to a significant degree, act independently of competitors, clients or consumers. Such an approach follows the case law of the European courts.

The basic definition of a 'relevant market' is provided in Article 3 of the PRCA, which also reflects EU competition legislation and case law, and is the same as the one used for merger control purposes. A 'relevant market' means a market defined by the relevant product or service market and the relevant geographical market. The 'relevant product or service market' represents a market that, as a rule, comprises all products or services that are regarded as interchangeable or substitutable by the consumer or user given their characteristics, their prices or their intended use. In turn, 'relevant geographic market' is defined as a market that, as a rule, comprises an area in which competitors in the relevant product or service market compete in the sale or purchase of products or services, an area in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because the competition conditions are substantially different. In determining the dominant position, the CPA takes into consideration, in particular, the market share, financial options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

Article 9(5) of the PRCA defines the market-share threshold for dominance as follows:

> *An undertaking shall be deemed to have a dominant position on the market if its market-share within the market of the Republic of Slovenia exceeds a threshold of 40 per cent.*

Even though the market-share threshold creates a legal presumption, such a presumption may be rebutted, since market share is an important, although not crucial, indicator of dominance.

Article 9 covers collective dominance, although there are no details on the assessment of collective dominance prescribed in the PRCA except that its presumption when the collective market share reaches the threshold of 60 per cent on the relevant market.

Although economics play a key role in the application of the dominance provisions, there are only a few cases where economic expert witnesses as external experts have been used in proceedings before the CPA. Analytical procedure is mostly performed by the CPA's employees who have knowledge of economics. Nevertheless, economic analysis is becoming a crucial part of more complex dominance cases. In the telecoms case *Mobitel (Itak Džabest)* the Supreme Court (2013) annulled the CPA's infringement decision since the CPA, *inter alia*, failed to establish and transparently present all the relevant elements on which its cost–price analysis was based.

10 The Administrative Court's decision No. I U 203/2015 of 13 May 2015.

11 The Administrative Court's decision No. I U 1871/2013 of 9 December 2014 and the Supreme Court decision No. X Ips 58/2015 of 15 July 2015.

## IV ABUSE

### i Overview

Similar to EU competition law, abuse of a dominant position as such is not defined by the PRCA. The PRCA generally prohibits the abuse of a dominant position and lists four typical examples of abusive behaviour:

*a* directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;

*b* limiting production, markets or technical development to the prejudice of consumers;

*c* applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and

*d* making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts.

The CPA's case law is generally aligned with that of the EU and it shows that abuse is still defined more in terms of the form of conduct than in relation to the effects of specific conduct in the market and on consumers. It follows from the above list that the concept of abuse covers exploitative as well as exclusionary practices. An example of exploitative abuse of dominant position as set out by the PRCA is unfair pricing or trading conditions. Examples of exclusionary abuse of dominant position as set out by the PRCA include predatory pricing, discrimination, refusal to deal and tying. It has to be noted that the list of forms of abuse in Article 9 is not exhaustive so the CPA is not excluded from dealing with other types of abusive practices.

Similar to the EU competition law, there is no direct causality between the creation of a dominant position and its abuse under Slovenian competition law. In order to apply Article 9, the existence of a dominant position must first be established, but simply having a dominant position is not *per se* illegal. Although in most cases a causal link between dominance and abuse is obvious, an abuse may exist even if there is no causal link between the dominant position and the inspected conduct. Further, it is also possible that abusive conduct can take place in a market other than the market where the dominant position is established.

If abuse of a dominant position is established, it must be prohibited with no explicit exemptions. The PRCA does not provide an efficiency defence. Nevertheless, while the existence of the efficiency defence under Slovenian law has never been confirmed by the CPA, it is expected that its future case law will follow that of the EU. So far, the most common defence used by dominant undertakings has been that their conduct has been justified on objective grounds. In such cases, the CPA must assess whether the dominant undertaking has provided all necessary evidence to show that the conduct is indispensable and proportionate to the goal pursued by the undertaking.

### ii Exclusionary abuses

***Exclusionary pricing***

In 2012 the CPA issued its decision in *Mobitel/Telekom Slovenije (Itak Džabest)*, finding that Telekom Slovenije (previously Mobitel) had been abusing its dominant position in the retail mobile telecommunications service market by offering the 'Itak Džabest' retail package to mobile phone users at unfair prices. The CPA established that Telekom Slovenije acted in predatory manner by imposing its 'Itak Džabest' package at below-cost prices (lower than

the costs incurred). With such prices, Telekom Slovenije gained new users and made it more difficult for other equally efficient competitors to gain new users and not suffer losses by doing so. The Supreme Court did not confirm the CPA's decision and returned the case to the CPA, which has reopened the administrative proceedings. It considered, *inter alia*, that the CPA failed to give reasons for the method that was used to calculate the incremental costs and explicitly stated that a transparent calculation of negative margin per subscriber is crucial in cases such as one where there is no clear and direct evidence of a 'predation strategy'.

While accepting that the cost–price analysis is an element in deciding whether a price is predatory, the Supreme Court noted that it was also relevant what the effects of the introduction and sale of the contested package were likely to be on the elimination of competitors, which (in the long run) harms consumers.

Price squeezes are not specifically mentioned in Article 9(4) of the PRCA. In principle, the CPA tends to follow the practice as developed under the Article 102 of the TFEU. The CPA dealt with an alleged abuse of dominant position by price squeeze in *Mobitel/Telekom Slovenije (Itak Džabest)* (2012) and *Telekom Slovenije* (2015). In both cases the CPA ultimately decided to drop the price-squeeze part of the complaint and ended the proceedings against Telekom Slovenije at the part regarding the possibility of creating margin-squeeze policy.

***Exclusive dealing***

Generally, rebates and discounts of dominant undertakings in exchange for ensuring business with customers are considered as abuse of a dominant position. The CPA recently dealt with loyalty rebates in *Pro Plus* (2012). It established that a leading broadcasting and internet media company in Slovenia had abused its dominant position in the market for television advertising airtime by concluding exclusive dealing arrangements with advertisers and granting conditional rebates with loyalty-inducing effects and, in particular, with granting high levels of discount as a reward for exclusivity. Concluding exclusive dealing arrangements with advertisers was also considered an abusive behaviour in *Pro Plus*. In particular, the CPA concluded that Pro Plus abused its dominant position by requiring individual advertisers to devote their advertising budgets exclusively to Pro Plus in return for granting rebates.

In the *Gasilska oprema* case (2010), the CPA established that Gasilska oprema, a wholesale company for fire extinguishers and related equipment, had a dominant position in the upstream market for the sale of new fire extinguishers. Although Gasilska oprema was not directly involved in after-sales services and maintaining of fire extinguishers, the CPA held that it was indirectly present in the downstream market through its right to conclude contracts for after-sales services and maintenance of fire extinguishers with the trademark Pastor. The CPA decided that Gasilska oprema abused its dominant position by terminating the contract for after-sale services of Pastor-branded fire extinguishers concluded between the complainant and Gasilska oprema when the complainant obtained an authorisation to maintain a competitor's fire extinguishers, as well as maintaining the contracts in force for the maintenance of the Pastor fire extinguishers, which were subject to abstention from selling competitors' fire extinguishers and maintaining competing brands.

***Leveraging***

Article 9 of the PRCA prohibits 'making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts'. In a renewed case, *Telekom Slovenije (ADSL/ISDN)* (2013), establishing potential abuse of a dominant position regarding ISDN and

ADSL tying, the CPA concluded that Telekom Slovenije had abused its dominant position on the inter-operator broadband access market with bit-streaming via the copper-based network in Slovenia by making ADSL connections for internet providers conditional on the prior leasing of ISDN connections by end-users, although ISDN connection was not needed or technically necessary.

In a recent case of abuse of dominant position by Telekom Slovenije (2015), the CPA also concluded that as concerns bitstream access, Telekom abused its dominance by not providing the wholesale 'naked xDSL' service to alternative operators, thereby preventing them from providing the xDSL service without the underlying telephone subscription to final customers.

In its very recent decision in *Geoplin* (2015) the CPA also concluded that Geoplin (see Section II, *supra*) abused its dominant position on the market of gas supply to large industrial customers by prohibited contractual clauses that caused industrial customers connected to the transmission network to be entirely tied to Geoplin.

***Refusal to deal***

An example of refusal to deal by a dominant undertaking without objectively justified reasons is *Luka Koper* (2009). An operator of the seaport of Koper refused, without justification, to allow its competitor access to the port, making it impossible for the competitor to perform towing and mooring activities. The CPA concluded that Luka Koper abused its dominant position by refusing such access, and doing so had the effect of excluding all competition on the markets for towing and mooring services in the port of Koper.

In the past, the CPA dealt with cases of refusal to deal, and access to essential facilities as a similar form of abuse as refusal to deal, mainly in the telecommunications sector. In the recent case of abuse of a dominant position by Telekom Slovenije (2015) the CPA held that on the market for access to the physical network infrastructure Telekom refused access to the optical local loop even in locations where copper loops were not available. Further, Telekom did not allow alternative operators to offer broadband bitstream access services to third-party operators on its unbundled local loops.

**iii Discrimination**

Price and non-price discrimination is included in exemplary list of Article 9(4) and is described as 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. So far, the most frequently investigated type of abuse has been price and non-price discrimination.

For example, in *Sazas*, the CPA established (2011) that SAZAS had established a non-transparent system that favoured certain authors, especially those who were included in the decision-making process concerning distribution of the collected royalties, which led to discrimination among authors.

In *SODO* (2012), the CPA found that SODO, the electricity distribution system operator in Slovenia, had abused its dominant position in the market for the management of the electric energy distribution network by charging only some electric power producers for excessive electric energy received and, thus, applying discriminative conditions to undertakings.

### iv Exploitative abuses

Exploitative prices or terms of supply are included in the list of Article 9(4) as an example of 'directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions'. The CPA has not yet decided on any relevant excessive pricing case in practice.

## V REMEDIES AND SANCTIONS

Article 9 expressly prohibits abusive practices and is directly applicable. The CPA may issue a decision establishing the existence of an infringement of Article 9 of the PRCA or Article 102 of the TFEU, or both, and require the undertaking concerned to bring such an infringement to an end. The CPA may, in addition, impose on the undertaking the obligation to take reasonable measures to bring an infringement and its consequences to an end (behavioural or structural remedies). When there is a possibility of infringement of Article 9 of the PRCA or Article 102 of the TFEU, or both, and in cases of urgency due to the risk of serious and irreparable damage to the effectiveness of competition on the market, the CPA may impose interim measures. In the case of a breach of Article 9 of the PRCA or Article 102 of the TFEU, or both, the CPA is entitled to impose fines.[12] In Slovenia the leniency programme does not apply to undertakings involved in abuse of dominance cases.

### i Sanctions

In the case of a breach of Article 9 of the PRCA or Article 102 of the TFEU, or both, the CPA may under Article 73 of the PRCA impose a minor offence fine on a legal entity, entrepreneur or individual who performs economic activity, of up to 10 per cent of its annual turnover in the preceding business year. A fine of between €5,000 and €30,000 can also be imposed on the responsible person within a legal entity or entrepreneur.

Under the Minor Offences Act, legal entities cannot be held solely responsible for offences as the CPA needs to identify one or more individuals (offenders) who have committed the infringement and then attribute their behaviour to the legal entity they represented and to impose a fine on that entity. In Slovenian legislation, detailed guidelines on the method of setting fines in competition cases do not exist. When setting a fine, the CPA takes into account the provisions of the Minor Offences Act and, thus, all circumstances that may reduce or increase the sanction (mitigating and aggravating circumstances), such as the level of the perpetrator's liability for a minor offence, the motives for committing it, the level of threat or violation of a protected good, the circumstances in which the minor offence was committed, the perpetrator's previous conduct, his or her personal circumstances, and his or her conduct after the minor offence was committed – in particular, whether he or she compensated for the damage. The calculation of a fine imposed on a legal person or individual sole trader will take into account their economic strength and previously imposed

12 The Criminal Code contains in Article 225, the criminal act 'unlawful restriction of competition', which incriminates abuses of a dominant position of one or more companies. However, although criminal sanctions are theoretically available undertakings or individuals are not pursued in practice.

sanctions. When imposing a fine on the responsible person of a legal entity or entrepreneur, the calculation of the fine will also take into account the perpetrator's financial conditions, salary, other incomes, and property and family duties.

The Slovenian case law on imposing fines in abuse of dominance cases is still limited to a few cases, which were concluded with the force of *res judicata*. The CPA's case law shows that it also takes into account the nature and gravity of the infringement, the market power of the undertaking, effects on the market, the geographical scope of the infringement and the duration of the infringement.

In addition, fines at the same level as for breaches of Article 9 of the PRCA or Article 102 of the TFEU, or both, can be imposed for failure to abide by imposed remedies, interim measures or commitment decisions.

### ii Remedies

The CPA can also impose behavioural or structural remedies on the undertaking. According to Article 37 of the PRCA, the CPA may impose the obligation to take reasonable measures to bring an infringement and its consequences to an end on the undertaking, in particular through the disposal of the business or part of the undertaking's business, by division of an undertaking or disposal of shares in undertakings, the transfer of industrial property rights and other rights, conclusion of its licence and other contracts that may be concluded in the course of operations between undertakings, or ensuring access to infrastructure.

## VI PROCEDURE

The CPA has the power to enforce Article 9 of the PRCA and also Article 102 of the TFEU. The CPA conducts two types of proceedings: administrative proceedings, in which infringements of Article 9 of the PRCA and Article 102 of the TFEU are assessed and brought to an end and minor offence proceedings, in which fines are levied.

Proceedings before the CPA are initiated only on the basis of information obtained by third parties (i.e., competitors or other market participants, public authorities or consumers) or information gathered by the CPA itself.

The CPA has extensive investigatory powers with regard to discovering abuses of a dominant position. It can issue requests for information and carry out inspections not only at the premises of undertakings against which a procedure has been initiated, but also at private homes.

An inspection of the premises of an undertaking against which a procedure has been initiated must be based on consent of the undertaking or a reasoned written court order. If the latter is the case, the inspection must be carried out in the presence of two adults.

When conducting an inspection, authorised persons may enter and inspect the premises at the registered office of the undertaking and at other locations at which the undertaking itself or another authorised undertaking performs the activity and business for which there is the probability of an infringement of Article 9 of the PRCA or Article 102 of the TFEU. They may examine accounts and other documentation, irrespective of the medium on which they are stored. The authorised persons may ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and the purpose of the inspection, and then record it.

Subject to certain conditions,[13] the CPA may also search the premises of an undertaking against which the procedure has not been initiated, and residential premises of members of the management or supervisory bodies or of the staff or other associates of the undertaking against which the procedure has been initiated.

Therefore, it is important that undertakings subject to investigations by the CPA, especially in the event of a dawn raid, are assisted by legal counsel as soon as possible. The Agency is not obliged to wait for the arrival of a lawyer and is entitled to start an inspection without his or her presence.

The legal representatives and employees of the undertaking are obliged to cooperate with the authorised persons of the CPA. If the undertaking refuses to permit an authorised person entry to the premises, interferes with their entry, denies access to accounts or other documentation, or obstructs or otherwise interferes with an inspection, the authorised persons have the right to enter the premises or to access such accounts and other documentation with the assistance of the police.

It is also important that undertakings give clear instructions to their employees not to destroy any documents or electronic data, or communicate with other undertakings about the inspection, otherwise, the undertaking risks incurring the penalty for obstruction. In the case of obstruction of inspection, the CPA may impose:

*a* on an undertaking a penalty payment amounting to 1 per cent of its annual turnover in the preceding business year; or

*b* on a natural person (if it is not deemed that the inspection has been obstructed by the undertaking) a penalty payment amounting to €50,000.

An undertaking will be deemed as obstructing an inspection if the inspection is obstructed by members of its management or supervisory bodies, its employees or even by its external contractors.

Letters, notifications and other means of communication between the undertaking against which the procedure has been initiated and its lawyer (privileged communications) are excluded from inspection to the extent that such communications pertain to the procedure in question. An undertaking or its lawyer may refuse to allow access to information, claiming it to be privileged communication. If an authorised person considers that such claim is evidently unfounded, the authorised person may seal the document (or its copy) in an envelope signed by both the undertaking and its lawyer and send it to the Administrative Court of the Republic of Slovenia. The Court then decides on the justification of claiming privileged communication within 15 days of the date of the request being filed by the CPA.

It is also advisable at the beginning of the inspection to form a team of employees who accompany and communicate with the authorised persons. Although the CPA usually obtains copies of the original documents, it is crucial to make copies of all documents taken by the CPA in order to prepare an effective defence.

13 If there are reasonable grounds to suspect that business books and other documentation relating to the subject matter of an inspection are being kept at the mentioned premises. In this case, Article 33 of the PRCA provides that the Agency must obtain a court order to search the premises from a judge of the competent court in Ljubljana, and that during the inspection of the residential premises, two adult witnesses must be present.

A formal investigation of a specific case should last no more than two years after the order for commencement of a procedure, and the CPA should adopt a decision, but in practice there are no legal consequences if the CPA adopts its decision later. The CPA normally comes to a decision without an oral hearing. The official at the CPA conducting the procedure determines whether an oral hearing needs to take place to clarify or establish essential facts.

In administrative proceedings the CPA can, after investigation:

*a* issue a decision establishing the existence of an infringement of Article 9 of the PRCA or Article 102 of the TFEU and require the undertaking concerned to bring such an infringement to an end;

*b* issue a decision making binding commitments proposed by the undertaking against which the procedure has been initiated; or

*c* terminate the proceedings.

A judicial protection procedure may be initiated against decisions adopted by the CPA in administrative proceedings. The parties may bring an action before the Administrative Court within 30 days of service of the decision.

## VII PRIVATE ENFORCEMENT

Affected parties (companies or consumers) can enforce Article 9 before the national courts although they do not have competence to prohibit abusive practices.

The PRCA provides that a person who intentionally or through negligence infringes the provisions of Article 9 of the PRCA or Article 102 of the TFEU will be liable for the damage caused by such infringement, but it contains no specific rules for private enforcement. Private enforcement in Slovenia is mainly focused on damage claims, where the general rules for damages apply. District courts are competent in civil disputes and can adjudicate on such claims. If the damage has been caused by infringement of provisions of Article 9 of the PRCA or Article 102 of the TFEU, the court will be bound by the final decision of the CPA and the European Commission establishing the existence of the infringement. The statute of limitations for compensation claims is suspended from the date of initiating procedure before the CPA or the European Commission to the date on which such procedure is finally concluded.

There is no way under Slovenian law of filing collective (class) actions, but actions can be joined by the court if several actions are lodged at the court with the same or similar factual and legal bases.

The PRCA, in Article 37(2), provides a legal basis for the CPA to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract. This provision does not apply to private suits before the national courts. Consequently, the national courts have the power to order a defendant to provide access to its infrastructure or network or other obligations only within the scope of the provisions of Article 133 of the Code of Obligations, which provide that at the request of an interested

person, the court can order appropriate measures to prevent the occurrence of damage or alarm or to dispose of a source of danger, to be taken at the expense of the possessor thereof should the latter fail to do so.[14]

In practice, cases of private enforcement have tended to be rare, mostly because of difficulties in meeting the burden of proof in damage claims. The injured party must prove the existence of an unlawful damaging act, damages (existence and amount of loss) and causation. Nevertheless, in recent years there has been increasing number of private suits before the national courts where market participants seek protection of their interests directly through damage claims.[15]

## VIII FUTURE DEVELOPMENTS

After changes to the regime of inspections that came into force in May 2014, no further major changes to competition legislation are expected in the near future. However, in 2016 the government proposed some important changes to minor offence proceedings conducted by the CPA focusing on creating a more effective system. The amendments of the Minor Offences Act are still in the legislative process. Considering the draft of the proposed amendments, it is expected that the CPA's system for sanctioning breaches of competition law will be finally excluded from the general minor offence proceedings system and is intended to be governed by specific rules laid down in the PRCA.

14 See, for example, the judgment of the Supreme Court of 23 May 2014 in the telecommunications case No. III Ips 98/2013.

15 Such as the recent telecommunications case in which the court awarded damages. After a 10-year-long judicial proceedings, the private company's (competitor) claim for damages for breach of competition law finally resulted in an award of €941,262 plus interest (the judgment of the Supreme Court of 23 May 2014, case No. III Ips 98/2013).

# Chapter 20

# SPAIN

*Francisco Enrique González-Díaz and Ben Holles de Peyer*[1]

## I INTRODUCTION

The key Spanish law provision regulating the abuse of a dominant position (ADP) is Article 2 of the 2007 Spanish Competition Act (LDC).[2] Article 2 is drafted in a similar way to Article 102 of the Treaty on the Functioning of the European Union (TFEU), the essential differences being:

*a* the territorial reach of the prohibitions (while the LDC prohibits ADP 'in all or part of the national market', the TFEU forbids ADP 'within the internal market or in a substantial part of it […] in so far as it may affect trade between Member States');

*b* the inclusion of an additional example in the list of potentially abusive conduct (i.e., '[t]he unjustified refusal to satisfy the demands of purchase of products or provision of services'); and

*c* the inclusion of Article 2(3) of the LDC, establishing that such prohibition also applies when dominance derives from the law.

Other key provisions include Articles 4 to 6 (legal exemptions, conduct of minor importance and findings of inapplicability), Chapters I and II of Title IV (antitrust procedure) and Title V of the LDC (sanctions). Moreover, the Spanish Competition Rules (RDC)[3] implement the LDC, regulating, notably, a number of procedural issues (e.g., investigation and interim measures). Furthermore, the National Markets and Competition Commission (NMCC)[4]

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2 Law 15/2007, 3 July.

3 Royal Decree 261/2008, 22 February.

4 Throughout this chapter 'NMCC' refers to both the National Markets and Competition Commission and the now defunct National Competition Commission.

has adopted two 'soft law' measures, namely, a Communication on the quantification of sanctions[5] and Guidelines on the termination of infringement proceedings by means of commitments.[6]

These rules apply to private and public undertakings alike. Indeed, according to the LDC and in line with EU case law, the notion of 'undertaking' refers to any person or entity carrying out an economic activity, regardless of their legal statute and form of financing. Although, *a priori*, public institutions are not subject to these provisions when exercising public prerogatives,[7] the NMCC has interpreted the notion of 'economic activity' widely and even seems to have upheld the applicability of antitrust rules in a case where a public entity did not act as an economic operator, but merely facilitated the commission of an antitrust infringement.[8]

## II YEAR IN REVIEW

The NMCC adopted only one fining decision in 2015 for ADP, namely, *AGEDI/AIE Radio* (excessive pricing and abusive discrimination).[9] This case led to the imposition of a €2.79 million fine on AGEDI and AIE, two collecting societies. In addition, the NMCC adopted a commitments decision in *SGAE Autores* (possible abusive discrimination).[10]

The total number of fining decisions and level of fines for ADP in 2015 were significantly lower than in recent years. Indeed, in 2014, the NMCC adopted four fining decisions for ADP, which led to the imposition of fines totalling €12.62 million.[11] In 2013, the NMCC imposed ADP fines reaching a total of €3.5 million, in three fining decisions.[12] In 2012, the NMCC adopted six fining decisions, which imposed fines amounting to

5 6 February 2009.

6 28 September 2011.

7 For a list of situations in which state action is not subject to antitrust law, see: Lillo, C, 'La normativa de competencia: su aplicación a la Administración Pública', Gaceta Jurídica de la Unión Europea y de la Competencia, July–August 2011, No. 22, pp. 27–28. See also: González-Díaz, F E, 'Algunas reflexiones sobre las recientes Sentencias del Tribunal de Justicia en los asuntos Ladbroke y Comisión contra Italia, Gaceta Jurídica de la Unión Europea y de la Competencia, April–May 1999, No. 200.

8 Case S/0167/09, Productores de Uva y Vinos de Jerez, 6 October 2011. See: Navarro, E and Rambal, M, 'La aplicación de las normas de defensa de la competencia a las Administraciones Públicas que no actúan como operadores económicos en el Mercado', Gaceta Jurídica de la Unión Europea y de la Competencia, January–February 2013, No. 31.

9 Case S/0500/13, *AGEDI/AIE Radio*, 26 November 2015.

10 Case S/0466/13, *SGAE Autores*, 9 July 2015.

11 In 2014, the NMCC adopted the following fining decisions for ADP: *Correos 2* (Case S/0373/11 on margin squeeze), *Endesa Instalación* (Case S/0446/12 on excessive pricing), *Criadores de Caballos* (Case S/0345/11 on leveraging) and *SGAE-Conciertos* (Case S/0460/13 on excessive pricing).

12 In 2013, the NMCC adopted the following fining decisions for ADP: *Correos* (Case S/0341/11 on refusal to deal), *AGEDI* (Case S/0360/11 on unfair, non-transparent and discriminatory management of intellectual property rights) and *Tanatorios Coslada* (Case SAMAD/12/10 on refusal to deal).

€162.4 million, including several key decisions such as *Transporte Televisión*[13] (margin squeeze), *Endesa Instalación*[14] (leveraging and exploitation) and *Mensajes Cortos*[15] (excessive pricing).

The reduction in the number and level of fines in 2015, compared with 2012, is likely due to the specific circumstances of the cases at hand and not to a general reduction of fines trend in ADP cases.

The following table shows the ADP cases that are currently pending before the NMCC:

| *Case Reference* | *Sector* | *Conduct* | *Case opened** |
|---|---|---|---|
| S/DC/0567/15 *Estudios de Mercado Industria Farmacéutica* | Market reports relating to the pharmaceutical industry | Terms in contracts between a supplier of reports relating to the pharmaceutical industry and wholesale distributors of pharmaceutical products | December 2015 |
| S/DC/0557/15 *Nokia* | GSM-R (Global System for Mobile Communications – Railway) infrastructure maintenance | Alleged excessive and discriminatory pricing, and refusal to supply | November 2015 |
| S/DC/0540/14 *Istobal* | Car wash systems | Alleged resale price maintenance and refusal to supply | December 2014 |
| S/DC/0511/14 *Renfe Operadora* | Rail freight transport and connected services | Allegedly discriminatory commercial conditions applied to certain companies for the provision of traction services and/or for the rental of railway wagons | October 2014 |
| * 'Case opened' refers to the date on which the NMCC opened its investigation (where known) or announced that it had opened an investigation. | | | |

## III MARKET DEFINITION AND MARKET POWER

The criteria used by the NMCC to define the relevant market are practically identical to those described in the Commission Notice on the definition of the relevant market and applied by the Commission in its decisional practice. In fact, according to well-settled decisional practice, the provisions of the Notice are fully applicable to Article 2 of the LDC cases.[16] No formal provisions exist in Spanish law or in the 'soft law' regulating market definition. Although the NMCC is often not very detailed in justifying its specific choice of market definition, this tendency is changing and its analysis is progressively becoming more sophisticated and grounded in economics.[17]

Given the lack of a provision defining 'dominant position', this task has been carried out by the NMCC, which, since 1999, has interpreted this notion in line with EU case law. Indeed, in 1999 the NMCC established that such a position exists when an undertaking has a sufficient degree of economic power and independence in the market to enable it to

13 Case S/0207/09, *Transporte Televisión*, 8 February 2012.

14 Case S/0211/09, *Endesa Instalación*, 21 February 2012.

15 Case S/0248/10, *Mensajes Cortos*, 19 December 2012.

16 See, for example, case 677/05, *Distribuidoras Prensa Ciudad Real*, 24 April 2006, p. 10.

17 See, for example, *Mensajes Cortos*, *supra*, pp. 129–139.

modify prices or commercial conditions, or both, without taking account of the reactions of competitors or consumers.[18] This definition has been repeated by the NMCC, with small variations, in recent decisions.[19]

The specific criteria used by the NMCC to assess dominance are very similar to those used by the Commission. For instance, in *Bacardí*, it was stated that to establish dominance it is necessary to focus on both the structure of the undertaking concerned (resources and methods of production, methods of presentation, transport and sales, technology and vertical integration) and the competitive environment (number and strength of competitors, market shares and sales volumes, prices and barriers to entry).[20] In *McLane/Tabacalera*, however, it was established that the *Bacardí* criteria constitute the basis of a 'structural' approach and that account may also be taken of behavioural elements and of the relationship between clients and providers and the undertaking in question.[21]

Finally, it is noteworthy that the NMCC interprets Article 2 of the LDC, which refers to '[a]ny abuse by one or more undertakings', as empowering it to pursue the collective ADP.[22]

## IV ABUSE[23]

The NMCC has also adopted the definition of 'abuse' developed by the EU courts in numerous decisions, such as in *Retevisión/Telefónica*.[24] Furthermore, the Supreme Court of Spain (TS) has explicitly established that Article 2 of the LDC must be interpreted in light of the EU case law concerning Article 102 of the TFEU.[25] It has also been confirmed that Article 2 of the LDC and Article 102 of the TFEU do not prohibit dominance in itself but only the use of such a position to impose commercial conditions and to obtain advantages that the undertaking would not be able to obtain under normal competitive conditions.[26]

18 See, for example, case 441/98, *Electra Avellana*, 7 July 1999, p. 9.

19 See, for example, case S/0157/09, *EGEDA*, 2 March 2012, p. 52; case S/0220/10, *SGAE*, 3 July 2012, p. 37; *Correos*, *supra*, p. 20; *AGEDI*, *supra*, p. 41; *AGEDI/AIE Radio*, *supra*, p. 48.

20 Case R 362/99, *Bacardí*, 30 September 1999, p. 8.

21 Case 486/00, *McLane/Tabacalera*, 24 April 2002, pp. 20–21.

22 See, *inter alia*: case 427/9, *Electra Caldense*, 19 February 1999, pp. 9–10; case 535/07, *Fonogramas*, 9 December 2008, p. 24; *Mensajes Cortos*, *supra*, pp. 155–165.

23 See González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 115-158.

24 Case 456/99, *Retevisión/Telefónica*, 8 March 2000, p. 28.

25 TS judgment in appeal 4495/1998, 8 May 2003, point of law 7.

26 *SGAE*, *supra*, p. 37.

In line with *Michelin I* and subsequent ADP EU case law, the NMCC and the courts have held that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition.[27] As to the list of activities contained in Article 2 of the LDC, it is well established that it must be interpreted as being open-ended.[28]

ADP has generally been described by the NMCC as constituting an objective concept[29] and thus, *a priori*, intent should be irrelevant in determining whether conduct is abusive. However, traditionally, intent has played a significant role in distinguishing between abusive conduct and competition on the merits. In fact, it has even been held on some occasions that intent is a necessary element that must be taken into account when assessing the lawfulness of allegedly anticompetitive behaviour.[30] It is also noteworthy that the NMCC's early decisional practice did not consider it necessary to prove actual anticompetitive effects to establish that conduct was abusive.[31]

In an attempt to clarify the conditions of the notion of 'abuse', in 2006, the TS established that the decisive element in identifying an abuse is not the intention of the dominant undertaking, but rather the objectively illegal nature of its conduct.[32] It was stated for instance, that the willingness to prevent an operator from entering the market may not be objectionable in itself, if implemented through legitimate means. However, although such a statement places the emphasis on objective considerations, it does not definitively rule out the need to take intent into account.

In this context, it has been noted that even if this test does not formally require the proof of anticompetitive effects, in practice, it is very similar to an effects-based approach.[33] It has been argued that today Article 2 of the LDC leaves no room for *per se* abuses and therefore a given conduct may only be deemed contrary to such a provision if it is liable to give rise to anticompetitive effects, even if these effects do not actually materialise in the specific case.[34]

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27 See, for example, case S/0003/07, E.On, 8 November 2011, p. 34; *SGAE-Conciertos*, *supra*, pp. 30-31; *Criadores de Caballos*, *supra*, pp. 28, 30, 32, 39, 41, 49, 59 and 61. See also TS judgment in appeal 3042/2008, 10 February 2011, point of law 6.

28 TS judgment in appeal 4495/1998, *supra*, point of law 7.

29 *Retevisión/Telefónica*, *supra*, p. 28.

30 See, for example, *Retevisión/Telefónica*, *supra*, p. 29.

31 Case 464/99, *Aseguradoras Médicas Vizcaya*, 6 July 2000, p. 17.

32 TS judgment in appeal 9174/2003, 20 June 2006, point of law 8.

33 Gutiérrez, A, 'Artículo 2. Abuso de posición dominante', in: Massaguer, J, Folguera, J, Sala Arquer, JM, Gutiérrez, A, *Comentario a la Ley de Defensa de la Competencia* (Civitas: Pamplona, 2010), pp. 203–204. See also González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 154–156.

34 Dorronsoro, C, 'Artículo 2. Abuso de posición dominante', in: Odriozola, M, Irissarry, B, Derecho español de la competencia: Comentarios a la Ley 15/2007, Real Decreto 261/2008 y Ley 1/2002 (Bosch: Barcelona, 2008), pp. 149–150. See also: González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 154–156.

Recent NMCC decisions confirm this shift towards an effects-based approach.[35] This said, the relevance of effects and intent in the assessment of potentially abusive conduct must logically be analysed by reference to the specific forms of abuse.

Finally, although the NMCC has often been criticised for not being sufficiently rigorous in its economic assessment of exclusionary practices,[36] recent decisions such as *Transporte Televisión* suggest that the NMCC is increasingly willing to base its decisions on solid economic grounds and analysis.[37]

**i Exclusionary abuses**

In its *Altadis* judgment on predatory pricing,[38] drawing on the criteria set out in *Akzo* and *Tetra Pak*, the TS held that when prices are set below average variable costs, they are presumed to be abusive, while if they are set at a level above average variable costs but below average total costs, they are only deemed abusive if they constitute part of a strategy to exclude competitors. The TS concluded that the decisive element defining predation was the intention to eliminate a competitor. While in the former case such intention would be presumed, in the latter case it must be proven.

In *Transporte Televisión*,[39] the NMCC fined Abertis Telecom for having abusively squeezed the margin between the wholesale prices at which access was granted to digital terrestrial television (DTT) transmission centres and the retail prices for DTT signal transport services. The NMCC held that Abertis had control over essential inputs and, after applying the 'as-efficient competitor test', concluded that such conduct constituted ADP, insofar as it hindered the entry of competitors in the DTT signal transport and distribution market. The NMCC noted that entry in the retail market was both technically viable and economically possible and thus the lack of effective competitors could only be the result of the pricing policy adopted by Abertis.

The NMCC's recent decisions in *Llamadas Móviles*, *Correos 2* and *Telefónica* have confirmed that the key test to determine whether a margin squeeze has taken place is the 'as-efficient competitor test'.[40] In *Llamadas Móviles* the NMCC also confirmed that proving the existence of exclusionary anticompetitive effects is essential to conclude that a margin squeeze constitutes a violation of Article 2 of the LDC and Article 102 of the TFEU.[41,42]

35 See, for example, *Transporte Televisión*, *supra*, pp. 135–139; case S/0391/11, *Llamadas Móviles*, 6 March 2014, pp. 65–68; *AGEDI/AIE Radio*, *supra*, pp. 73–76.

36 See: Ortiz, L, Ibáñez, P, 'Evolving priorities and rising standards: Spanish law on abuses of market power in the light of the 2008 Guidance Paper on Article 82 EC', in: Pace, LF, *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar: Cheltenham, 2011), pp. 90–94.

37 See, for example, *Transporte Televisión*, *supra*, pp. 77–92 and 118–135.

38 TS judgment in appeal 915/2002, 13 December 2004, point of law 7.

39 *Transporte Televisión*, *supra*.

40 *Llamadas Móviles*, *supra*, p. 66; *Correos 2*, *supra*, pp. 30, 31 and 36.; Case S/0409/12, Telefónica, 29 October 2015, pp. 6–7.

41 *Llamadas Móviles*, *supra*, pp. 65–68.

42 See: González-Díaz, F E, Padilla, J, 'Chapter 5. Margin Squeeze', in: González-Díaz, F E, Snelders, R, *EU Competition Law Volume V. Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 229–317.

The NMCC decision in *Iberia*[43] constitutes a key precedent on loyalty rebates. This case concerned a target rebate scheme whereby travel agencies benefited from rebates only if their purchases had increased in comparison with their purchases in the previous year. These rebates were analysed in light of the criteria set out in *Hoffmann La Roche* and *Michelin* and were deemed to be abusive insofar as they gave rise to harm to consumers and competitors.

In *Unión Española de Explosivos*[44] the TS assessed exclusivity clauses in light of Article 2 of the LDC. The TS held that such clauses constituted part of a foreclosure strategy engaged in to prevent potential competition. It has been argued that while exclusivity clauses had been traditionally considered as *per se* abuses by the NMCC, this approach changed in *Airtel/Telefónica*, where the NMCC applied an effects-based approach to exclusivity,[45] and as a result of the *de minimis* rule contained in Article 5 of the LDC.[46]

As regards leveraging practices, in *BT/Telefónica*[47] the NMCC considered that Telefónica had unlawfully tied the renting of international circuits to that of national circuits, where competition was less intense, which had the effect of restricting potential competition. In recent years the NMCC has imposed severe fines on several energy companies for having engaged in leveraging practices. For instance, in *Endesa Instalación*,[48] this company was deemed to have taken advantage of its position in the distribution market to increase its market power on the neighbouring market for electrical installation work (i.e., by making use of information to which it had privileged access because of its status as a distributor, offering to carry out installation work for large customers).[49]

Regarding refusal to deal, it has been noted that the NMCC has generally been more willing to consider such conduct abusive when the company requesting supply was already a client or competitor of the dominant undertaking and when such refusal constituted an absolute refusal to deal.[50] In *McLane/Tabacalera*, the NMCC concluded that by refusing to supply certain products, Tabacalera abused its dominant position since the products in question were indispensable to compete in the wholesale distribution market.[51] Tabacalera was deemed to have attempted to foreclose potential competition to protect its position in the market, which had recently been liberalised. In an older case, *Iasist/3M*,[52] a refusal to license case, the NMCC considered such conduct abusive despite the lack of indispensability, given the 'excessive influence' that this conduct could have on the competitive conditions of the market in which the complainant operated.

It is noteworthy that two out of three fining decisions for ADP in 2013 concerned refusals to deal. In *Correos*, the NMCC fined Correos, the Spanish public postal services operator and owner of the public postal network, for ceasing to supply competitors with

43 Case 514/01, *Iberia*, 1 April 2002.

44 TS judgment in appeal 4699/2003, 4 April 2006.

45 Case 413/97, *Airtel/Telefónica*, 26 February 1999, p. 40.

46 Gutiérrez, *supra*, pp. 205–206.

47 Case 412/97, *BT/Telefónica*, 21 January 1999.

48 Case S/0211/09, *Endesa Instalación*, *supra*, pp. 40–48.

49 See similarly: case S/0089/08, Unión Fenosa Instalación, 20 September 2011; case 2795/07, Hidrocantábrico Instalación, 20 September 2011; E.On, *supra*.

50 Gutiérrez, *supra*, p. 184.

51 *McLane/Tabacalera*, *supra*, p. 25.

52 Case 517/01, *Iasist/3M*, 5 April 2002.

wholesale access services, in particular, those related to the delivery of administrative notifications. The NMCC found that this conduct was abusive because (1) access to the Correos network was necessary to effectively compete in the downstream market for the delivery of administrative notifications, (2) this network could not be replicated and (3) such conduct was not objectively justified.[53]

### ii Discrimination

According to Article 2(2)(d) of the LDC, discriminatory pricing may be abusive if it unjustifiably places certain competitors at a disadvantage. In recent years there has been a considerable amount of ADP enforcement in this field. For instance, in *Mediapro*, the NMCC considered that by engaging in unjustified discrimination in licensing the use of broadcasting rights, Mediapro had hindered competition in the market for the resale of audiovisual broadcast rights of football matches and in the downstream television markets (especially pay TV).[54]

The NMCC has also focused on discrimination in several cases concerning collecting societies.[55] For instance, in *AGEDI/AIE Radio*, the NMCC concluded that the remuneration system created by two collecting societies for the use of music by radio stations was in breach of Article 2 of the LDC and Article 102 of the TFEU, as it unjustifiably placed certain radio stations that were subject to higher fees at a competitive disadvantage.[56]

### iii Exploitative abuses

Exploitative abuses are at the forefront of the NMCC's enforcement priorities. This lies in stark contrast to the Commission's quasi-exclusive focus on exclusionary abuses.[57] By far the largest fine in recent years was levied on three telecommunications companies for excessive pricing.[58] In addition, two out of four fining decisions for ADP in 2014 concerned excessive pricing.[59]

In the past, a number of benchmarks have been used to determine whether prices are excessive (e.g., historical price data, production costs and costs in other competitive

53 *Correos*, *supra*, pp. 21–36.

54 Case S/0153/09, *Mediapro*, 17 March 2011.

55 See: case 2785/07, *AIE*, 23 February 2011; case S/0297/10, *AGEDI/AIE*, 14 June 2012; *SGAE*, *supra*; *AGEDI*, *supra*; *AGEDI/AIE Radio*, *supra*.

56 *AGEDI/AIE Radio*, *supra*.

57 It has been argued that both the sheer number of ADP infringement decisions adopted by the Spanish authorities (nearly three times more than the Commission from 1992 to 2009) and the large proportion of exploitative abuses cases (34 out of 74) reflect the fact that Spanish ADP enforcement may be at a different stage of development from that of Commission Article 102 of the TFEU enforcement. See: Ortiz, Ibáñez, *supra*, pp. 85–87.

58 *Mensajes Cortos*, *supra*. The NMCC imposed a fine of €119.96 million on Telefónica, Vodafone and Orange.

59 Case S/0446/12, *Endesa Instalación*, *supra*, and *SGAE-Conciertos*, *supra*.

geographic markets). In recent cases, the NMCC has relied on a variety of benchmarks, such as, among others, those contained in regulatory prescriptions,[60] price levels in other EU Member States[61] and prices charged by the same undertaking to operators in other sectors.[62]

In *Mensajes Cortos* the NMCC concluded that three mobile network operators had priced termination services at an excessively high level, leading to higher retail prices for SMS and MMS services users. In reaching these conclusions, it was noted, *inter alia*, that: (1) prices of termination services had been high and stable over the relevant period, despite considerable traffic increase and cost reductions; and (2) wholesale termination services prices for short messages in Spain were among the highest in Europe.[63]

In *Endesa Instalación* the NMCC laid out a non-exhaustive list of: (1) the structural market conditions under which excessive pricing is likely; and of (2) the benchmarks that may be used to determine whether prices are excessive.[64] As regards the former, the NMCC concluded that excessive pricing is likely when prices are set by a company that is in a monopoly or quasi-monopoly situation and in markets characterised by the existence of high barriers to entry and relatively inelastic demand. As regards the latter, the NMCC concluded that prices may be deemed excessive by reference to the costs of the product or service, or to the prices of the product or service in a competitive situation, in other geographical markets or in a different time period.[65]

In *SGAE-Conciertos*, the NMCC established that the fees charged by the SGAE, a collecting society, as consideration for the right to publicly play musical content subject to copyright in concerts in Spain, were excessive and thus in breach of Articles 2 of the LDC and 102 of the TFEU. The NMCC carried out an in-depth analysis of the rates charged by collecting societies in other EU Member States and observed that the fees charged by the SGAE were significantly higher than the rates paid in 73 per cent of the EU Member States and in the United States.[66] The NMCC concluded that such fees had an exploitative effect on concert promoters and could indirectly prejudice consumers by leading to higher ticket prices.[67]

## V REMEDIES AND SANCTIONS

### i Sanctions

The key provisions concerning sanctions are Articles 61 to 70 of the LDC and the NMCC Communication on the quantification of sanctions.

As a general rule ADP is considered a serious infringement, punishable with a fine of up to 5 per cent of the total turnover of the infringing undertaking in the immediately preceding business year. However, when ADP is committed by an undertaking operating in

60 Case S/0211/09, *Endesa Instalación*, *supra*, p. 51.

61 *EGEDA*, *supra*, pp. 41–44 and 55–60; *SGAE-Conciertos*, *supra*, pp. 17–18 and 22–26.

62 *EGEDA*, *supra*, pp. 41–44 and 55–60.

63 *Mensajes Cortos*, *supra*, pp. 141–154.

64 Case S/0446/12, *Endesa Instalación*, *supra*, pp. 25–26.

65 See also, for example, case S/0501/13, *Continental Automotive*, 15 October 2015, p. 31.

66 *SGAE-Conciertos*, *supra*, pp. 17–18 and 22–26.

67 *SGAE-Conciertos*, *supra*, pp. 25–26.

a recently liberalised market, such an undertaking has a market share near monopoly or it enjoys special or exclusive rights, it will be considered a very serious infringement and the NMCC may levy fines of up to 10 per cent of such turnover.

The aggravating and mitigating circumstances provided for in the LDC are very similar to those enshrined in the 2006 Commission Fining Guidelines. Certain differences, however, exist as regards the regulation of mitigating factors: (1) the LDC explicitly provides that the NMCC may reduce the fine due to the adoption of actions intended to repair the damage; and (2) according to the Fining Guidelines, the Commission may reduce the fine where the undertaking provides evidence that the infringement has been committed as a result of negligence and where the anticompetitive conduct has been authorised or encouraged by public authorities or legislation.

The NMCC may also impose fines of up to €60,000 on the legal representatives and managers of the infringing undertakings and periodic penalty payments (PPPs) of up to €12,000 per day under specific circumstances.

### ii Behavioural remedies

The NMCC has often adopted behavioural remedies in ADP cases. For instance, in the *SGAE* case, the SGAE was ordered to withdraw a specific clause from its contracts, which was deemed unfair and discriminatory.[68] In *AIE*, this undertaking was given two months to proceed to the publishing of the decision and to send it to certain clients, under threat of PPPs.[69] In *Correos*, this company was given two months to grant private postal operators access to its network.[70]

Moreover, the NMCC may adopt interim measures, either *ex officio* or at the request of one of the parties, at any moment throughout the proceedings. These measures may consist of: (1) cease-and-desist orders or orders imposing specific obligations to prevent potential damage; or (2) securities to ensure the availability of funds to face future damages claims. The conditions for the adoption of interim measures are the existence of *fumus boni iuris* and *periculum in mora*.

### iii Structural remedies

Structural remedies may only be imposed in the absence of equally effective behavioural remedies or when these remedies would be more onerous for the undertaking in question than the imposition of structural remedies. The NMCC has not yet imposed this type of remedy in its Article 2 of the LDC and Article 102 of the TFEU enforcement.

## VI PROCEDURE

The NMCC ADP infringement proceedings are regulated in Chapters I and II, Title IV of the LDC, as well as in Chapters I and II, Title II of the RDC. These proceedings are divided into two phases, before two different bodies within the NMCC: (1) the Competition

68 *SGAE*, *supra*, p. 49.

69 *AIE*, *supra*, p. 42–43.

70 *Correos*, *supra*, p. 41.

Directorate (CD), in charge of the investigation of the case and of making proposals to the Council; and (2) the Council of the NMCC (CNMCC), with adjudicatory functions and power to issue sanctions.

Proceedings may be initiated: (1) *ex officio* by the CD, on its own initiative or on that of the CNMCC; or (2) by complaint made by any natural or legal person. In practice, investigations are commonly triggered either way. Once the CD receives information concerning a potential infringement, it may conduct a preliminary investigation (prior to the opening of formal proceedings), to determine whether it may open such proceedings. As a result, the CD may carry out inspections. Although at this stage the parties' procedural guarantees are limited, the NMCC must abide by fundamental rights standards (e.g., impossibility to access premises without consent or court order) and must respect legal professional privilege. The CNMCC may then adopt a decision either dismissing the case or opening formal proceedings.

Once proceedings have been opened, interested parties will have the right to access the file. The CD may carry out two types of investigatory acts: (1) inspections at the undertaking's premises, means of transport or in the private homes of the companies' managers and staff (with consent or judicial authorisation); and (2) requests for information directed at any natural or legal person. If an undertaking fails to comply with its obligation to submit to an inspection, it may be subject to a fine of up to 1 per cent of its total turnover in the immediately preceding business year. Companies are also obliged to reply to requests for information, under threat of PPPs of up to €12,000 per day. All acts and decisions adopted by the CD may be subject to appeal before the CNMCC if they breach the parties' rights of defence or give rise to irreparable damage.

Subsequently, the CD may issue a statement of objections. Interested parties have 15 days to reply to it and to submit relevant evidence. After carrying out all necessary investigatory acts the CD may propose a draft decision and interested parties may submit allegations and request that an oral hearing be held before the CNMCC. This puts an end to the first phase of the proceedings and marks the beginning of the second phase before the CNMCC.

The CNMCC may order the production of evidence as well as complementary measures to clarify certain issues. It may also hold a hearing upon request of the parties. The CNMCC then issues its final decision, which may be challenged within two months before the High Court of Spain (AN), which exercises full judicial review and may adopt interim measures such as, for instance, the suspension of the decision. The adoption of interim measures, regulated in the Law on Contentious Administrative Jurisdiction,[71] may be requested at any stage of the judicial proceedings. These measures may remain in force until a final non-appealable judgment is issued.

Alternatively, administrative proceedings may be terminated through the acceptance of commitments proposed by the parties before the end of the 15-day period to reply to the statement of objections. While the decision as to whether to begin a commitments procedure is the responsibility of the CD, it is the CNMCC who adopts the final decision accepting, rejecting or requesting new commitments. Commitments proceedings are regulated in the NMCC Guidelines on the termination of infringement proceedings by means of commitments.

71 Law 29/1998, 13 July, Articles 129–136.

As to the timing, while the duration of the preliminary investigation is not subject to a statutory limit, formal proceedings may not last more than 18 months and the first phase may last no longer than 12 months.

Concerning international cooperation, it suffices to note that the NMCC and the courts are subject both to Chapter IV of Regulation 1/2003 on cooperation as well as to the Commission Notice on cooperation within the Network of Competition Authorities and the Commission Notice on the cooperation between the Commission and the courts of the EU Member States.

Although the LDC empowers the NMCC to issue findings of inapplicability with regard to conduct *a priori* falling under Article 2 of the LDC, these powers may only be exercised *ex officio* and where the public interest so requires.

Finally, it is noteworthy that there are reasonable prospects for successfully appealing NMCC decisions before the Spanish courts.

As an example, in July 2015, the AN annulled the NMCC's margin squeeze decision in *Correos 2*.[72] In *Correos 2*, the NMCC concluded that Correos, the Spanish public postal services operator and owner of the public postal network, had abused its dominant position by squeezing the margins of its competitors, thereby preventing them from providing postal services to a specific category of customers, i.e., to 'large customers' whose yearly budget for postal services exceeds €100,000. Citing recent case law of the EU courts, such as *Post Danmark*, the AN concluded that Correos could not be held to have breached Article 2 of the LDC or Article 102 of the TFEU, because the NMCC had not demonstrated that Correos' conduct had actually or potentially excluded its competitors from the market. The AN stressed that a finding of illegal margin squeeze requires proof of actual or at least potential exclusionary anticompetitive effects.

Additionally, in September 2015, the AN annulled[73] an NMCC decision,[74] according to which there was not sufficient evidence that Oracle had abused its dominant position through a refusal to supply. The AN concluded that Oracle was dominant in the markets for high-performance databases and for databases in general, and that by rendering its high-performance database incompatible with Hewlett-Packard's Itanium processor, and thus with Hewlett-Packard's Integrity servers, Oracle had excluded Hewlett-Packard's servers from the market, favouring its own server business. Having found an infringement of Article 2 of the LDC and Article 102 of the TFEU, the AN referred the case back to the NMCC, which will decide on a possible fine.

## VII PRIVATE ENFORCEMENT

According to the LDC, the commercial courts have jurisdiction to rule on civil actions concerning the application of Article 2 of the LDC. Although private enforcement in the form of actions for damages arising from ADP has traditionally been fairly limited, it is slowly

72 AN judgment in appeal 118/2014, 1 July 2015.

73 AN judgment in appeal 168/2013, 24 September 2015.

74 Case S/0354/11, *Oracle*, 26 February 2013.

becoming a reality and more and more courts are ruling against competition law infringers and considering them to be civilly liable.[75] These actions for damages may be brought before these courts under Article 1902 of the Civil Code.

In principle, any person affected by ADP has standing to bring an action on this basis. To date no final judgments have been issued in Spain awarding damages as a result of a collective action. However, Article 11 of the Code of Civil Procedure[76] recognises the possibility for consumer protection organisations to bring collective actions in representation of these. This provision may be applicable by analogy to other organisations or groups of individuals.[77]

In these cases, much controversy has arisen concerning the quantification of damages, especially that of *lucrum cessans*. In practice, damages have been calculated on the basis of a number of often case-specific considerations. It appears, however, that at least when the conduct is deemed to violate Article 102 of the TFEU, damages must cover not only *damnum emergens* but also *lucrum cessans* and interest in light of the *Manfredi and Others* case law.[78]

As to the interplay between public and private enforcement, since 2007, the possibility of pursuing civil actions is no longer conditional upon the prior finalisation of the administrative procedure. However, the law does provide for the possibility of suspending the time limit to issue the judgment when the judge deems it necessary to have prior knowledge of the content of the administrative decision. Moreover, the NMCC has the power to provide information and submit observations during judicial proceedings. With regard to the effect of documents and statements made during the administrative proceedings, it has been noted that these should be interpreted in accordance with the general rules set out in the Code of Civil Procedure and may thus be used as evidence within the civil proceedings.[79]

## VIII FUTURE DEVELOPMENTS

As explained above, pursuant to Articles 62 and 63(1) of the LDC,[80] as a general rule ADP is considered a serious infringement, punishable with a fine of up to 5 per cent of the total

75 See: Ordóñez, D, 'La reclamación ante los tribunales españoles de los daños sufridos en violación del Derecho europeo de la competencia', *Gaceta Jurídica de la Unión Europea y de la Competencia*, January–February 2011, No. 19, p. 21.

76 Law 1/2000, 7 January.

77 Fernández, C, 'Diez años de la aplicación privada del Derecho comunitario de la competencia en España', *Gaceta Jurídica de la Unión Europea y de la Competencia*, September–October 2012, No. 29, pp. 13–14.

78 Fernández, *supra*, p. 21.

79 Rodríguez-Sastre, I, 'Disposición adicional primera', in: Odriozola, Irissarry, *supra*, p. 1196.

80 Law 15/2007, *supra*, Article 63(1):

*1. The competent bodies may impose the following fines on the economic agents, undertakings, associations, unions or groupings of them that, intentionally or by negligence, infringe the provisions of this Act:*

*(a) Minor infringements with a fine of up to 1% of the total turnover of the infringing undertaking in the business year immediately preceding that of the imposition of the fine.*

*(b) Serious infringements with a fine of up to 5% of the total turnover of the infringing undertaking in the business year immediately preceding that of the imposition of the fine.*

turnover of the infringing undertaking in the immediately preceding business year. If ADP is committed by an undertaking operating in a recently liberalised market, and such an undertaking has a market share near monopoly or it enjoys special or exclusive rights, it will be considered a very serious infringement and the NMCC may levy fines of up to 10 per cent of such turnover.

On 29 January 2015, the TS handed down a judgment clarifying two aspects regarding the interpretation of Article 63(1) of the LDC: (1) the 5 and 10 per cent limits do not constitute a ceiling applicable *ex post* once the fine has been calculated but, rather, they act as the upper limit of a range or scale within which the fine must be determined based on the gravity and the duration of the specific infringement; and (2) the notion of 'total turnover' refers to the turnover of the infringing undertaking in all the markets in which it is active and not only in the market affected by the infringement.[81]

As regards the former aspect, it must be noted that, pursuant to both Article 23(2) of Regulation 1/2003 and to the 2006 Commission Fining Guidelines, the total amount of the fine may not exceed 10 per cent of the turnover of the infringing undertaking in the preceding business year. This means that once the fine has been determined,[82] the final amount will be reduced in the event that the fine thus calculated exceeds the aforementioned 10 per cent threshold.

This is, *mutatis mutandis*, the same system that has traditionally been applied by the NMCC to calculate fines for ADP, as described in the NMCC's Communication on the quantification of sanctions, with the fundamental difference that, instead of applying the 10 per cent cap established in Article 23(2) of Regulation 1/2003, the NMCC applied the 5 and 10 per cent limits established in Article 63(1) LDC. As the Commission does, the NMCC would apply the 5 and 10 per cent limits *ex post* as a cap to, if necessary, reduce the total amount of the fine once the fine had already been calculated.

The TS judgment of 29 January 2015 represents a major shift in the way in which the NMCC must apply the 5 and 10 per cent limits established in Article 63(1) of the LDC to ADP cases under Articles 2 of the LDC and 102 of the TFEU. In its judgment, the TS established that the 5 and 10 per cent limits act as the upper limit of a range or scale within which the fine must be determined based on the gravity and the duration of the specific infringement.

This means that the NMCC must take these limits into account *ex ante* so that, for instance, in an ordinary ADP case,[83] the NMCC must set a fine of up to 5 per cent of the infringing undertaking's turnover, depending on how serious the infringement is. Thus, while for less serious infringements the NMCC fine will be closer to 1 per cent, for more serious infringements the fine will be closer to 5 per cent. The seriousness of the infringement will

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*(c) Very serious infringements with a fine of up to 10% of the total turnover of the infringing undertaking in the business year immediately preceding that of the imposition of the fine.*
*The total turnover of associations, unions or groupings of undertakings shall be determined taking into consideration the turnover of their members'.*

81 TS judgment in appeal 2872/2013, 29 January 2015.

82 By calculating the basic amount of the fine and potentially adjusting it due to the existence of aggravating or mitigating circumstances, or to the need to ensure a sufficient deterrent effect.

83 A case not involving a recently liberalised market, a near monopoly or special or exclusive rights.

be assessed based on the criteria set out in Article 64(1) of the LDC, for example, the size and the characteristics of the market affected by the infringement, the market shares of the infringing undertaking and the duration of the infringement.

According to the TS, interpreting the 5 and 10 per cent limits of Article 63(1) of the LDC as a cap applicable *ex post* instead of as the upper limit of a range or scale applicable *ex ante* would be contrary to the principle of legality. In the TS's view, such principle requires that all administrative and criminal sanctions be subject to a minimum and a maximum limit established by law, and that, for each specific infringement, the sanction be determined based on the gravity and the duration of the infringement within those limits.

The TS established that the NMCC is bound by this interpretation of Article 63(1) of the LDC both when it applies Article 2 of the LDC autonomously and when it applies Article 2 of the LDC in conjunction with Article 102 of the TFEU. The TS justified this on the basis that EU Member States are free to determine their own systems of sanctions in applying EU competition law within their territory, consistent with Article 5 of Regulation 1/2003.

Since January 2015, the NMCC has been applying this new interpretation of Article 63(1) of the LDC in its new decisions.[84] In addition, the Spanish courts have partially annulled a number of NMCC ADP decisions, referring the cases back to the NMCC and ordering the NMCC to recalculate the fines based on the criteria set out by the TS in its judgment of 29 January 2015.[85] It is unclear at this stage whether the NMCC will issue a new communication on the quantification of sanctions in accordance with the TS's interpretation of Article 63(1) of the LDC.

84 See, for example, *AGEDI/AIE Radio*, *supra*, pp. 79–84.

85 See, for example, AN judgment in appeal 139/2012, 20 February 2015 (the AN partially annulled the NMCC's decision in *Transporte Televisión*, *supra*); AN judgment in appeal 183/2008, 24 March 2015 (the AN partially annulled the NMCC's decision in case 627/07, *Estación Sur de Autobuses*, 31 March 2008); AN judgment in appeal 346/2012, 10 April 2015 (the AN partially annulled the NMCC's decision in *AGEDI/AIE*, *supra*); TS judgment in appeal 2064/2012, 23 April 2015 (the TS partially annulled the NMCC's decision in case 646/08, *Axión/Abertis*, 19 May 2009); AN judgment in appeal 275/2013, 13 July 2015 (the AN partially annulled the NMCC's decision in *Correos*, *supra*); AN judgment in appeal 452/2012, 21 December 2015 (the AN partially annulled the NMCC's decision in *SGAE*, *supra*).

# Chapter 21

# TURKEY

*Gönenç Gürkaynak*[1]

## I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited'.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU), dominance itself is not prohibited, but only the abuse of dominance is outlawed. Further, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions as well as the other provisions of Law No. 4054 apply to all companies and individuals, to the extent that they act as an 'undertaking' within the meaning of Law No. 4054. An 'undertaking' is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054 therefore applies to individuals and corporations alike, if they act as an undertaking. State-owned and state-affiliated entities also fall within the scope of the application of Article 6.[2]

Furthermore, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according to the

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2 See, for example, *General Directorate of State Airports Authority*,15-36/559-182, 9 September 2015; *Turkish Coal Enterprise*, 04-66/949-227, 19 October 2004; *Türk Telekom*, 14-35/697-309, 24 September 2014.

secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The Turkish Competition Authority (the Competition Authority) is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance in cases of acquisitions) are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather 'a restriction of effective competition' element is required to deem the relevant transaction as illegal and prohibited. Thus, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, recently the Turkish Competition Board (the Competition Board) rejected the acquisition of sole control over Beta Turizm and Pendik Turizm by Setur as it concluded that the transaction would result in the creation of a dominant position and thus, would impede effective competition.[3]

On a separate note, mergers and acquisitions are normally caught by the merger control rules contained in Article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms used joint venture agreements as a back-up tool to exclude competitors, which is prohibited under Article 6.[4]

## II YEAR IN REVIEW

According to the Competition Authority's 2015 statistics, the Competition Board decided on 41 pre-investigations or investigations out of a total of 89, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part of thereof. Further, 29 finalised investigations have been carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country. The Competition Board also decided on the remaining 19 investigations that have been initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to assert that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.[5] Over the past five years, the Competition Board has shifted

3 15-29/421-118, 9 July 2015

4 See, for example, *Biryay*, 00-26/292-162, 17 July 2000.

5 In 2014, the Competition Board decided on a total of 163 pre-investigations or investigations. Among these pre-investigations or investigations, 91 were concerning

its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. As a reflection of this trend, the Competition Board has also shown an increased interest in the unilateral pricing behaviour of undertakings, as exemplified by recent high-profile predatory pricing investigations involving Turkish Airlines,[6] where there was ultimately no finding of an abuse of a dominant position, and the shipping company UN Ro-Ro,[7] where UN Ro-Ro was fined 4 per cent of its 2011 turnover, which amounted to 841,199.70 lira. In *Turkcell*,[8] the Competition Board analysed the market foreclosure allegations against Turkcell, Turkey's dominant GSM operator. It concluded that Turkcell had violated the law by preventing its competitors' activities through exclusive practices for vehicle-tracking services, imposing a monetary fine of 39 million lira. Similarly, in *Mey İçki*,[9] the Competition Board imposed a monetary fine of 41 million lira on Mey İçki for its abusive conduct of preventing sales points from selling competitors' products, exclusivity imposed on sales points and obstructing competitors' activities on the market for the alcoholic beverage rakı. Finally, Tüpraş[10] was fined more than 412 million lira for the abuse of its dominant position through excessive pricing; the Competition Authority had launched the investigation in 2012.

The following table shows the Competition Board's most recent landmark decisions regarding abuse of dominance:

| *Investigated party* | *Date and number of the Competition Board decision* | *Summary of the case* | *Administrative monetary fine* |
|---|---|---|---|
| Solgar | No. 16-05/116-51, 18 February 2016 | In 2010, the Competition Board initiated a preliminary investigation against Solgar based on the allegations that Solgar violated Articles 4 and 6 of Law No. 4054 through an alleged refusal to supply. The Board unanimously ruled that Solgar did not violate Law No. 4054 and no administrative fines were levied. The 13th Chamber of the Council of State annulled the Competition Board's decision in late 2014, on the grounds that the information and evidence obtained during the preliminary investigation was not sufficient to conclude that the case did not necessitate an in-depth investigation. Upon the Council of State's decision, the Competition Board initiated a full-fledged investigation against Solgar, by operation of administrative law, in order to determine whether Solgar has violated Article 4 or Article 6 of Law No. 4054 by refusing to supply Anadolumed's orders.<br><br>At the end of this thorough and in-depth investigation, the Competition Board concluded that Solgar did not violate Law No. 4054 and, thus, it did not impose any administrative monetary fine on Solgar. | N/A |

violations of Article 4 of Law No. 4054, 48 were concerning violations of Article 6 of Law No. 4054 and 24 cases were evaluated from the aspect of both Article 4 and Article 6.

6 *Turkish Airlines*, 11-65/1692-599, 30 December 2011.

7 *UN Ro-Ro*, 12-47/1412-474, 1 October 2012.

8 *Turkcell*, 13-71/988-414, 9 December 2013.

9 *Mey İçki*, 14-21/410-178, 12 June 2014.

10 *Tüpraş*, 14-03/60-24, 17 January 2014.

| | | | |
|---|---|---|---|
| Coca-Cola | No. 15-10/148-65, 5 March 2015 | The Competition Board initiated an investigation against Coca-Cola as a result of the preliminary inquiry related to the claims that Coca-Cola made exclusive agreements with some sales points in various cities in Turkey, especially in Istanbul, Ankara, Izmir, Bursa and Antalya. During the investigation, the Competition Board analysed whether: Coca-Cola has fulfilled the requirements of the Competition Board's decision No. 07-70/864-327, 10 September 2007; Coca-Cola's existing contracts and protocols contain exclusivity provisions; and its contracts and practices in the market create *de facto* exclusivity in the market taking into account its availability and market-share data.<br><br>At the end of an in-depth investigation, the Competition Board found no infringement of competition law on the part of Coca-Cola, as no information or finding was obtained showing that Coca-Cola carried out organised and systematic practices preventing its competitors from entering points of sale. | N/A |
| Turkish Airlines | No. 14-54/932-420, 25 December 2014 | Pegasus, a low-cost rival airline company, complained that Turkish Airlines engaged in abusive behaviour through predatory pricing and obstructing rivals' flights and other abusive operations and accused Turkish Airlines of violating Article 6 of Law No. 4054 through abuse of its dominance.<br><br>The case was an extension of an older fully fledged investigation in 2011, which the Competition Board closed without a fine against Turkish Airlines because of a lack of merit in the claims (*Turkish Airlines*, No. 11-65/1692-599, 30 December 2011). The Ankara Administrative Court repealed the 2011 investigation decision, arguing that the Competition Board should have engaged in a more detailed and sophisticated analysis of Turkish Airlines' pricing behaviour. As a result, the Competition Board had to reopen the case again in 2013. Following the fully fledged investigation process, the Board did not find any violation on the part of Turkish Airlines. | N/A |

Additionally, the Competition Board rendered five no-fine decisions in 2015 and 2016. These five decisions concern the investigations launched against: Tırsan Kardan-Tiryakiler, active in the market for sales of cardan shaft and spare parts (No. 15-30/445-132, 10 July 2015), General Directorate of State Airports Authority, a state-owned airports administration (No. 15-36/559-182, 9 September 2015), Unilever and Advertising Self-Regulatory Board (No. 15-38/631-214, 16 October 2015), Nuh Çimento, active in the cement market (No. 16-05/118-53, 18 February 2016), and Türk Telekom-TTNet (No. 16-15/254-109, 3 May 2016).

Ongoing high-profile investigations of the Competition Authority, at the time of writing, are provided in the table below:

| *Investigated party* | *Alleged abuse of dominance activity* | *Date of initiation* |
|---|---|---|
| Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda San ve Tic AŞ | MFN clauses and exclusivity | 18 March 2015 |
| (i) Mozaik İletişim Hizmetleri AŞ<br>(ii) Doğan TV Digital Platform İşletmeciliği AŞ<br>(iii) Krea İçerik Hizmetleri ve Prodüksiyon AŞ | Refusal to provide access to satellite platform | 24 April 2015 |
| (i) Ankara Uluslararası Kongre ve Fuar İşletmeciliği Merkezi AŞ<br>(ii) GL Events Fuarcılık AŞ | Refusal of application to organise a furniture fair | 15 June 2015 |
| (i) Turkish Pharmacists' Association<br>(ii) Turkish Pharmacists' Association Commercial Enterprise | Practices related to import of medicines that are not supplied to the market | 7 July 2015 |
| (i) Booking.com BV<br>(ii) Bookingdotcom Destek Hizmetleri Limited Şirketi | MFN clauses concerning the best price guarantees | 9 July 2015 |
| Mey İçki San ve Tic AŞ | Preventing competitors' activities | 28 July 2015 |
| Luxottica Gözlük Endüstri ve Ticaret AŞ | Tying and bundling practices | 1 September 2015 |
| Siemens San ve Tic AŞ | Non-compliance with the obligations under a previous decision of the Competition Board | 1 September 2015 |
| Türk Philips Ticaret AŞ | Price discrimination among equal buyers | 9 September 2015 |
| Dow Türkiye Kimya San ve Tic Ltd Şti | No information available | 10 November 2015 |
| Mey İçki Sanayi ve Ticaret AŞ | Pressurising the sale points through rebates and/or investment supports | 20 April 2016 |
| (i) Turkish Pharmacists' Association<br>(ii) Seven Chambers of Pharmacists (İzmir 3rd District, Adana, Bursa Adıyaman, Antalya, Uşak and Giresun) | Exclusive distribution and allocation of prescriptions among pharmacies in turns and on the basis of limits | 30 March 2016 |

The four aforementioned ongoing investigations (i.e., investigations against Mozaik İletişim Hizmetleri, Doğan TV Digital Platform İşletmeciliği and Krea İçerik Hizmetleri; Turkish Pharmacists' Association and Seven Chambers of Pharmacists; Siemens Turkey; and Ankara Uluslararası Kongre ve Fuar İşletmeciliği and GL Events) were initiated upon the annulment of the Ankara Administrative Courts or Council of State.

## III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, which states that 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers'. Enforcement trends show that the Competition Board is inclined to broaden

the scope of application of the Article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.[11]

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. For establishing a dominant position, first, the relevant market has to be defined and secondly, the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer's point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of market definition. Thus, the undertakings concerned have to be in a dominant position in relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary step for evaluating its position in the market. In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance whereas a firm with a market share of less than 25 per cent would not generally be considered as dominant.

In assessing dominance, although the Competition Board considers a large market share as the most indicative factor of dominance, it also takes account of other factors such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm. Thus, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or of other quantitative elements; other market conditions as well as the overall structure of the relevant market should also be assessed in detail.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.[12]

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, the indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm. Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant),

11 See, for example, *Anadolu Cam*, 04-76/1086-271, 1 December 2004; and *Warner Bros*, 07-19/192-63, 8 March 2007.

12 See, for example, *Turkcell/Telsim*, 03-40/432-186, 9 June 2003; *Biryay*, 00-26/292-162, 17 July 2000.

certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) has been reviewed under Article 4 (restrictive agreement rules). The *3M Turkey*, *Turkcell* and *Solgar* decisions are the latest examples of this same trend. In *3M Turkey*,[13] the Competition Board analysed whether 3M Turkey, which was not found to be in a dominant position in the work safety products market, discriminated against some of its dealers under Article 4 and not under Article 6. 3M Turkey was cleared without a fine. In *Turkcell*,[14] the Competition Board assessed whether Turkcell's exclusive contracts foreclosed the market, based on both Article 6 and Article 4, eventually finding that Turkcell did not violate either Article 6 or Article 4. Likewise, in *Solgar*,[15] the Competition Board decided on a fully fledged investigation against Solgar, which looked into whether Solgar had violated Article 4 or Article 6 of Law No. 4054 by refusing to supply. The Competition Board concluded that Solgar did not violate Law No. 4054 and, thus, it did not impose any administrative monetary fine on Solgar.

## IV ABUSE

### i Overview

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes 'abuse' *per se*, it provides five examples of prohibited abusive behaviour, which comes as a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. Accordingly, these examples include the following:

*a* directly or indirectly preventing entry into the market or hindering competitor activity in the market;

*b* directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

*c* making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services, or acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;

*d* distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and

*e* limiting production, markets or technical development to the prejudice of consumers.

Moreover, Article 2 of Law No. 4054 adopts an effects-based approach for identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was employed in demonstrating the existence of dominance. Furthermore, abusive conduct on a market that is different from the

13 *3M*, 14-22/461-203, 25 June 2014.

14 *Turkcell*, 14-28/585-253, 13 August 2014.

15 *Solgar*, 16-05/116-51, 18 February 2016.

market subject to dominant position is also prohibited under Article 6.[16] On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as strategic capacity construction, predatory product design or product innovation, failure to pre-disclose new technology, predatory advertising or excessive product differentiation.

### ii Exclusionary abuses

*Exclusionary pricing*

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board.[17] That said, complaints on this basis are frequently dismissed by the Competition Authority due to its welcome reluctance to micro-manage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims. Nonetheless, in the *UN Ro-Ro* case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.[18]

Furthermore, in line with the EU jurisprudence, price squeezes may amount to a form of abuse in Turkey and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.[19]

*Exclusive dealing*

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.[20]

On a separate note, the Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share above 40 per cent. Thus, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single branding arrangements.

Additionally, although Article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. The Competition Board, in *Turkcell*,[21] condemned the defendant for abusing its dominance by, *inter alia*, applying rebate schemes to encourage the use of the Turkcell logo

16 See, for example, *Volkan Metro*, 13-67/928-390, 2 December 2013; *Turkey Maritime Lines*, 10-45/801-264, 24 June 2010; *Türk Telekom*, 02-60/755-305, 2 October 2002; and *Turkcell*, 01-35/347-95, 20 July 2001.

17 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Coca-Cola*, 04-07/75-18, 23 January 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Trakya Cam*, 11-57/1477-533, 17 November 2011; *Turkey Maritime Lines,* 06-74/959-278, 12 October 2006; and *Feniks*, 07-67/815-310, 23 August 2007.

18 *UN Ro-Ro*, 12-47/1412-474, 1 October 2012.

19 See, for example, *TTNet*, 07-59/676-235, 9 October 2007; *Doğan Dağıtım*, 07–78/962–364, 9 October 2007; *Türk Telekom*, 04-66/956-232, 19 October 2004; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008.

20 See, for example, *Mey İçki*, 14-21/410-178, 12 June 2014.

21 *Turkcell*, 09-60/1490-37, 23 December 2009.

and refusing to offer rebates to buyers that work with its competitors. The Competition Board has condemned Doğan Yayın Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.[22]

***Leveraging***

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board assessed many tying, bundling and leveraging allegations against dominant undertakings and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to have them avoid tying and leveraging.[23]

***Refusal to deal***

Refusals to deal and access to essential facilities are the forms of abuses that are brought before the Competition Authority frequently. Therefore, there are various decisions by the Competition Board concerning this matter.[24]

### iii Discrimination

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.[25]

### iv Exploitative abuses

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Board has condemned excessive or exploitative pricing by dominant firms.[26] That said, complaints on this basis are frequently dismissed by the Competition Authority because of its welcome reluctance to micro-manage pricing behaviour.

## V REMEDIES AND SANCTIONS

### i Sanctions

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date

22 *Doğan Holding*, 11-18/341-103, 30 March 2011.

23 See, for example, *TTNET-ADSL*, 09-07/127-38, 18 February 2009.

24 See, for example, *POAS*, 01-56/554-130, 20 November 2001; *Eti Holding*, 00-50/533-295, 21 December 2000; *AK-Kim*, 03-76/925-389, 12 April 2003; and *Çukurova Elektrik*, 03-72/874-373, 10 November 2003.

25 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002; and *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008.

26 See, for example, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 02-60/755-305, 2 October 2002; and *Belko*, 01-17/150-39, 6 April 2001.

of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of the undertaking. After the amendments in 2008, the new version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments, etc., in determining the magnitude of the monetary fine.

Additionally, Article 56 of Law No. 4054 provides that agreements and decisions of trade associations that infringe Article 4 are invalid and unenforceable with all their consequences. The issue of whether the 'null and void' status applicable to agreements that fall foul of Article 4 may be interpreted to extend to cover contracts entered into by infringing dominant companies is a matter of ongoing controversy. However, contracts that give way to or serve as a vehicle for an abusive contract may be deemed invalid and unenforceable because of violation of Article 6.

The highest fine imposed to date in relation to abuse of a dominant position was in *Tüpraş*,[27] where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the relevant undertaking's annual turnover for the relevant year).

In addition to monetary sanctions, the Competition Board is authorised to take all necessary measures to terminate infringements, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures to restore the level of competition and status as before the infringement.

### ii Behavioural and structural remedies

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on the matter, in case there is a possibility of serious and irreparable damages.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to follow a certain method of conduct such as granting access, supplying goods or services or concluding a contract). Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead to an investigation, which may or may not result in a finding of infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

## VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days. The Competition Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious.

27 *Tüpraş*, 14-03/60-24, 17 January 2014.

At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30 days to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Competition Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterparty.

The Competition Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 17,700 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.[28]

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can examine the books, paperwork and documents of undertakings and trade associations, and, if need be, take copies of the same;

28 *Türk Telekom*, 16-15/255-110, 3 May 2016.

request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking. Law No. 4054 therefore provides broad authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. Computer records are fully examined by the experts of the Competition Authority, including deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation). Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 17,700 lira. It may also lead to the imposition of a periodic daily-based fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) for each day of the violation.

Final decisions of the Competition Board, including its decisions on interim measures and fines, can be submitted to judicial review before the Administrative Courts by filing a lawsuit within 60 days of the receipt by the concerned parties of the Competition Board's reasoned decision. Filing an administrative action does not automatically stay the execution of the Competition Board's decision (Article 27, Administrative Procedural Law).

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually takes more than 18 months.

Third parties can also challenge the Competition Board's decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

## VII PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

## VIII FUTURE DEVELOPMENTS

In 2013, the Competition Authority prepared the Draft Competition Law (the Draft Law). In 2015, the Draft Law was under discussion in the Turkish parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The Draft Law proposed various changes to the current legislation; in particular, to provide efficiency in time and resource allocation in terms of procedures set out under the current legislation. The Draft Law became obsolete as a result of the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law, as noted in the 2015 Annual Report of the Competition Authority. It is further indicated that the Authority may take steps toward the amendment of certain articles if a new competition law is not passed by the parliament.

The Competition Authority also showed increasing willingness at the beginning of 2015 to develop its relations with other governmental agencies in Turkey, signing a cooperation protocol with the Energy Market Regulatory Authority and enlarging the scope of its cooperation protocol with the Information and Communication Technologies Authority.

The recent enforcement trend of the Competition Authority shows that it is becoming more and more sensitive to dominant undertakings' excessive pricing and exclusionary behaviour towards new entrants or current rivals. Over the past few years, the Competition Board has launched many pre-investigations and investigations especially regarding pricing behavior of dominant undertakings. Nevertheless, the Competition Authority noted in the 2015 Annual Report that the Board did not impose any administrative monetary fines at the end of certain investigations.

# Chapter 22

# UNITED KINGDOM

*Paul Gilbert*[1]

## I INTRODUCTION

The United Kingdom is an EU Member State. As such, the provisions of Article 102 of the Treaty on the Functioning on the European Union (TFEU) directly apply in the United Kingdom.

The United Kingdom has also implemented national legislation that substantially mirrors the provisions of Article 102, contained in Chapter 2 of the Competition Act 1998 (the Act). Section 18 of the Act provides that, subject to limited exclusions: 'any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom' (the Chapter 2 Prohibition). The UK competition authorities and courts are required to interpret the relevant provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.[2]

Public enforcement of UK and EU competition law is carried out primarily by the Competition and Markets Authority (CMA).[3] In addition to the CMA, the following sectoral regulators have the power to enforce competition law in their sectors:

1 Paul Gilbert is counsel at Cleary Gottlieb Steen & Hamilton LLP.

2 Section 60 of the Act.

3 The CMA was created on 1 October 2013, and acquired its powers and responsibilities on 1 April 2014. It replaced two former public authorities: the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT had powers to enforce the prohibitions in Articles 101 and 102 of the TFEU and the equivalent UK prohibitions, to carry out Phase I merger reviews and market studies. The CC was a reference body, carrying out Phase II merger reviews, market investigations and certain regulatory appeals. Where relevant, this chapter refers to the former OFT and CC.

| *Regulator* | *Sector* |
|---|---|
| Civil Aviation Authority (CAA) | Air traffic services and airport operation services in the UK |
| Financial Conduct Authority (FCA) | Financial services in the UK |
| Monitor | Healthcare services in England |
| Northern Ireland Authority for Utility Regulation | Gas, electricity, water and sewerage services in Northern Ireland |
| Office of Communications (Ofcom) | Electronic communications, broadcasting and postal services in the UK[1] |
| Office of Gas and Electricity Markets (Ofgem) | Gas and electricity in Great Britain |
| Office of Rail and Road (ORR) | Railway services in Great Britain |
| Payment Systems Regulator (PSR)[2] | Payment systems in the UK |
| Water Services Regulation Authority (Ofwat) | Water and sewerage in England and Wales |

1 In the telecommunications sector, Ofcom also has the power to impose regulatory conditions on undertakings found to have 'significant market power.' Significant market power is equivalent to the concept of dominance under EU and UK competition law.

2 The PSR has been established as a separate body under the FCA, with its own managing director, board and budget.

The United Kingdom has also established a specialist competition court, the Competition Appeal Tribunal (CAT). Any person who is found to have infringed Article 102 or the Chapter 2 Prohibition by the CMA or a regulator has a right of appeal to the CAT.[4] The CAT can also hear follow-on damages claims in competition cases and, since October 2015, has had the power to hear stand-alone claims for damages and injunctive relief. The civil courts can also hear competition claims, but may transfer cases to the CAT.

When enforcing Article 102 and the Chapter 2 Prohibition, the CMA and regulators have regard to the European Commission's 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.'[5] The CMA also has regard to its own substantive and procedural guidance (including previous OFT guidance that the CMA has formally adopted).[6] These include:

*a* 'Abuse of a dominant position', December 2004;
*b* Assessment of market power', December 2004;
*c* Guidance on the CMA's investigation procedures in Competition Act 1998 cases', March 2014;
*d* 'Involving third parties in Competition Act investigations', April 2006;
*e* 'CMA Powers of Investigation of anticompetitive behaviour', December 2004; and
*f* 'Competition Law Application and Enforcement', December 2004.

Separately, the CMA has the power to investigate markets as a whole, by carrying out market studies. At the end of a market study, the CMA can make recommendations to businesses

4 Section 46 of the Act.

5 2009/C 45/02.

6 The investigation procedures followed by the sectoral regulators differ in some respects from the CMA's procedures.

and government, or initiate enforcement action under other statutory powers (including the Chapter 2 Prohibition and Article 102). If the CMA has reasonable grounds for suspecting that a feature of a market is preventing, restricting or distorting competition, it can initiate a full market investigation. A market investigation can also be initiated by any of the concurrent regulators (listed above) or by the Secretary of State. Following a market investigation, the CMA has the power to tackle any features having an adverse effect on competition (including unilateral conduct features) by imposing a wide range of remedies. The identification of anticompetitive features in a market investigation is not a finding that market participants have infringed the law, and remedies are intended to be prospective rather than punitive.

## II YEAR IN REVIEW

### i The Financial Conduct Authority and Payment Systems Regulator

The Financial Conduct Authority (FCA) and Payment Systems Regulator acquired concurrent powers to enforce UK and EU competition law, and to make market investigation references, with effect from 1 April 2015. Neither regulator has yet opened a formal dominance investigation, but the FCA is carrying out a number of market studies.[7]

### ii Levels of public enforcement

The CMA has investigated relatively few dominance cases. It is currently pursuing four dominance investigations, three in the pharmaceutical sector and one in the healthcare and medical equipment sector. Two main reasons are usually cited to explain the relative lack of enforcement by the CMA: (1) cross-border cases affecting the United Kingdom often fall to be investigated by the European Commission; and (2) cases involving natural monopolies generally fall to be investigated by the concurrent sectoral regulators. On top of this, the CMA can investigate unilateral behaviour through market studies and investigations.

The recent government reforms have sought to encourage greater use of competition law enforcement by the sectoral regulators in particular. These regulators now have a duty to apply *ex post* competition law in preference to *ex ante* regulation where possible. The government has placed a responsibility on the CMA to monitor the work of sectoral regulators and, if appropriate, take enforcement action in their sectors. The CMA is also obliged to publish an annual report on the functioning of the concurrency regime as soon as practicable after the end of each financial year,[8] and the Secretary of State retains a right to remove concurrent powers from sectoral regulators if they are not used. This has resulted in more investigations, including dominance investigations, in the regulated sectors.

Nevertheless, in February 2016, the National Audit Office published a critical report into the UK competition regime, which strongly encourages the CMA and sectoral regulators to find ways to increase levels of competition enforcement.

7 The FCA can carry out market studies under the Enterprise Act 2002 and also under its sectoral regulatory powers contained in the Financial Services and Markets Act 2000. In practice, it has tended to use the latter.

8 The second Annual Report was published on 28 April 2016. The CMA also published a 'Baseline Report' on concurrency on 1 April 2014.

### iii Major developments in public enforcement

The CMA issued one infringement decision during the last year.[9] Ofwat and the ORR accepted commitments in two investigations. In addition, the CMA and Ofcom issued statements of objections in two cases.

In February 2016, the CMA issued an infringement decision against GSK, Generics UK, and Alpharma concerning the supply of branded paroxetine (an antidepressant medicine), imposing fines of approximately £45 million. The CMA found that GSK had entered into 'pay for delay' agreements with each of Generics UK and Alpharma, deferring the date on which they would launch generic paroxetine products in competition to GSK's branded product, Seroxat. The CMA concluded that these were anticompetitive agreements, infringing Article 101 TFEU and the Chapter 1 prohibition. In addition, the CMA found that GSK had made payments to Generics UK, Alpharma and also to IVAX (another potential competitor) and that these payments constituted an abuse of dominance, infringing the Chapter 2 prohibition. The parties have appealed this decision to the CAT, with GSK arguing, among other things, that the CMA erred in finding that it held a dominant position because the CMA had defined the relevant product market incorrectly.

In December 2015, the ORR closed an investigation into Freightliner on the basis of binding commitments. The ORR had investigated the terms of Freightliner's agreements with customers for the provision of rail freight services between deep-sea container ports and inland destinations. The terms included exclusive purchasing obligations, minimum volume commitments, and suspected loyalty-inducing rebates. Certain customers were also prevented from reselling capacity purchased under the contracts. Freightliner committed to remove or amend the provisions in its contracts to address the ORR's concerns.

In August 2015, the CMA issued a statement of objections to Pfizer and Flynn Pharma, alleging that each had charged excessive and unfair prices for phenytoin sodium capsules, an anti-epilepsy drug. Pfizer manufactures phenytoin sodium capsules. It previously sold the product directly to wholesalers and pharmacies. In September 2012, Pfizer sold the UK distribution rights for the product to Flynn Pharma. The statement of objections concerns the prices charged by Pfizer to Flynn Pharma, found to be eight to 17 times Pfizer's historic prices to wholesalers and pharmacies, and the prices charged by Flynn Pharma to its customers, which were between 25 and 27 times higher than those historically charged by Pfizer.

In July 2015, Ofcom issued a statement of objections to Royal Mail. Ofcom provisionally concluded that Royal Mail had engaged in unlawful price discrimination when setting prices for its bulk mail delivery services – prices charged to other postal operators who collect business mail and pass it to Royal Mail for final sorting and delivery. Ofcom alleged that Royal Mail charged higher prices to customers who competed with Royal Mail in delivery than to those who did not. Ofcom considered that these higher access prices could discourage entry into the downstream delivery market and increase barriers to expansion for postal operators seeking to compete with Royal Mail.

In March 2015, Ofwat closed an investigation into Bristol Water on the basis of binding commitments. Bristol Water holds a local monopoly in the upstream market for the supply and maintenance of water infrastructure. Bristol Water is also active as a 'self-lay'

9 This case concerned infringements of Article 101 TFEU, the Chapter 1 Prohibition and the Chapter 2 Prohibition.

contractor in a contestable downstream market, installing pipes that connect to the mains supply. Bristol Water was suspected of abusing its position in the upstream market by offering discriminatory terms to other self-lay contractors. The commitments require Bristol Water to ensure functional separation between its upstream and downstream services, and to ensure that its upstream business offers equivalent price and non-price terms to third-party contractors as offered to its own downstream business.

The CMA, Ofwat and Ofcom closed three cases without adopting infringement or commitments decisions.

In February 2016, Ofcom closed an investigation into BSkyB concerning the wholesale supply of Sky Sports channels to BT. BT complained that BSkyB had made the supply of Sky Sports 1 and 2 conditional on BT supplying BT Sport channels for resale on Sky's satellite platform. BT subsequently obtained access to Sky Sports 1 and 2 on a non-reciprocal basis. Ofcom therefore decided that pursuing its investigation further was no longer an administrative priority.

In December 2015, Ofwat closed an investigation into Anglian Water, finding no grounds for action. This follows a statement of objections issued in December 2011 and a supplementary Statement of Objections in April 2014. Anglian Water has a statutory monopoly for the provision of water and sewerage services in its region. Ofwat provisionally found that Anglian Water had implemented an illegal margin squeeze when pricing its upstream services to a rival, Independent Water Networks Limited (IWN), that was competing with Anglian Water for the contract to supply a new site with water and sewerage services. Ofwat eventually concluded that, as the site developer evaluated bids for water and sewerage services on a combined basis, it was unlikely that a margin squeeze applied to sewerage services alone would have made it materially more difficult for IWN to compete for the contract.

In June 2015, the CMA closed an investigation into suspected loyalty-inducing rebates in the pharmaceutical sector, on the grounds of administrative priorities. The case was closed before any statement of objections was issued. The CMA nonetheless sent a warning letter to the relevant party, identifying potential concerns that may arise in the context of discounts and rebates.

In March 2016, the CMA issued a provisional decision on remedies in its Private Healthcare market investigation. This market investigation began in 2012. The CMA published a final report in April 2014, concluding (among other things) that there were features of the market in central London that resulted in an adverse effect on competition. Specifically, it found that one provider, HCA, held a position of market power in central London and was able to charge higher prices than other providers. Although not a formal finding of dominance, the CMA's report sought to impose a divestment remedy on HCA, to address the adverse effect on competition. In December 2014, the CAT quashed key parts of the CMA's report, including the divestment remedy, and remitted the case to the CMA for further investigation. In November 2015, the CMA issued new provisional findings, largely confirming its previous findings. However, in March 2016, the CMA published a provisional decision on remedies, concluding that, particularly in light of expected new entry in the market, no further remedies would be effective and proportionate. The remitted investigation is expected to conclude in July or August 2016, when the CMA will publish a new final report.

### iv Current abuse of dominance investigations

The CMA and sectoral regulators are currently investigating seven suspected abuse of dominance cases, summarised in the table below.

| *Sector* | *Investigating authority* | *Conduct* | *Case opened** |
|---|---|---|---|
| Healthcare and medical equipment | CMA | Suspected anticompetitive practices in the medical equipment sector. | April 2016 |
| Pharmaceuticals | CMA | Suspected abuse of dominance by Allergan in relation to hydrocortisone tablets. | March 2016 |
| Pharmaceuticals | CMA | Discounts offered for a pharmaceutical product. | December 2015 |
| Airport operation services | CAA | Provision of access to car parking facilities at an airport. | March 2015 |
| Electricity connections | Ofgem | Terms offered by SSE (a distribution network operator) to competitors seeking connections to the network. | January 2015 |
| Postal services | Ofcom | Complaint by TNT Post UK Limited (now Whistl) about the terms offered by Royal Mail for certain letter delivery services to downstream access customers. | April 2014 |
| Pharmaceuticals | CMA | Excessive and unfair prices offered by Pfizer and Flynn Pharma for the supply of an anti-epilepsy drug. | May 2013 |

* 'Case opened' refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation.

### v Major developments in private actions in 2015–2016

Two notable cases before the High Court are ongoing actions by Infederation Limited (trading as Foundem) and Streetmap.EU Limited against Google. The first case concerns an alleged abuse of dominance by Google in how it selects, ranks and displays rival shopping comparison services in its internet search results, allegedly favouring its own services. The second case concerns the allegation that Google favours its own maps when displaying maps in its search results.

These cases are interesting because they show the High Court attempting to grapple with issues that in part overlap with, and in part supplement, matters being considered by the European Commission in a separate Article 102 investigation. Relying on assurances from the European Commission, the High Court ruled that distinct questions of abuse not being investigated in Brussels could be heard before the Commission had concluded its investigation.[10]

In *Streetmap*, the Court was able to hear allegations of abuse separately from allegations of dominance (which were stayed). In February 2016, the High Court decided that Google's conduct was not abusive, even if Google was considered dominant.[11] Specifically, the Court found that changes to the way Google displayed excerpts from Google Maps in response to search queries (called a 'Maps OneBox') were not reasonably likely to have an appreciable effect on competition in the market for online maps, and, even if they were to have such an effect, the changes were in any event objectively justified. Streetmap sought permission from

10 *Infederation Ltd v. Google Inc and others* [2013] EWHC 2295 (Ch) (26 July 2013).

11 *Streetmap.EU Limited v. Google Inc and others* [2016] EWHC 253 Ch.

the Court of Appeal in March 2016 to appeal the High Court judgment. In contrast, the *Foundem* case has been stayed in its entirety because of practical difficulties in separating out distinct allegations of abuse.

Other cases before the CAT and the High Court are summarised below.

| *Case* | *Allegation* | *Status* |
|---|---|---|
| *Socrates Training Limited v. The Law Society of England and Wales* | Alleged abuse of dominance by the Law Society in the market for the provision of certification and accreditation services to conveyancing firms. Application for damages and an injunction. | Pending. Claim launched in April 2016. |
| *NVIDIA Corporation and others v. Qualcomm Inc and others* | Predatory pricing and loyalty-inducing rebates. The same allegations are also being investigated by the European Commission, which issued two Statements of Objections in December 2015. | Pending. Claim launched in December 2015. |
| *Shahid Latif & Mohammed Abdul Waheed v. Tesco Stores Limited* | Restrictive covenant in a land agreement that prevented the claimant from developing retained land in a way that could have competed with the defendant. | Case settled and claim withdrawn in March 2016. |
| *NCRQ Ltd v. Institution of Occupational Safety and Health* | Interim injunction sought relating to alleged abuse of dominance in the market for the accreditation of qualifications in the health and safety sector. | Case settled and claim withdrawn in January 2016. |
| *Packet Media Ltd v. Telefonica UK Ltd* | Refusal by Telefonica (O2) to supply services for resale by Packet Media Limited. | Interim injunction awarded in July 2015. Interim injunction discharged and claim dismissed by summary judgment in January 2016. |
| *Speed Medical Examination Services v. Secretary of State for Justice* | Judicial review application alleging abuse of dominance by monopoly regulator concerning its criteria for selecting approved medical reporting officers and medical experts. | Judgment in December 2015. Application refused. |
| *Unwired Planet International Ltd v. Huawei Technologies Co Ltd and others* | Patent infringement. Defendant argues that the claimant's refusal to license standard essential patents on fair reasonable and non-discriminatory terms is an abuse of dominance. | Application for strike out dismissed in July 2015. Application refused in April 2016 to have the competition arguments transferred to the CAT. |

## III MARKET DEFINITION AND MARKET POWER

The assessment of market definition and market power in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.

One difference between EU and UK law is that under the Chapter 2 prohibition there is no need to show a cross-border effect, and no minimum market size threshold: a 'dominant position' refers to a dominant position in the United Kingdom or any part of the United Kingdom. This means that dominant positions can be found even for small suppliers in small markets.

## IV ABUSE

### i Overview

The assessment of abuse in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission. There is no exhaustive list of abuses under Section 18 of the Act (the equivalent of Article 102).[12] Any conduct by a dominant undertaking that excludes competitors or exploits customers is potentially abusive, unless that conduct is objectively justified. Moreover, the High Court has held that conduct should be looked at 'in the round', rather than seeking to identify on a narrow basis whether conduct departs from 'competition on the merits'.[13]

### ii Exclusionary abuses

Enforcement action in the United Kingdom has focused primarily on exclusionary abuses.

The OFT decision in *Gaviscon* is notable in that it demonstrates the OFT's (and, by extension, the CMA's) willingness to grapple with novel abuses. The case concerned abusive behaviour by Reckitt Benckiser, which held a dominant position in the market for alginates and antacids. Reckitt Benckiser withdrew its Gaviscon Original product from sale to the UK National Health Service (NHS) when the product no longer benefited from patent protection, even though it remained on sale 'over the counter'. Reckitt Benckiser replaced Gaviscon Original with a similar product, Gaviscon Advance, which continued to benefit from patent protection. Because of the way the NHS computer system operated, the withdrawal of Gaviscon Original made it more difficult for doctors to prescribe alternative generic products as opposed to Gaviscon Advance. The OFT concluded that this action was expected to 'hinder the development of generic competition' to Gaviscon, thereby excluding competition from the market. Reckitt Benckiser entered into a settlement agreement with the OFT, agreeing not to challenge its decision and to pay a fine of £10.2 million.

In *Cardiff Bus*, the OFT investigated exclusionary behaviour preventing a competing bus company, 2 Travel, from establishing a rival service to the dominant incumbent. The case concerned both price and non-price predation. Cardiff Bus reacted to the launch of a rival 'no-frills' service by introducing its own no-frills service on the same routes, without a valid business case and running at a loss. In both *Cardiff Bus* and *Gaviscon* the OFT uncovered evidence of anticompetitive intent.

The focus on exclusionary conduct is borne out by other recent investigations. All but one of the 2015–2016 cases mentioned above concern suspected exclusionary abuses. In addition:

*a* In October 2014, Ofcom closed an investigation into suspected margin squeeze by BT in relation to superfast broadband services, following a complaint by TalkTalk Telecom Group plc.

12 This point was underlined by the High Court in *Purple Parking Limited v. Heathrow Airport Limited* [2011] EWHC 987 (Ch).

13 *National Grid plc v. GEMA*, [2010] EWCA Civ 114.

*b* In September 2014, the CMA closed an investigation into suspected abuse of dominance by Epyx concerning the market for vehicle service, maintenance and repair platforms, on the basis of binding commitments. The CMA had investigated whether Epyx's contracts prevented customers from switching to competing suppliers.

*c* In June 2014, the CMA closed an investigation into suspected abuse of dominance by Certas Energy UK Limited (previously GB Oils Limited) concerning the wholesale supply of road fuels in the Western Isles of Scotland, on the basis of binding commitments. GB Oils had entered into five-year exclusive contracts with filling stations, preventing them from sourcing fuel from other suppliers.

*d* In 2011, the OFT issued a reasoned 'no grounds for action' decision in relation to Idexx Laboratories Limited, a supplier of in-clinic companion-animal diagnostic testing equipment. The OFT investigated whether Idexx had engaged in anticompetitive bundling and predatory pricing, concluding that there was insufficient evidence that Idexx's conduct was likely to restrict or impair effective competition in the relevant markets.

*e* In 2010, the OFT issued a similar 'no grounds for action' decision following an investigation of Flybe. The investigation followed a complaint that Flybe had engaged in predatory conduct that excluded a rival airline, Air Southwest, from certain routes. It was clear that Flybe had priced below its average avoidable costs of entry. However, the OFT noted that Flybe was itself a new entrant and that it was normal commercial practice for an airline in this position to operate at a loss. The situation could therefore be distinguished from the position of a dominant incumbent reacting to new entry.

*f* Also in 2010, the ORR issued a 'no grounds for action' decision concerning suspected predatory behaviour by DB Schenker Rail (UK) Limited (DBS) in relation to petroleum haulage contracts. The ORR concluded that DBS had not priced below cost and was competing on the merits.

### iii Discrimination (including discriminatory pricing)

Discrimination cases in the United Kingdom have also tended to focus on exclusionary conduct. For example, in 2006 the ORR found that English, Welsh and Scottish Railway (EWS) had engaged in abusive discriminatory conduct through the prices it charged for access to its coal haulage services. The ORR found that EWS had discriminated against Enron Coal and Steel Limited (ECSL), offering prices that excluded ECSL from bidding effectively for coal haulage contracts. Similarly, in *Bristol Water* and *Anglian Water* (both mentioned above), Ofwat investigated whether an upstream supplier offered discriminatory terms that favoured its own downstream business over those of competitors. In *Royal Mail* (also above), Ofcom is investigating suspicions that Royal Mail discriminates between downstream access customers depending on whether those customers are also downstream competitors.

In *Purple Parking*, the High Court found that Heathrow Airport had abused a dominant position by offering discriminatory terms of access to providers of valet parking services.[14] Heathrow permitted its own valet parking service access to its forecourts at Terminals 1 and 3, while requiring rival service providers (including Purple Parking) to relocate from the forecourts to the car parks. The High Court held that the forced relocation

14 *Purple Parking Limited v. Heathrow Airport Limited* [2011] EWHC 987 (Ch).

of rival providers placed them at a competitive disadvantage, and that this was sufficient to show abuse. The case is unusual in that there was no requirement to show that access to the forecourts was an essential facility or that competition would be eliminated entirely.

Similarly, in *Streetmap* (discussed above), the High Court proceeded on the assumption that, at least in principle, a dominant undertaking might commit an abuse by promoting its own products or services in a separate market over those of a rival, provided the conduct had an appreciable effect on competition in the second (non-dominated) market and was not objectively justified. The Court did not specifically consider whether a dominant undertaking that was not an essential facility could be required to provide access to downstream rivals on equivalent terms to those offered to its own downstream business. This question was not necessary to decide the case on the facts, and arguably overlaps with questions currently being considered by the European Commission.

The Court went further in *ATS v. London Luton Airport Operations*. In this case, the Court concluded that a concession agreement granted to National Express by London Luton Airport Operations that carved out easyBus from the exclusivity provisions was discriminatory against other bus operators, even though Luton Airport Operations (the upstream supplier) was not active in the downstream bus market. The Luton Airport case clarifies a question previously considered in *SEL-Imperial Ltd v. British Standards Institution*.[15] In this case, the High Court considered an action for strike out by the British Standards Institution of an abuse of dominance claim concerning the certification of replacement vehicle parts. The High Court refused to strike out the claim because it was insufficiently clear at the time whether decisions affecting a market in which the alleged dominant undertaking was not active could constitute an abuse.

### iv Exploitative abuses (including excessive pricing)

While the focus of UK enforcement action has been on exclusionary conduct, excessive pricing has been considered in a number of cases, including *Napp Pharmaceutical Holdings Limited* (OFT decision of 2001), *Thames Water Utilities Ltd/Bath House and Albion Yard* (Ofwat decision of 2003) and *Albion Water v. Ofwat* (Ofwat decision appealed to the CAT, judgment of 2006). These cases have all considered the potential exclusionary effect of pricing behaviour.

The Court of Appeal also grappled with the concept of excessive pricing in 2007 in *Attheraces Limited v. British Horseracing Board Limited*.[16] This case concerned the price at which the British Horseracing Board made available pre-race data to Attheraces for sale to overseas bookmakers. Attheraces claimed that the price charged was excessive, as well as discriminatory, amounting to a refusal to supply. Attheraces was successful at first instance, but its claim was overturned by the Court of Appeal. The Court of Appeal accepted that, in principle, prices were excessive if they significantly exceeded the economic value of the product. However, in assessing economic value, it was insufficient merely to show that prices exceeded costs by a reasonable amount, without having regard to the price customers (in this case the overseas bookmakers) were prepared to pay. The Court also noted that there was little evidence of harm to ultimate consumers (i.e., the betting public) from the alleged excessive pricing.

15 *Sel-Imperial Ltd v. The British Standards Institution* [2010] EWHC 854 (Ch).

16 [2007] EWCA Civ 38.

As noted above, the CMA is currently investigating Pfizer and Flynn Pharma for suspected excessive pricing.

## V REMEDIES AND SANCTIONS

### i Sanctions

An undertaking that has abused a dominant position may be fined up to 10 per cent of its worldwide turnover in the last business year, calculated according to rules set out by Statutory Instrument.[17] An undertaking may be fined only if its conduct was intentional or negligent (i.e., where the undertaking ought to have known that its conduct would result in a restriction or distortion of competition)[18]. Any undertaking whose turnover does not exceed £50 million benefits from immunity from fines for infringing the Chapter 2 Prohibition (but not Article 102), although immunity may be withdrawn on a prospective basis.[19]

The CMA is obliged to publish guidance as to the appropriate amount of a penalty (which is subject to approval by the Secretary of State). The CMA (and concurrent regulators) must have regard to that guidance when imposing penalties. The OFT published new guidance in September 2012, following a series of successful appeals against its fining decisions before the CAT.[20] The guidance, which was adopted by the CMA, sets out a six-step approach to calculating fines:

*a* calculation of a starting point by multiplying the undertaking's turnover in the relevant market by a percentage of up to 30 per cent depending on the seriousness of the infringement (under its previous guidance the maximum was 10 per cent);
*b* adjustment for duration;
*c* adjustment for aggravating and mitigating factors;
*d* adjustment to achieve sufficient deterrence and to ensure proportionality;
*e* adjustment to ensure the statutory cap (10 per cent of worldwide turnover) is not exceeded; and
*f* adjustment to reflect any settlement discount.

The CMA's guidance states that it will apply a starting point percentage 'towards the upper end of the range' when considering the most serious abuses of a dominant position. Seriousness will be assessed by reference to the structure and size of the market, the effect on competitors (and others), the need for deterrence and the damage caused to consumers.

17 Section 36 of the Act, and the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

18 *Napp Pharmaceutical Holdings Limited and Subsidiaries v. Director General of Fair Trading* [2002] CAT 1, paragraph 457.

19 Section 40 of the Act.

20 In connection with the OFT's infringement decisions concerning: (1) bid-rigging arrangements in the construction sector; and (2) cartel behaviour by recruitment agencies.

### ii Behavioural remedies (including interim measures)

On reaching an infringement decision, the CMA (or regulator) may give any person such directions as it considers appropriate to bring the infringement of Article 102 or the Chapter 2 Prohibition to an end. Directions may be enforced through the civil courts.[21]

The CMA and regulators also have the power to impose interim measures.[22] Interim measures may be imposed only where the authority has opened a formal investigation (and therefore has 'reasonable suspicion' of an infringement) and considers it necessary to impose interim measures as a matter of urgency for the purposes of preventing significant damage, or to protect the public interest.

The CMA is yet to impose interim measures, although it did consider and reject an application by Worldpay against Visa UK Limited in 2014.[23] The OFT imposed interim measures only once (in 2006), and those measures were subsequently withdrawn. However, the legal threshold for the OFT to impose interim measures was one of 'serious, irreparable damage', whereas the CMA need only show the prospect of 'significant damage'. This change in the legal threshold is intended to make it easier for the CMA to impose interim measures in future. Until now, parties seeking interim relief have generally found it necessary to resort to the civil courts.[24]

### iii Structural remedies

The CMA and regulators have no power to impose structural remedies following a finding of abuse of dominance. However, it is possible for a dominance investigation to be closed on the basis of structural commitments. This has happened on one occasion.

In January 2013, Ofwat accepted binding commitments from Severn Trent Water, the first time it had accepted commitments in a competition case. The investigation considered whether Severn Trent Water was cross-subsidising its water analysis business, Severn Trent Laboratories, from its core regulated business. Specifically, Ofwat considered whether (as a result of cross-subsidisation) Severn Trent Laboratories was able to price below cost when competing for contracts with other providers of water analysis services. The decision to accept commitments in this case is notable not only because it included a structural divestment, but also because the decision to accept commitments departed from the published guidance, which states that commitments will not generally be accepted in serious abuse of dominance cases, such as predatory pricing.

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21 Sections 33 and 34 of the Act.

22 Section 35 of the Act.

23 See CMA press release of 27 March 2015.

24 See, for example, *Dahabshiil Transfer Services Limited v. Barclays Bank plc and Harada Limited* and *Berkeley Credit and Guarantee Limited v. Barclays Bank plc* [2013] EWHC 3379 (Ch). This case concerned an alleged abuse of dominance by Barclays, which withdrew certain money-servicing activities from the claimant. The High Court granted an interim injunction, subject to standard cross-undertakings in damages, requiring Barclays to continue providing the services to the claimant pending a full trial. See also *Packet Media Ltd v. Telefonica UK Ltd* (above). By contrast, interim relief was refused by the High Court in *Bruce Baker v. The British Boxing Board of Control* [2014] EWHC 2074 (QB).

In *Bristol Water* (mentioned above), Ofwat accepted quasi-structural commitments under which Bristol Water agreed to introduce functional separation between its upstream and downstream businesses.

The CMA also has the power to impose structural measures to address unilateral market power following a market investigation.

*a* In 2014, following its *Private Healthcare* market investigation, the CMA decided that HCA should divest private hospitals in central London (although that decision was subsequently quashed and has been remitted for reinvestigation by the CMA).

*b* In 2014, following a market investigation into *Aggregates, Cement and Ready Mix Concrete*, the CC found that Hanson had exclusive rights to produce ground granulated blast-furnace slag (an input into cement) in Great Britain and forced it to divest one of its facilities to create competition.

*c* In 2010, the CC required BAA plc (the owner of the largest UK airports) to divest two London airports and one Scottish airport, to improve competition in the relevant markets.

## VI PROCEDURE

The UK enforcement procedure is similar in many respects to the procedure that applies at EU level (under Regulation 1/2003). The CMA (or concurrent regulator) investigates a suspected infringement and reaches an administrative decision in the first instance. That decision is then subject to appeal. The stages of a CMA investigation are as follows:

*a* Investigations are usually triggered by complaints. However, this is not always the case, and the CMA is able to investigate on its own initiative. The OFT's *Gaviscon* investigation, for example, began after evidence was submitted by a whistle-blower.

*b* Before opening a formal investigation, the CMA must be satisfied that it has 'reasonable suspicion' of an infringement.[25] The CMA has no power to use formal investigation powers unless this legal threshold is met. For this reason, it typically carries out 'informal' information gathering in the first instance (including seeking further information from complainants).

*c* As well as satisfying the legal threshold, the CMA must decide whether the case is an administrative priority, in accordance with its published Prioritisation Principles.[26] The Prioritisation Principles are intended to ensure the CMA makes efficient use of its resources when deciding which cases to pursue. The High Court has upheld the CMA's right to prioritise its cases in this way, and to close investigations on administrative grounds, even after considerable investigation has been carried out.[27]

*d* Once it has opened an investigation, the CMA will publish a short notice on its website indicating in broad terms the relevant sector and conduct under investigation. It does not usually name the parties to its investigations before a statement of objections is issued. However, in exceptional circumstances, the CMA can decide to publish the names of the parties in its initial public notice. Exceptional circumstances

25 Section 25 of the Act.

26 CMA16, April 2014.

27 *R (ex p. Cityhook) v. OFT* [2009] EWHC 57.

include instances where a party's involvement is already in the public domain, or where the CMA considers that the potential harm to consumers or other businesses from non-disclosure is sufficient to justify disclosure.

*e* Provided the legal threshold for opening a case is met, the CMA has wide powers to require the production of information. It may require the production of specified documents or information, ask individuals oral questions or carry out interviews with individuals. Individuals are required to answer the CMA's questions, subject to their privilege against self-incrimination, and failure to do so can result in civil sanctions. The CMA may also carry out unannounced visits of business or domestic premises (i.e., 'dawn raids'). It may enter premises without a warrant, or it may enter and search premises with a warrant (which it can obtain from the Competition Appeal Tribunal or the High Court).

*f* If the CMA is minded to reach an infringement decision against an undertaking, it must issue a statement of objections, setting out its case and evidence it intends to rely on. The decision whether to issue a statement of objections must be taken by the case team's senior responsible officer. The CMA must also allow access to its case file when it issues a statement of objections. The CMA's file must contain all material relevant to the matters in the statement of objections (subject to certain redactions). Any party receiving a statement of objections has the right to submit written representations and to attend an oral hearing. The same process applies in relation to any proposed fine (i.e., the CMA will provide details of its proposed fine and allow the opportunity for written representations and an oral hearing).

*g* The CMA will consider entering into settlement discussions in any case where it considers that the evidential standard for giving notice of its proposed infringement decision is met.[28] 'Settlement' is the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation of that business's conduct. If so, the CMA will impose a reduced penalty on the business. Settlement discussions can be initiated either before or after the statement of objections is issued. The CMA retains broad discretion in determining which cases to settle, and this includes the discretion whether to explore interest in settlement discussions, whether to continue or withdraw from settlement discussions and whether to settle at all. Businesses do not have a right or an obligation to settle in a given case and may withdraw from settlement discussions at any time.

*h* Parties can offer commitments at any stage of an investigation, although the CMA encourages parties considering commitments to offer them before a statement of objections is issued. The commitments process is similar to the EU process under Article 9 of Regulation 1/2003. There is no obligation on parties to offer commitments. However, if accepted, the commitments become binding and are enforceable through the courts.

*i* Following parties' written and oral representations, the CMA must decide whether to issue an infringement decision. This decision is taken on a collective basis by a three-member case decision group (CDG), which may include any senior CMA staff or board member or any member of the CMA panel. The senior responsible officer

28 In the past, settlement was formally referred to as 'early resolution'.

may not be a member of the CDG, to ensure that the final decision is taken by officials who were not involved in the decision to issue the statement of objections. The CMA may equally decide at this stage to issue a reasoned decision that it has no evidence of an infringement. Final decisions are published (in redacted form) on the CMA's website.

*j* CMA infringement decisions are subject to appeal to the Competition Appeal Tribunal (CAT), and subsequently to the civil appeal courts on points of law.

CMA investigations vary significantly in duration, and no statutory deadlines apply. Very broadly, a CMA investigation is likely to take around three years (from case-opening until decision), with the statement of objections being issued roughly halfway through that period.

During an investigation, disputes over procedural matters (such as deadlines for responding to information requests, or confidentiality redactions) that cannot be resolved with the case team itself may be referred to the CMA's Procedural Officer. The Procedural Officer will review the party's written application and relevant correspondence, and allow an opportunity for each side to present its views orally (which may be by telephone). The Procedural Officer will then issue a short reasoned decision (within a target deadline of 10 working days), which is binding on the CMA. CMA procedural decisions are ultimately subject to judicial review by the civil courts.

As explained above, the CMA has the power to impose interim measures to prevent significant damage, or to protect the public interest. If the CMA is minded to impose interim measures, it must first give notice to the party in question and allow them the opportunity to make representations. Interim measures decisions are subject to appeal to the CAT.

The Consumer Rights Act 2015 also gives the CMA a new power to certify voluntary compensation schemes following an infringement decision, intended to encourage firms to offer compensation without the need for victims to commence private litigation.

Outside an investigation, the CMA has the power to publish opinions on novel issues of competition law where it considers there is sufficient need for general guidance (e.g., because of their economic importance for consumers). The CMA has never published an opinion in relation to a question of abuse of dominance. The CMA is sometimes prepared to offer private, informal advice on an *ad hoc* basis but only in exceptional cases and only where the matter in question would satisfy its case Prioritisation Principles. By contrast, the CMA does encourage potential complainants to approach it with possible complaints for discussion on an informal and confidential basis.

## VII PRIVATE ENFORCEMENT

Two types of private action exist in the United Kingdom: follow-on actions and stand-alone actions.

A follow-on action is a damages action founded on an infringement decision by a UK competition authority or the European Commission. The court is bound by the findings of infringement already made (as well as findings of fact in the infringement decision). The claimant is therefore required only to show loss and causation. In a stand-alone action, the claimant must prove that the defendant infringed competition law, as well as proving that the claimant suffered reasonably foreseeable loss. Since October 2015, stand-alone actions and follow-on actions can be brought before the CAT as well as the civil courts (the High Court of England and Wales, the High Court of Northern Ireland, or the Court of Session or Sheriff

Court in Scotland).[29] The civil courts and the CAT have wide jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality.

In the past, private claims tended to gravitate towards the civil courts, and particularly the High Court of England and Wales, for a variety of reasons. The Consumer Rights Act 2015 aims to reverse this trend. Not only does the CAT now have the power to hear stand-alone actions and grant injunctive relief, it is also the only venue in which claimants can bring opt-out and opt-in collective actions (discussed below). Further, some cases before the CAT will qualify for fast-track review, capping the costs risk for claimants. The civil courts also have the power to transfer competition cases to the CAT. The CAT's procedural rules and limitation periods are now generally aligned with those that apply to the civil courts, although some questions remain over how the new rules apply to claims relating to conduct pre-dating October 2015. Taken together, these changes are intended to make the CAT the principal venue for competition cases in the United Kingdom.

There are four forms of collective action in the United Kingdom.

*a* Collective actions before the CAT: since October 2015 any representative of a class of persons may bring a collective action for damages before the CAT on an opt-out basis or an opt-in basis. In either case, the claimant must obtain permission from the CAT (a 'collective proceedings order') to continue with a claim on this basis, by showing that they are a suitable representative and that the claims in question are sufficiently similar to be brought in collective proceedings.

*b* Consumer actions by specified bodies: 'specified bodies' can bring follow-on damages actions before the CAT on behalf consumers, on an opt-in basis. A 'specified body' is a consumer organisation specified by the Secretary of State by statutory order. To date, only the Consumers' Association (also known as 'Which?') has been designated a specified body. Which? has brought only one action under these provisions (concerning replica football kits and which was ultimately settled), and has publicly stated that it will not bring any further actions of this type.

*c* Group litigation orders: the High Court has the power to make a group litigation order combining claims that raise common or related issues. A group litigation order will also provide for the establishment of a group register of the claims forming the group. Judgments are binding on all parties on the group register.

*d* Representative actions: it is, in theory, possible for a claimant to bring an action in the High Court on behalf of all claimants with the same interest.[30] However, following a 2010 Court of Appeal judgment,[31] it seems highly unlikely that mass representative actions can be brought in a competition case under these provisions, and far more likely that representative claimants will seek to launch collective proceedings before the CAT.

Damages in competition claims are intended to be compensatory: they are intended to place the victim in the position he or she would have been in had the infringement not occurred. In exceptional circumstances, where compensatory damages would otherwise be an inadequate

29 Before October 2015, the CAT did not have jurisdiction to hear stand-alone actions.

30 Civil Procedure Rule 19.6.

31 *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ 1284.

remedy, damages might be awarded on a restitutionary basis (i.e., an account of the profits earned unjustly by the defendant). While the Court of Appeal has accepted in principle that restitutionary damages may apply,[32] they have never been awarded in practice.

Exemplary damages are possible in dominance cases where no administrative fine has been imposed. This principle was established in the *Cardiff Bus* case.[33] In 2008, the OFT issued an infringement decision, finding that Cardiff City Transport Services Limited (trading as Cardiff Bus) had engaged in predatory behaviour in the supply of local bus services in the Cardiff area. No fine was imposed on Cardiff Bus, because its turnover fell below the statutory threshold for immunity from fines. However, a rival bus company, 2 Travel, which had exited the market (and was by now in liquidation), sought follow-on damages in the CAT under several heads. The CAT found that Cardiff Bus was liable for 2 Travel's loss of profit of around £34,000 (plus interest), but that the other claimed losses had not been proven. The CAT nevertheless awarded exemplary damages of £60,000 (almost tripling the total damages awarded), on the basis that Cardiff Bus's abusive conduct had been calculated to make a profit that was likely to exceed the compensation payable to the claimant. This was the first successful follow-on claim for damages brought before the CAT in the 10 years since the provisions were brought into force. It was also the first time exemplary damages have been awarded in a UK competition law action.

Although the CAT stressed that Cardiff Bus was an exceptional case, the justification for awarding exemplary damages in this case could apply in other abuse of dominance cases. In fact, the point was considered only a few months later in *Albion Water*, the second follow-on damages case decided by the CAT.[34] Dwr Cymru (Welsh Water) was found to have abused a dominant position in the pricing it charged rivals for the common carriage of water.[35] Albion Water, a rival water company, brought a follow-on action based on these findings. The CAT awarded Albion Water damages of just under £2 million (plus interest) as compensation for the overcharge it suffered and for the loss of opportunity to win a new contract. The CAT also considered whether exemplary damages should be awarded. It concluded that, although the evidence of Dwr Cymru's actions 'casts it in a very poor light' and at times amounted to a 'conspicuous and reprehensible failure of corporate governance', the evidence was insufficient to show that Dwr Cymru had a 'cynical disregard' for Albion Water's rights.

More generally, the UK has become a popular venue for private actions even where the claimant has a choice of jurisdiction. There are two principal reasons for this. First, the UK rules on disclosure of evidence are favourable to claimants (allowing access to evidence that might not be available in other jurisdictions). Secondly, costs are generally awarded on 'loser-pays' basis. A successful claimant is therefore likely to recover a significant proportion of his costs from the defendant.

Public funding is generally unavailable for competition law actions. However, other funding options are available. In particular, parties may enter conditional fee agreements (CFAs) with lawyers. Under a CFA, the lawyer will be paid nothing if the case is lost but

32 *Devenish Nutrition Ltd v. Sanofi-Aventis SA (France) & Ors* [2008] EWCA Civ 1086.

33 *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19, judgment of 5 July 2012.

34 *Albion Water Limited v. Dwr Cymru Cyfyngedig* [2013] CAT 6, judgment of 28 March 2013.

35 Ofwat originally investigated Dwr Cymru's behaviour and found no abuse of dominance. This decision was overturned by the CAT on appeal.

will be entitled to a success fee (i.e., an uplift) of up to 100 per cent for winning the case. Competition actions in the United Kingdom may also be funded through 'after-the-event' insurance or by professional funders. However, in most cases, any uplift or after-the-event insurance premium will not be recoverable from an unsuccessful defendant. Since April 2013, claimants have also been able to instruct lawyers under a damages-based agreement (DBA). Under a DBA the lawyer is entitled to a percentage of the damages awarded to a successful claimant, but receives nothing if the claim is unsuccessful. DBAs are not permitted in opt-out collective proceedings before the CAT.

## VIII FUTURE DEVELOPMENTS

The public enforcement regime in the United Kingdom has undergone considerable reform in recent years. While these reforms are significant from an institutional and, to a lesser extent, procedural perspective, the substantive rules on dominance are unchanged. The reforms are continuing to bed down and have undoubtedly had a disruptive influence on enforcement activity. The reforms are nevertheless intended to result in more competition law enforcement cases, especially in the regulated sectors, together with greater use of market investigations to tackle concerns about unilateral conduct.

The rules for private actions in competition cases have also seen significant changes. As mentioned, the Consumer Rights Act 2015 allows opt-out collective actions and settlements before the CAT. The CAT has new powers to hear stand-alone claims and to grant interim relief. New procedural rules that are more favourable to claimants have also been introduced. The civil courts can transfer cases raising competition issues to the CAT and some cases before the CAT will qualify for fast-track review, capping the costs risk for claimants. Finally, the United Kingdom is consulting on further changes to the rules on private actions in competition cases, which are required to ensure effective implementation of the EU Damages Directive (discussed in the EU Chapter). Taken together, these reforms should provide greater stimulus to victims of competition infringements to seek redress, particularly in cases where individual losses (e.g., losses by consumers) are insufficient to motivate actions on an individual basis.

The question for the coming year is whether these reforms will deliver the expected uptick in public enforcement and private litigation that they were intended to achieve. Early indications suggest that they will.

# Chapter 23

# UNITED STATES

*Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon*[1]

## I INTRODUCTION

The US Supreme Court has emphasised that the opportunity to attain a monopoly and reap its benefits encourages investment and innovation.[2] Thus, possessing and exercising monopoly power does not violate US antitrust law 'unless it is accompanied by an element of anticompetitive conduct'.[3] Unlike the competition laws of many other jurisdictions, therefore, US antitrust law does not recognise claims for abuses of dominance that merely exploit existing monopoly power, such as claims for excessive pricing. This difference in focus is reflected throughout the standards adopted in US law as discussed below.

The US antitrust statute specific to monopolies is Section 2 of the Sherman Act, 15 USC Section 2. It provides that '[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony […]'. US law recognises three separate violations that arise under this statute:

*a* monopolisation, which requires: (1) monopoly power and (2) anticompetitive conduct that helps to obtain or maintain that power;[4]

*b* attempted monopolisation, which requires: (1) a dangerous probability of achieving monopoly power; (2) anticompetitive conduct that threatens to help achieve that power; and (3) a specific intent to monopolise;[5] and

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1 Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon are associates at Cleary Gottlieb Steen & Hamilton LLP.

2 See *Verizon Communications Inc v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 407 (2004).

3 Id. [Emphasis in the original.]

4 Id.

5 See *Spectrum Sports Inc v. McQuillan*, 506 US 447, 453–54, 459 (1993).

*c* conspiracy to monopolise, which requires: (1) a conspiracy; (2) a specific intent to monopolise; and (3) an overt act in furtherance of that conspiracy.[6]

The Sherman Act can be enforced in civil actions through injunctions brought by the US Department of Justice (DOJ) and through private litigation, as detailed below.[7]

Other statutes also apply to the behaviour of monopolists. Most notable is Section 5 of the Federal Trade Commission (FTC) Act, 15 USC Section 45, which prohibits 'unfair methods of competition'. The FTC Act reaches all conduct covered by the Sherman Act and probably reaches more broadly.[8] It can be enforced solely by the FTC through civil action for injunctions and prospective cease-and-desist orders.[9]

Many US states have analogous statutes that apply to monopolists. In addition, in certain industries, other regulations can also apply to and potentially limit monopolists.

## II YEAR IN REVIEW

The US Supreme Court did not decide any monopolisation cases in the past year, but lower courts have held that the Supreme Court's 2013 ruling on 'reverse payment settlements' applies to non-cash payments. Other notable lower court decisions included cases on 'product hopping'. The DOJ sued United Airlines for monopolisation at Newark Airport, the first monopolisation case brought by the DOJ since 2011. The FTC issued guidelines on the application of Section 5 of the FTC Act and has debated the use of disgorgement as a remedy in monopolisation cases.

### i Lower courts continue to consider reverse payment settlements

In 2013, the US Supreme Court held in *FTC v. Actavis* that reverse payment settlements – that is, payments made by a drug manufacturer to delay the entry of a generic competitor – 'can sometimes violate the antitrust laws'.[10] Specifically, the Supreme Court said that the traditional 'rule of reason', requiring proof of anticompetitive effects and balancing the pro-competitive effects, applies to reverse payment settlements.[11]

Lower courts are now interpreting the scope of the Supreme Court's decision. One issue that has been litigated is what qualifies as a 'payment'. In the last year, two federal appellate courts held that 'payment' is not limited to cash payment and that the rule of reason applies to all forms of reverse payments, including agreements where the branded company agrees not to launch an authorised generic product (a 'no-AG agreement').[12]

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6 See *United States v. Yellow Cab Co*, 332 US 218, 225–26 (1947).

7 Criminal sanctions are also theoretically available in monopolisation cases. In practice, however, the DOJ typically pursues criminal sanctions – which include fines and imprisonment – only for horizontal cartels that engage in plainly illegal activity such as price fixing.

8 See *FTC v. Cement Inst*, 333 US 683, 691–94 (1948).

9 15 USC Sections 45, 53(b).

10 *FTC v. Actavis Inc*, 133 S. Ct. 2223, 2227 (2013).

11 Id. at 2237–38.

12 See *King Drug Co of Florence Inc v. SmithKline Beecham Corp*, 791 F.3d 388 (3d Cir. 2015); *Rochester Drug Co-Operative Inc v. Warner Chilcott Co* (*In re Loestrin 24 FE Antirust*

In *King Drug Company of Florence v. SmithKline Beecham Corporation*, a generic drug manufacturer, Teva Pharmaceuticals, challenged brand-name producer GlaxoSmithKline's patents related to Lamictal, a drug used to treat epilepsy and bipolar disorder. The parties later settled, with Teva agreeing to end its patent lawsuit and GlaxoSmithKline agreeing that Teva could enter with a generic chewable form of the drug (in contrast to a tablet version) and that it would not produce its own generic tablet version of the drug for almost four years. Direct purchasers of Lamictal sued, and the district court dismissed the claim, holding that non-cash settlements were not subject to antitrust scrutiny. The US Court of Appeals for the Third Circuit reversed and concluded that a non-cash agreement may represent 'an unusual, unexplained reverse transfer of considerable value from the patentee to the alleged infringer' and thus is subject to the rule of reason.[13] The defendants asked for Supreme Court review. At the time of writing, this petition was still pending.

In *In re Loestrin 24 FE Antitrust Litigation*, generic manufacturer Watson Pharmaceuticals notified brand-name manufacturer Warner Chilcott that it was planning to introduce a generic version of Loestrin 24, an oral contraceptive. Warner Chilcott then sued Watson for patent infringement. The parties later settled the patent suit, with Watson agreeing to delay its generic entry and Warner Chilcott agreeing to give favourable promotional deals to Watson and not introduce its own authorised generic version of Loestrin 24 until Watson's generic had been on the market for 180 days. The district court dismissed the case on the grounds that only cash payments were subject to antitrust scrutiny under the Supreme Court's *Actavis* ruling. The US Court of Appeals for the First Circuit reversed, explaining that 'antitrust scrutiny attaches [...] to other forms of reverse payment that induce the generic to abandon a patent challenge', and remanded the case back to the district court for further proceedings.[14]

The FTC also continued its enforcement efforts against reverse payments. In May 2015, the FTC entered into a settlement with Teva related to reverse payments made by Cephalon (which Teva acquired in 2012) involving Provigil, a sleep disorder drug. The FTC had sued Cephalon in 2008, charging that it paid generic competitors over US$300 million to drop patent challenges and stay off the market for six years. The settlement required Teva to pay US$1.2 billion into a settlement fund and represented the largest monetary relief that the FTC has ever obtained. The settlement also barred Teva from entering certain types of reverse-payment agreements.

In March 2016, the FTC sued brand-name manufacturer Endo Pharmaceuticals for entering into reverse-payment settlements covering its pain relief products Opana ER and Lidoderm. With respect to both drugs, the FTC alleged that Endo entered into agreements whereby Endo agreed, among other things, not to release an authorised generic, and generic companies agreed to delay their generic entry for up to two-and-a-half years. At the same time, the FTC also filed a settlement with Teikoku (Endo's Lidoderm partner) in which Teikoku promised not to enter into a no-AG agreement for 20 years. Though the FTC had

*Litigation*), 814 F.3d 538, 542 (1st Cir 2016).

13 *King Drug Co*, 791 F.3d at 393-94.

14 *Rochester Drug Co-Operative*, 814 F.3d at 550.

previously suggested that no-AG agreements could raise antitrust concerns, this was the FTC's first court challenge to a no-AG agreement.[15] Over the past year, the FTC has also filed *amicus* briefs in several pending private reverse-payment cases.

### ii Lower courts continue to consider 'product hopping'

Over the past year, lower courts have also considered how the antitrust laws apply to 'product hopping' by brand-name pharmaceutical manufacturers. Almost all US states have automatic substitution laws that allow or require pharmacists to substitute therapeutically equivalent generics for branded pharmaceuticals unless the physician writes 'dispense as written' on the prescription. To be automatically substituted, the generic drug must have the same active ingredient, dosage, form, strength, and safety and efficacy profile. 'Product hopping' is when a brand name manufacturer releases a slightly modified version of a branded drug (e.g., changing from capsules to tablets, changing from twice-daily to once-daily dosing, adding a 'score' line to a pill) and then discontinues the earlier version of that same branded drug. Such changes prevent pharmacists from automatically substituting to the previously equivalent generics, although they do not prohibit doctors from prescribing generic drugs.

In *New York v. Actavis plc*, the US Court of Appeals for the Second Circuit affirmed a district court opinion granting a preliminary injunction that prohibited Actavis from withdrawing an older twice-daily version of its Alzheimer's drug Namenda. When the patents on Actavis's twice-daily drug approached their expiration date, Actavis decided to discontinue manufacturing the twice-daily drug and instead produce a newer once-daily version with patent protection that lasted until 2029. The state of New York sued, and a district court in New York issued a preliminary injunction that required Actavis to keep the twice-daily version on the market. The appellate court affirmed, finding that New York had demonstrated a substantial likelihood of success on the merits. The court noted that Actavis's 'hard switch' forced Alzheimer's patients to buy the new drug – crossing the line 'from persuasion to coercion' – and would likely impede generic competition by precluding automatic substitution.[16]

By contrast, in *Mylan v. Warner Chilcott*, a district court in Pennsylvania found that Warner Chilcott did not engage in monopolisation by reformulating its acne treatment Doryx from capsule form to tablet form.[17] The court said that although the plaintiff would need to reformulate its generic version to benefit from automatic substitution laws, that did not 'exclude competition' and instead only denied generics 'the opportunity to take advantage of a regulatory "bonus"'.[18] The plaintiffs appealed to the US Court of Appeals for the Third

15 See, for example, Federal Trade Commission Brief as Amicus Curiae, *In re: Effexor XR Antitrust Litig*, (August 10, 2012) (Lead Case No. 3:11-cv-05479) ('[The] empirical evidence confirms what the pharmaceutical industry has long understood: that a no-AG commitment provides a convenient method for branded drug firms to pay generic patent challengers for agreeing to delay entry').

16 *New York v. Actavis plc*, 787 F.3d 638, 654 (2d Cir. 2015).

17 See *Mylan Pharms Inc v. Warner Chilcott plc*, No. 12-3824, slip op. at 21 (E.D. Pa. 16 April 2015).

18 Id. at 25.

Circuit. At the time of writing, the appeal was pending. The FTC filed an *amicus curiae* brief with the appellate court, arguing that the district court improperly embraced 'a rule of nearly *per se* legality' for product hopping.[19]

### iii DOJ sues United Airlines for monopolisation

In November 2015, the DOJ sued United Airlines and Delta Airlines, alleging that United engaged in attempted monopolisation by attempting to acquire airline 'slots' from Delta at Newark Liberty International Airport. Slots are take-off and landing authorisations that are issued by the Federal Aviation Administration (FAA) at particularly busy airports. United controlled 902 of the 1,233 slots at Newark – more than 10 times as many as the next largest competitor. Although United did not use about 80 slots a day, it sought to acquire another 24 from Delta. United had previously attempted to acquire additional slots at Newark, but abandoned those efforts as a result of DOJ opposition. When United and Delta did not abandon this attempted acquisition, the DOJ alleged that it was an attempt to maintain United's monopoly at the airport and sued in federal court. United and Delta abandoned the deal after the FAA decided to no longer require slots for take-offs and landings at Newark. The DOJ then dropped its lawsuit, which was the first monopolisation lawsuit brought by the DOJ since 2011 and which followed criticism of the DOJ for not bringing such cases.[20]

### iv FTC issues guidance on Section 5 of the FTC Act

Section 5 of the FTC Act prohibits 'unfair methods of competition'. It is widely accepted that 'unfair methods of competition' includes conduct prohibited by the Sherman Act, but there is uncertainty about what other conduct could violate Section 5. Although there was a general consensus that this portion of Section 5 should consider economic principles, from time to time, some had suggested using Section 5 to address various non-economic concerns such as environmental protection, employment and income inequality.[21] There was also consensus that Section 5 could reach invitations to collude that do not amount to an agreement and thus may not be actionable under the Sherman Act, but it was unclear what other conduct might be actionable under Section 5. In August 2015, the FTC issued a Statement of Enforcement Principles, listing certain principles that the FTC will use when challenging conduct under Section 5. The Statement was less than one page. The FTC said that it will be guided by 'the promotion of consumer welfare', will use a framework similar to the 'rule of reason', and will be less likely to bring a stand-alone Section 5 challenge if the Sherman or Clayton Act would

19 Brief for Amicus Curiae Federal Trade Commission Supporting Plaintiff-Appellant, *Mylan Pharms Inc v. Warner-Chilcott plc*, (September 30, 2015) (No. 15-2236).

20 *Wall Street Journal*, 'Justice Department Doesn't Deliver on Promise to Attack Monopolies' (7 November 2015). The lawsuit against United was filed three days after this Wall Street Journal article.

21 See, for example, Jonathan B Baker and Steven C Salop, *Antitrust, Competition Policy, and Inequality*, 104 Geo. L.J. Online 1 (2015); Michael Pertschuk, Chairman, Fed. Trade Comm'n, New Directions for the FTC, Remarks Before the Eleventh New England Antitrust Conf. (Nov. 18, 1977), reprinted in 308 Trade Reg. Rep. (CCH) (Supp. 1977). Section 5 also prohibits 'unfair or deceptive acts', where different principles apply.

suffice.[22] One Commissioner dissented, criticising the statement for its vagueness and noting that it adopted an 'unbounded interpretation' of Section 5.[23] The statement also did not specify what type of conduct is lawful or unlawful under Section 5 or reference any case law.

### v FTC debates the use of monetary remedies

The DOJ and FTC typically are not able to recover damages in antitrust lawsuits. However, they can, in appropriate cases, pursue equitable monetary remedies, such as disgorgement or restitution. In 2012, the FTC withdrew a policy statement that explained when the FTC would seek monetary remedies. Since then, the FTC has sought equitable monetary remedies in four cases, including the US$1.2 billion settlement with Teva noted above.[24] This increased pursuit of equitable monetary remedies has generated controversy. Commissioner Maureen Ohlhausen has repeatedly criticised the FTC's repeal of its policy statement, arguing that the pursuit of monetary remedies distorts the FTC's decision-making process,[25] and two out of five Commissioners dissented when the FTC required Cardinal Health to disgorge wrongfully obtained profits. The FTC had sued Cardinal Health for monopolising 25 local markets by obtaining *de facto* exclusive distribution rights to heart perfusion agents, the drugs used to perform heart stress tests. When Cardinal Health settled the case, it agreed to disgorge US$26.8 million. Commissioner Ohlhausen and Commissioner Wright dissented, arguing among other things that disgorgement should be limited to more egregious conduct that clearly violates the antitrust laws – such as horizontal price-fixing – and not in an exclusive dealing case where there are potential efficiency justifications.[26]

## III MARKET DEFINITION AND MARKET POWER

Monopoly power is a prerequisite to bringing a monopolisation claim. Monopoly power is the ability to control prices or exclude competition.[27] It can be proven through direct evidence of actual price increases or the exclusion of rivals. More typically, however, courts infer monopoly power from the combination of high market shares and entry barriers. Higher

22 See Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act (13 August 2015).

23 Dissenting Statement of Commissioner Maureen K Ohlhausen, FTC Act Section 5 Policy Statement (13 August 2015).

24 See *FTC v. Endo Pharma*, No. 2:16-cv-1440 (ED Pa 30 March 2016); *FTC v. Cardinal Health,* No. 15-cv-3031 (SDNY 20 April 2015); *FTC v. AbbVie Inc*, No. 2:14-cv-05151 (ED Pa 8 September 2014); *FTC v. Cephalon Inc*, No. 2:08-cv-2141 (E.D. Pa. Nov. 18, 2013).

25 See, for example, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission, Maureen K. Ohlhausen, Commissioner, FTC (April 20, 2016); Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (31 July 2012).

26 *FTC v. Cardinal Health*, Dissenting Statement of Commissioner Maureen K. Ohlhausen (17 April 2015); *FTC v. Cardinal Health*, Dissenting Statement of Commissioner Joshua D Wright (17 April 2015).

27 See, for example, *United States v. EI DuPont de Nemours & Co*, 351 US 377, 391 (1956).

market shares are more likely to support the inference of monopoly power, and typically shares below 50 per cent cannot support that inference.[28] But even a very high share does not automatically establish monopoly power.[29]

Monopoly power is not required for attempted monopolisation or conspiracy to monopolise claims. Attempted monopolisation instead requires only a 'dangerous probability' of achieving monopoly power, and thus can be sustained with a lesser showing of market power. A conspiracy to monopolise arguably requires no showing of market power at all, although cases alleging a conspiracy to monopolise in the absence of market power are relatively rare.

Inferring monopoly power requires measuring market shares and thus requires defining a relevant market. Relevant markets have both product and geographic dimensions. Product markets are defined by looking at what products are reasonably interchangeable substitutes for one another.[30] Geographic markets are defined by looking at what other geographies sellers operate in and buyers can turn to.[31] One method that is often used to determine what products or geographies are in the market is to ask whether customers would substitute from one product or geography to another in response to a small price increase above competitive levels.[32]

## IV ABUSE

### i Overview

Monopolisation requires anticompetitive conduct that helps to obtain or maintain a monopoly. Obtaining or maintaining a monopoly through other means, such as 'superior product, business acumen, or historic accident', is therefore not a violation.[33]

US courts and antitrust regulators have not established a definitive list of what conduct can be anticompetitive nor have they adopted clear standards for distinguishing between pro-competitive and anticompetitive conduct. The DOJ did issue guidance on monopolisation in 2008 but withdrew it in May 2009.[34] The list below, although not exhaustive, discusses the most important types of potential anticompetitive conduct that courts and regulators have recognised could support a monopolisation claim.

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28 See, for example, *Domed Stadium Hotel Inc v. Holiday Inns Inc*, 732 F.2d 480, 489 (5th Cir 1984) ('Supreme Court cases, as well as cases from this court, suggest that in the absence of special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.').

29 US law does not recognise 'relative dominance' or 'collective dominance'.

30 See, for example, *Brown Shoe Co v. United States*, 370 US 294, 325 (1962); DuPont, 351 US at 395.

31 See, for example, *Tampa Elec Co v. Nashville Coal Co*, 365 US 320, 327–28 (1961).

32 Cf. Horizontal Merger Guidelines, US Dep't of Justice and the Federal Trade Commission Section 4.1.1 (19 August 2010) (describing similar approach in merger context using prevailing prices as baseline).

33 See, for example, *United States v. Grinnell Corp*, 384 US 563, 570–71 (1966).

34 Press release, US Dep't of Justice Office of Public Affairs, 'Justice Department Withdraws Report on Antitrust Monopoly Law' (11 May 2009), available at www.justice.gov/opa/pr/2009/May/09-at-459.html.

### ii Exclusionary abuses

***Exclusionary pricing***

Predatory pricing is charging low prices to try to drive competitors from the market. Because low prices are generally pro-competitive and beneficial to consumers, US law imposes rigorous requirements to sustain a predatory pricing claim. Specifically, a plaintiff must prove: (1) that the defendant's prices are below cost; and (2) that the defendant has a 'dangerous probability' of recouping the losses that it incurs when charging below-cost prices by raising its prices above competitive levels after driving competitors from the market.[35] The US Supreme Court has not specified the precise measure of cost that should be used in this analysis, although most lower courts have required pricing below some measure of incremental cost.

A price squeeze or margin squeeze is when a firm that is active in upstream and downstream markets charges high prices for the upstream input and low prices for the downstream product. The potential antitrust concern is that a downstream competitor that is not vertically integrated must therefore pay high prices for an input while charging low prices to compete downstream. However, US law does not recognise price-squeeze claims without either an upstream duty to deal with competitors or downstream predatory pricing.[36]

***Exclusive dealing***

Exclusive dealing can have many pro-competitive benefits, including encouraging investment by reducing uncertainty about future sales, encouraging relationship-specific investments, and encouraging better product promotion and related services. However, exclusive dealing can also have anticompetitive effects when it forecloses rivals from the market and impairs their competitiveness. Under US law, exclusive dealing cannot be anticompetitive unless it forecloses a 'substantial share' of the relevant market.[37] What counts as 'substantial' is unsettled. Some courts have suggested that foreclosure of 30 per cent or less may suffice, while others have suggested that 40 to 50 per cent may be required.[38] Courts have also suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.[39]

Loyalty conditions are when a seller charges customers one price if the customer purchases a certain percentage of its needs of a product from the seller and a higher price if the customer does not. Loyalty conditions can pro-competitively reduce costs, shift risk

35 *Brooke Group Ltd v. Brown & Williamson Tobacco Corp*, 509 US 209, 222–24 (1993). In a predatory pricing claim based on price discrimination brought under the Robinson-Patman Act, 15 USC Section 13, a plaintiff must prove a 'reasonable prospect' of recoupment. Id. at 224.

36 *Pacific Bell Telephone Co v. linkLine Communications Inc*, 555 US 438 (2009).

37 *Tampa Electric Co v. Nashville Coal Co*, 365 US 320, 327 (1961).

38 *Compare Twin City Sportservice Inc v. Charles O Finley & Co Inc*, 676 F.2d 1291, 1298, 1304 (9th Cir 1982) (finding substantial foreclosure where defendant 'controlled 24 per cent' of the market), with *Stop & Shop Supermarket Co v. Blue Cross & Blue Shield of RI*, 373 F.3d 57, 68 (1st Cir 2004) (foreclosure is 'unlikely to be of concern where they are less than 30 or 40 per cent'), with *United States v. Microsoft Corp*, 253 F.3d 34, 70 (DC Cir 2001) (en banc) ('roughly 40 per cent or 50 per cent share usually required' for an unreasonable restraint of trade claim).

39 See *Microsoft*, 253 F.3d at 70.

in volatile industries, or lead to efficient contracting such as by encouraging promotional or marketing efforts. But like exclusive dealing, they can also foreclose rivals and impair their competitiveness. US law on loyalty discounts is unsettled. Some courts have applied a predatory pricing analysis, finding loyalty conditions to be potentially anticompetitive only when the resulting price is below cost.[40] Other courts have applied an exclusivity analysis, finding loyalty conditions to be potentially anticompetitive whenever they foreclose a substantial share of the market.[41] Some courts and regulators may also focus on the loyalty condition's effect on the incremental price of a customer's 'contestable' share that it would be willing to switch to the defendant's rivals.[42]

MFN clauses provide that a customer will receive pricing or other terms as good as those that the seller offers other customers.[43] MFNs can pro-competitively help buyers obtain low prices and can help prevent opportunism when one party makes relationship-specific investments. But MFNs can also anticompetitively limit competition by preventing new entrants from obtaining prices as low as they otherwise would have. US case law on MFNs is relatively undeveloped. However, antitrust regulators have pursued enforcement actions against MFNs, most often in healthcare.[44]

***Tying***

Tying is when a supplier conditions its sale of one product (the tying product) on the customer purchasing another product (the tied product).[45] Tying can be accomplished through an absolute refusal to sell the items separately or through a price difference between the bundle and the separate items if the difference is sufficiently large that most or all customers would purchase the bundle. Tying can pro-competitively lower costs or increase the value of the items to customers, improve quality or protect goodwill, and efficiently meter consumption. On the other hand, tying may anticompetitively allow a company with monopoly power in the tying product to increase its market power in the tied product, help it protect its monopoly power in the tying product, or otherwise increase its monopoly profits. A successful tying claim requires that the tying and tied items be separate products. Items are deemed separate products when customers want to buy them separately and when offering them separately is possible and efficient.[46] Additionally, tying requires that the defendant have market power in the tying product.[47] More recent cases have recognised the potential pro-competitive benefits

40 See, for example, *Concord Boat Corp v. Brunswick Corp*, 207 F.3d 1039, 1060–62 (8th Cir 2000).

41 See, for example, *LePage's Inc v. 3M*, 324 F.3d 141, 157–59 (3d Cir. 2003) (en banc).

42 See, for example, US Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 107 (2008) (now withdrawn).

43 For discussions of MFNs, see, for example, Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses', 64 *Antitrust L.J.* 517 (1996); and Salop & Scott Morton, 'Developing an Administrable MFN Enforcement Policy', 27(2) *Antitrust Magazine* 15 (2013).

44 See, for example, Complaint, *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155-DPH-MKM (E.D. Mich. 18 October 2010).

45 See *Jefferson Parish Hospital v. Hyde*, 466 US 2, 21 (1984).

46 See E*astman Kodak Co v. Image Technical Services Inc*, 504 US 451, 462 (1992).

47 See *Jefferson Parish*, 466 US at 13–14.

of tying, although some older precedents could be read to suggest that pro-competitive justifications are inadmissible in a tying case.[48] Proving that a substantial share of the relevant market is foreclosed is not a requirement for a tying claim.

Bundling is when a supplier charges one price if a customer purchases two or more products together, but charges a higher price when the products are purchased separately. Bundling can pro-competitively lower costs or increase the value of the products to customers. But bundling raises similar potential anticompetitive concerns as tying. Bundling can also be combined with loyalty conditions, such that obtaining a lower price requires that the customer buy a certain share of its needs across multiple products from a particular company. Similar to loyalty conditions, US case law on bundling is unsettled. Some courts have ruled that bundling cannot be anticompetitive unless it results in prices that are below 'an appropriate measure' of cost.[49] In applying this cost-based test, some courts have used a 'discount attribution test' that applies the entire price 'discount' across all bundled products to the standalone price of the competitive product and then compares the resulting price to the cost of the competitive product.[50] Other courts have instead found that bundling can be potentially anticompetitive whenever it forecloses a substantial share of the market.[51]

Exclusionary product design – where a company designs its product in a way that makes it difficult for competitors to develop compatible or interoperable products – can raise similar concerns as tying. Although exclusionary product designs can in certain circumstances be actionable,[52] antitrust laws encourage innovation and US courts are generally reluctant to second-guess product design decisions.[53] Unless the product design clearly has no benefits to customers, a court is relatively unlikely to sustain an exclusionary product design claim.

***Refusal to deal***

US law generally does not impose a duty to deal with competitors because the possibility of obtaining monopoly power and the ability to exclude rivals encourages investment and innovation and because setting the terms of dealing and monitoring would be administratively burdensome. However, in limited circumstances, a refusal to deal with rivals can be anticompetitive conduct. The cases where courts have found a duty to deal generally involve the defendant ceasing a prior, voluntary and profitable course of dealing with its rivals and the defendant dealing with rivals on different terms than with non-rivals (such as where the defendant refuses to sell a product to rivals that the defendant sells at retail).[54] Even when other US regulations mandate dealing between competitors, US courts generally will not find an antitrust duty to deal.

48 See *Ill Tool Works Inc v. Independent Ink Inc*, 547 US 28, 35 (2006).

49 See, for example, *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 903 (9th Cir 2008).

50 See id., at 906–08.

51 See, for example, *LePage's Inc v. 3M*, 324 F.3d 141, 154–57 (3d Cir 2003) (en banc).

52 See, for example, *United States v. Microsoft Corp*, 253 F3d 34, 65 (DC Cir 2001) (en banc); *CR Bard Inc v. M3 Systems Inc*157 F3d 1340, 1382 (Fed Cir 1998).

53 See, for example, *Berkey Photo Inc v. Eastman Kodak Co*, 603 F2d 263, 286-87 (2d Cir 1979).

54 See, for example, *Verizon Communications Inc v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 409–10 (2004); *Aspen Skiing Co v. Aspen Highlands Skiing Corp*, 472 US 585, 605–11 (1985).

### iii Discrimination

Discriminatory pricing occurs when a seller charges different customers different prices for the same product. Unless the pricing is predatory, price discrimination alone is not anticompetitive conduct. However, a separate statute called the Robinson-Patman Act, which is not specific to monopolists, prohibits discriminatory pricing in the sale of commodities where the effect may be to reduce downstream competition between customers.[55] This aspect of the Robinson-Patman Act has been widely criticised, and enforcement of it is relatively rare. Although the statute requires an effect on competition, US courts typically infer that effect from the fact of differential pricing.[56] Discriminatory pricing is not prohibited by the Robinson-Patman Act if the sale does not involve commodities, if the customers do not compete with one another downstream, or if the price differential is justified by differential costs, an effort to meet competitors' pricing, or changing conditions.[57] The Robinson-Patman Act therefore does not prohibit price discrimination between final consumers, as they do not compete downstream.

### iv Exploitative abuses

As noted, exercising monopoly power is generally legal under US law. US law therefore does not in general recognise exploitative abuses.

### v Miscellaneous

A variety of other types of conduct can, in certain circumstances, support a monopolisation claim. A non-exhaustive list is discussed here.

Monopoly leveraging is using monopoly power in one market to gain an advantage in a second market. But under US law, monopoly leveraging likely cannot support a monopolisation claim unless it involves some anticompetitive conduct (such as tying, exclusive dealing, or a refusal to deal) and it helps the defendant obtain or maintain a monopoly in the second market (or creates a dangerous probability of doing so).[58]

Monopolisation claims have also been brought against patent holders for abusing standard-setting processes. Such claims might be brought where the patent holder induces a standard-setting organisation to adopt a standard that includes its patents but either deceptively promises to license the patents on FRAND terms and reneges or fails to disclose the existence of its patents in the first place. The concern is that such abuses may result in monopoly pricing that otherwise could have been avoided. Some courts have allowed such

55 15 USC Section 13.

56 See *FTC v Morton Salt Co*, 334 US 37, 47 (1948).

57 15 USC Section 13(a), (b).

58 See *Trinko*, 540 US at 415 n. 4.

claims to go forward, while others have suggested they do not constitute monopolisation.[59] The FTC has also used Section 5 of the FTC Act to pursue enforcement actions against alleged abuses of the standard-setting process.[60]

Monopolisation claims can also be brought against companies that abuse government processes. For example, 'sham' litigation and other abuses of the litigation process can be monopolisation.[61] Similarly, enforcing intellectual property rights obtained through fraud can be monopolisation.[62] Other abuses of governmental processes are also possible.

Additionally, in extreme cases, more general tortious conduct can support a monopolisation claim. For example, one US court allowed a monopolisation claim when a defendant removed its rival's products and advertising from retail stores without permission.[63]

Mergers that help obtain or maintain a monopoly can constitute monopolisation, although typically mergers are challenged under Section 7 of the Clayton Act, 15 USC Section 18, which prohibits mergers that 'substantially […] lessen competition' or 'tend to create a monopoly'.

## V REMEDIES AND SANCTIONS

Available remedies in monopolisation cases include injunctive relief and monetary damages.[64] Civil fines are not available.

Both the US antitrust regulators and private plaintiffs can seek injunctive relief, a court order that either requires the defendant to take certain actions or prohibits the defendant from taking certain actions. Injunctive relief has multiple purposes, including stopping the anticompetitive conduct, reversing its anticompetitive effects, and denying the defendant the fruits of that conduct.[65] Courts have broad discretion to frame appropriate injunctive relief to achieve these goals. Appropriate relief may include structural remedies (such as dissolving or splitting the defendant or requiring divestitures) or behavioural remedies (such as prohibiting the defendant from engaging in certain activities in the future or requiring that the defendant grant rivals access to certain property). Moreover, injunctive relief can include monetary equitable remedies, such as disgorgement (an order requiring the defendant give up supracompetitive profits related to the antitrust violation) or restitution (an order requiring that the defendant compensate victims for their losses).

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59 Compare *Broadcom Corp v. Qualcomm Inc*, 501 F.3d 297 (3rd Cir 2007) (allowing claim for breach of FRAND commitments), with *Rambus Inc v. FTC*, 522 F.3d 456, 462 (DC Cir 2008) (not allowing such a claim).

60 See, for example, *In re Negotiated Data Solutions*, File No. 051-0094, slip op at 2 (FTC 23 January 2008) (Statement of the Commission), available at www.ftc.gov/os/caselist/0510094/080122statement.pdf.

61 See, for example, *Professional Real Estate Investors Inc v. Columbia Pictures Industries Inc*, 508 US 49, 60–61 (1993) (holding that sham litigation requires both objective and subjective baselessness); *California Motor Transport Co v. Trucking Unlimited*, 404 US 508 (1972) (allowing claims based on abuse of the litigation process through repetitive lawsuits).

62 See, for example, *Walker Process Equip v. Food Mach & Chem Corp*, 382 US 172 (1965).

63 See *Conwood Co v. United States Tobacco Co*, 290 F.3d 768, 783–84 (6th Cir 2002).

64 As noted, criminal sanctions are theoretically available but not pursued in practice.

65 See, for example, *United States v. United Shoe Mach Corp*, 391 US 244, 250 (1968).

Private plaintiffs can seek monetary damages equal to three times their actual injury, plus litigation costs and reasonable attorney fees, as detailed below.[66] US and state governments also can seek treble damages for injury to their own business or property (as can foreign governments, although they are usually limited to single damages).[67] In addition, a US state can bring a *parens patriae* action seeking treble damages on behalf of its residents.[68]

## VI PROCEDURE

Monopolisation enforcement principally occurs through government investigations by the US antitrust regulators and court proceedings initiated by the US antitrust regulators, states or private plaintiffs.

Investigations by US antitrust regulators can start in a variety of ways, including the regulator's own initiative, complaints from private parties, or requests from other governmental actors (e.g., the US Congress). The DOJ and FTC can work voluntarily with the target of the investigation and third parties or can use compulsory process, including subpoenas and 'civil investigative demands' (CIDs), to obtain documents, written responses to questions, and witness testimony.[69] Entities subjected to compulsory process often seek to negotiate the scope of the discovery and sometimes seek to quash it,[70] although in practice doing so is relatively difficult, particularly for a target of an investigation. An investigation can be dropped at any time and that decision is unreviewable by a court. An investigation can also be resolved through settlement at any time. The DOJ, as an agency of the US executive branch, must obtain court approval of its settlements, while the FTC, as an independent administrative agency, must approve settlements by majority vote of the FTC Commissioners.

An investigation can also lead to litigation. The DOJ must pursue litigation in federal court, following the procedures described below. The FTC, by contrast, has its own administrative courts, with somewhat different procedures, followed first by an appeal to the Commission itself and then an appeal to a federal appellate court.

Court proceedings in a monopolisation case are similar to court proceedings in other cases. US federal courts have exclusive jurisdiction to hear cases under the federal antitrust laws, although state courts can hear cases under state antitrust laws.[71] Antitrust cases that seek monetary damages are generally tried before a jury, while antitrust cases that seek only injunctive relief are instead tried before a judge. A court case starts with the plaintiff filing a complaint laying out the allegations against the defendant. The defendant can move to dismiss a complaint on several grounds, most importantly that the allegations fail to state a plausible claim. If the case proceeds, parties engage in potentially wide-ranging discovery, including document production, written interrogatories, requests for admissions, and depositions. After discovery, a party may move for summary judgment on some or all issues if no genuine dispute exists as to any material fact and, given the material facts, the party is

66 15 USC Section 15.

67 15 USC Section 15(b); 15a.

68 15 USC Section 15c.

69 See 15 USC Sections 46, 49, 57b-1; 15 USC Sections 1311–1314.

70 See 15 USC Section 1314(b); 16 CFR 2.7(d).

71 *See General Investment Co v. Lake Shore & Mich S Ry Co*, 260 US 261, 286–88 (1922).

entitled to judgment as a matter of law. During and after a trial, parties can again move for judgment as a matter of law. Adverse decisions can be appealed, although typically not until after a final judgment. In general, the parties are free to settle at any time during this process.

Both the US antitrust regulators and private plaintiffs can also seek preliminary relief prior to a full adjudication by moving for a temporary restraining order or preliminary injunction to stop the challenged conduct. Preliminary relief can only be obtained from a court. Whether preliminary relief is appropriate depends on balancing the likelihood each party will succeed on the merits with the harm to the defendant from granting the preliminary relief and the harm to the plaintiff and the public from not granting it. In general, preliminary relief is unusual in a monopolisation case.

Further, the DOJ offers a business review process and the FTC offers an advisory opinion process that may allow businesses to obtain guidance about the DOJ's or FTC's present enforcement intentions as to certain conduct.[72] The business must submit a written request to the DOJ or FTC describing the conduct and provide documents and other information. The DOJ or FTC typically will consider only requests related to proposed conduct (and thus typically will not consider requests related to conduct that is already ongoing), and they can decline to issue guidance. If the DOJ or FTC responds, the response and request are made available publicly. The guidance is not legally binding, but in practice the DOJ and FTC are unlikely to pursue enforcement action against a requesting party that relies on it (except in special circumstances, such as if the facts provided were inaccurate).

## VII PRIVATE ENFORCEMENT

As explained above, private plaintiffs can and often do seek treble damages and injunctive relief in monopolisation cases. Private actions can be brought by individual plaintiffs or through an opt-out class action that adjudicates the claims of many similarly situated plaintiffs in a single lawsuit. Class actions have additional procedural requirements that must be satisfied.[73] Often, antitrust actions are viewed as amenable to resolution on a class-wide basis because many of the relevant issues will be market-wide and thus common to the class. Still, procedural hurdles remain, including demonstrating that impact can be proven on a common basis.

Typically, monopolisation suits are brought either by customers alleging that they paid more because of the reduction in competition caused by the monopolisation or by competitors alleging that they made less profit because their ability to compete was impaired. In general, indirect purchasers cannot bring claims under US federal antitrust laws, although many states allow indirect purchasers to bring claims under state antitrust laws.[74]

To obtain damages, a private plaintiff must establish more than the antitrust violation itself. It must also show that it was injured, that the violation was a material cause of its injury, that its injury was sufficiently closely related to the violation, and that its injury resulted from an anticompetitive effect of the violation. Finally, it must prove the amount of damages.

72 See 16 CFR Sections 1.1–1.4; 28 CFR Section 50.6.

73 See Fed R Civ P 23.

74 See *Illinois Brick Co v. Illinois*, 431 US 720 (1977); *California v. ARC America Corp*, 490 US 93 (1989).

Conceptually, the appropriate measure of damages is the difference between the plaintiff's position in the actual world and what its position would have been in the but-for world without the challenged conduct. Establishing what would have happened in the but-for world is often difficult, so courts typically require plaintiffs to prove damages only with reasonable certainty. Plaintiffs can do so by offering a rough approximation, and in practice, they typically compare the actual world to a baseline unaffected by the challenged conduct (e.g., the same market before the challenged conduct began or a similar market where the challenged conduct never occurred). Increasingly, damages are modelled using econometric techniques.

To obtain an injunction, by contrast, a private plaintiff must generally show that monetary damages would not be an adequate remedy because it cannot prove the amount of damages with reasonable certainty. The forms of injunctive relief discussed above (including behavioural and structural remedies) are in theory available to private plaintiffs.

Private enforcement also interacts with public enforcement. Private plaintiffs can encourage the government to open an investigation. If the government brings a public enforcement action and obtains a favourable judgment, that may benefit private plaintiffs by precluding the defendant from re-litigating certain issues in future private actions by providing *prima facie* evidence of a violation under the antitrust statutes or under more general procedural principles governing preclusion.[75] In contrast, if the government chooses not to bring an action or if it brings an action and loses, that does not prevent a future private action. A settlement likewise does not prevent a future private action, and, if entered before testimony is obtained, also cannot be used as *prima facie* evidence of a violation. In addition, regardless of whether the government decides to bring an action, private plaintiffs can often benefit from the fruits of a government investigation, such as the discovery that the government obtains. The statute of limitations for private actions can also be suspended by a government action.

## VIII FUTURE DEVELOPMENTS

We expect the coming year to largely continue current enforcement practices and do not anticipate major shifts in the law. At the time of publication, there were no significant monopolisation cases pending before the US Supreme Court.

75 See 15 USC Section 16(a).

## Appendix 1

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Mr de Bure teaches competition law at Université Montpellier 1 (DJCE/DCI) and is co-author of the book *EU Competition Law – Abuse of Dominance under Article 102 TFEU* (Claeys & Casteels Publishing).

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He obtained an LLM degree in competition law and economics at the Erasmus University Rotterdam in 2003, and a PhD in law and economics at LUISS Guido Carli University in 2005.

Mr Faella is the author of a book on discounting policies of dominant firms (*Politiche di sconti delle imprese dominanti*, Giappichelli, Turin, 2012), as well as several articles and essays on competition law, unfair competition, intellectual property and civil law, and he has delivered speeches at several conferences and seminars, in Italy and abroad.

**ANDREJ FATUR**

*Fatur Law Firm*

Andrej Fatur is a senior partner and has extensive international experience gained from studying and working in New York, London, Luxembourg and Amsterdam. He specialises in competition and corporate law. As an attorney he has advised numerous leading domestic and foreign corporations on complex competition law issues, especially on information and communication technology, pharmaceuticals and trade, as well as on the restructuring and regulation of the energy and pharmaceutical sectors. He is the author of numerous articles and papers, particularly in the field of competition law. In 2012, Hart Publishing published his book *Information and Communication Technology Networks Industries and EU Competition Policy*. He was also a recipient of several prestigious international scholarships, such as the Fulbright and Chevning Scholarships. He regularly lectures on international seminars and conferences. Besides his legal practice in Slovenia, Dr Fatur is also a licensed attorney in

New York. Since March 2012 he has also been a member of the supervisory board of Nova KBM d.d., a Slovenian bank. He is listed by *Chambers and Partners* as one of the leading competition lawyers in Slovenia and is especially praised for his excellent knowledge of the EU competition law.

**LUIS GERARDO GARCÍA SANTOS COY**

*Creel, García-Cuéllar, Aiza y Enríquez SC*

Luis Gerardo García Santos Coy is a partner and heads the competition and antitrust practice at the firm. He obtained his law degree (LLB) from the Ibero-American University in 1993. A survey published in *Global Competition Review*'s '40 under 40: the world's brightest young antitrust lawyers and economists' cited him as one of the world's top young antitrust lawyers. Mr García has also been included in *Who's Who Legal: Competition* since 2005, has been recognised by *Chambers and Partners* as an expert in the fields of M&A, corporate and competition/antitrust, and is listed in *Practical Law Company*, *Best Lawyers* and *Expert Guides*, as a leader among competition lawyers. He joined the firm in 1989 and specialises in competition law, mergers and acquisitions and corporate law. He is a member of the Mexican Bar Association.

Mr García has published (as author or co-author) several articles, including the Mexico chapters in *The Handbook of Competition Enforcement Agencies* in 2004 and 2005; *Cartel Regulation: Getting the fine down* in 2006 and 2011; *PLC Cross-border Competition Handbook 2011*; *The Merger Control Review*, published by Law Business Research, in 2010, 2011 and 2012; *Immunity, Sanctions & Settlements*, published by Global Competition Review in 2014 and 2015; 'A tough sheriff', published in the *International Financial Law Review* in December 2006; 'Overcoming the Constitutional Difficulties: Recent Trends in Mexican Competition Law' published in *Latin Lawyer* in July 2006; 'Competition and antitrust developments in Mexico' published by *Euromoney* in 2012; *The Cartels and Leniency Review*, published by Law Business Research in 2013, 2014 and 2015; 'Mexico: New Antitrust Authorities and a New Federal Economic Competition Law', published by the *Journal of European Competition Law & Practice*, Oxford University Press in 2014; and several other articles published by *Euromoney*, *Global Competition Review*, *International Financial Law Review*, *Latin Lawyer* and *International Law Office*.

**ARLAN GATES**

*Baker & McKenzie LLP*

Arlan Gates is a partner in Baker & McKenzie's global antitrust and competition practice group and heads the antitrust and competition team in Canada. His practice focuses on merger control and counselling in the areas of pricing, distribution and trade practices, abuse of dominance, competitor collaboration, marketing practices and misleading advertising. He has significant experience in the pharmaceuticals, health, food and consumer products sectors, as well as in technology, communications and other industries. He is based in the firm's Toronto office and has also worked in its Sydney office.

**DAMIEN MB GERARD**

*Cleary Gottlieb Steen & Hamilton LLP*

Damien Gerard is a consultant in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP and an academic affiliated with the College of Europe (Bruges, Belgium) and the Université catholique de Louvain (UCL, Belgium). Mr Gerard's practice focuses on Belgian competition law, covering the whole spectrum of restrictive practices, as well as merger control. He has also

gained significant experience by assisting clients in a number of prominent EU antitrust cases, including before the EU courts, and by advising on a broad range of EU law issues, notably in relation to the internal market. This is reflected in his scholarship, which spans a wide range of EU law topics, with a particular emphasis on competition law enforcement. A graduate of UCL, the College of Europe and New York University School of Law, Mr Gerard is member of the board of editors of *TBM-RCB*, *the Belgian Competition Law Review*, and a co-author of a recent treatise on Belgian competition law (Le nouveau droit belge de la concurrence, Anthémis, 2010). A member of the Bars in Brussels and New York, he is distinguished by *Chambers Europe* as an antitrust practitioner in Belgium and by *Global Competition Review* as one of the world's most promising '40 under 40' competition specialists.

**PAUL GILBERT**

*Cleary Gottlieb Steen & Hamilton LLP*

Paul Gilbert is counsel based in the London office of Cleary Gottlieb.

Mr Gilbert's practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He has represented clients before the European Commission, the UK Competition and Markets Authority (and its predecessors, the Office of Fair Trading and Competition Commission), as well as in litigation before the UK Competition Appeal Tribunal and Court of Appeal.

Mr Gilbert joined the firm in January 2011 and became counsel in January 2015. Before joining the firm he was Deputy Director of Competition Policy at the UK Office of Fair Trading. Mr Gilbert graduated with first class honours from Trinity College, Oxford in 1997. He obtained postgraduate diplomas in law and legal practice from the College of Law in 2000 and 2001, both with distinction.

Mr Gilbert is a solicitor of the Senior Courts of England and Wales.

**FRANCISCO ENRIQUE GONZÁLEZ-DÍAZ**

*Cleary Gottlieb Steen & Hamilton LLP*

Francisco Enrique González-Díaz is a partner based in the Brussels office.

Mr González-Díaz's practice focuses on European and Spanish competition law, including mergers and acquisitions, restrictive practices, abuse of dominance and state aid.

Mr González-Díaz has a law degree from the University of Granada, as well as LLM degrees from the Free University of Brussels and Harvard University, and an economics and mathematics degree from the Open University.

Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr González-Díaz held a number of positions within European institutions. Between 1998 and 2003, he headed one of the enforcement units of the European Commission's Merger Task Force and led the European Commission in its review of a number of large and complex cases in a wide array of market sectors. Between 1996 and 1998, Mr González-Díaz clerked for Judge García Valdecasas at the European Court in Luxembourg. From 1990 to 1996, Mr González-Díaz was a member of the European Commission's Legal Service.

Mr González-Díaz has written extensively on EU law matters, particularly in the field of antitrust and competition law. He has recently authored and edited a book on abuse of dominance at EU level. He was a lecturer in private international law at the University of Alicante from 1985 to 1989. He also serves on the advisory and editorial boards of a number of legal publications.

Mr González-Díaz is a member of the Bars in Madrid and Brussels. His native language is Spanish, and he is fluent in English and French.

**THOMAS GRAF**

*Cleary Gottlieb Steen & Hamilton LLP*

Thomas Graf is a partner at Cleary Gottlieb Steen & Hamilton LLP. Mr Graf's practice focuses on EU competition law, regulatory affairs and intellectual property law. His experience includes work in a number of industries, including IT, pharmaceuticals, media, sports rights, energy and engineering.

**GÖNENÇ GÜRKAYNAK**

*ELIG, Attorneys-at-Law*

Mr Gönenç Gürkaynak is a founding partner and the managing partner of ELIG, Attorneys-at-Law, a leading law firm of 65 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels, and England and Wales (currently a non-practising solicitor). Before founding ELIG, Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG, Attorneys-at-Law, which currently consists of 36 lawyers. He has unparalleled experience in Turkish competition law counseling issues, with more than 18 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about a dozen antitrust appeal cases in the high administrative court and over 45 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

**BEN HOLLES DE PEYER**

*Cleary Gottlieb Steen & Hamilton LLP*

Ben Holles de Peyer is an associate based in the Brussels office.

Mr Holles de Peyer's practice focuses on EU competition law and regulation in network industries. He has experience advising clients in the energy and telecoms sectors. Moreover, he has appeared before the EU courts in litigation involving data protection and abuse of dominant position.

Mr Holles de Peyer joined the firm in 2012. He received an LLM degree from the College of Europe in 2012 after graduating at the Autonomous University of Madrid with two bachelor's degrees in law and political science. He also participated in an international exchange programme at the Institut d'Etudes Politiques de Paris (Sciences Po).

Mr Holles de Peyer is a member of the Bar in Madrid and is registered with the Brussels Bar. His native languages are English, Spanish and Catalan, and he is fluent in French.

**VERRY ISKANDAR**

*Soemadipradja & Taher*

Verry Iskandar joined Soemadipradja & Taher (S&T) as a senior associate in 2014. He obtained his Sarjana Hukum (bachelor of laws) degree in 2002 from the University of

Gadjah Mada, Jogjakarta and a master of laws degree from the University of North Sumatra in 2009. He joined S&T after working for many years with the Indonesian Commission for the Supervision of Business Competition (KPPU).

Mr Iskandar has extensive experience in a variety of fields. Working for the head of the investigation division at the KPPU provided him with a range of insights into the law in both theory and practice. He was a main drafter of the KPPU's business investigation process and its case-handling procedures, and therefore has in-depth understanding of these matters. As a senior investigator on merger control, he has reviewed many high-profile transactions in a variety of businesses and industries. He focuses on ICL and policy as well as general corporate matters.

He is a vice secretary general of the ASEAN Competition Institute (ACI).

**JORGE KARGL PAVÍA**

*Creel, García-Cuéllar, Aiza y Enríquez SC*

Jorge Kargl Pavía is a senior associate in the competition and antitrust practice at the firm. He obtained his law degree (LLB) with honours from the Facultad Libre de Derecho de Monterrey in 2006 and his master of laws degree (LLM) in public law as top of his class from Mexico City's Anahuac University in 2013. He has also undertaken postgraduate studies in economics and competition law at the Ibero-American University in Mexico City and has a postgraduate diploma in economic regulation from the Mexican Federal Commission of Regulatory Improvement. Mr Kargl also has experience working at an international law firm's antitrust and competition practice group in Brussels, Belgium. Mr Kargl has also been selected for inclusion in *Euromoney*'s LMG Rising Stars 2015 (Inaugural Edition). He joined the firm in 2013 and is a member of Mexico's National Association of Corporate Lawyers, the international legal fraternity Phi Delta Phi (Salinas Martínez Chapter) and the International Law Society at the Facultad Libre de Derecho de Monterrey.

Mr Kargl is co-author of the 'Mexico' chapter in *The Dominance and Monopolies Review*, third edition, published by Law Business Research in 2015, *Mexico: New Antitrust Authorities and a New Federal Economic Competition Law*, published by the Journal of European Competition Law & Practice, Oxford University Press in 2014, *Immunity, Sanctions & Settlements*, published by Global Competition Review, in 2014 and 2015, and *A new era in Mexican Antitrust Enforcement*, published by the International Bar Association's Latin American Regional Forum in 2012.

**KITI KARVINEN**

*Castrén & Snellman Attorneys Ltd*

Kiti Karvinen joined Castrén & Snellman Attorneys Ltd's EU and Competition law practice at the beginning of 2015. Prior to joining the firm, she worked at another law firm for several years advising clients on a wide range of issues relating to competition law with particular focus on issues of dominant companies. In addition her LLM degree from the University of Helsinki, she has completed a postgraduate diploma in EU competition law at King's College London. Ms Karvinen specialises in antitrust and competition law. She advises clients in EU and Finnish competition law across a variety of business sectors.

**TILMAN KUHN**

*Cleary Gottlieb Steen & Hamilton LLP*

Tilman Kuhn is a counsel based in the Cologne office and a member of the Cologne Bar.

Mr Kuhn's practice focuses on European and German competition law, including administrative and civil litigation. He publishes regularly on antitrust topics and is a co-author of the Frankfurt commentary on EU and German competition law.

Mr Kuhn joined Cleary Gottlieb Steen & Hamilton LLP in 2004 and became counsel in 2012. From 2004 to 2009, he was resident in the Cologne office, and from 2009 to 2010, he was resident in the Brussels office. He received an LLM degree from the University of Amsterdam in 2001 and a doctorate in law (Dr iur), *summa cum laude*, from the University of Cologne in 2005. Mr Kuhn passed his second state examination in the State of North Rhine Westphalia in 2003 and the first state examination at the University of Bonn in 2000.

**ANNA KUUSNIEMI-LAINE**

*Castrén & Snellman Attorneys Ltd*

Anna Kuusniemi-Laine specialises in competition law, public procurement and state aid as well as in domestic and EU litigation relating to these fields. She regularly advises major Finnish and international companies in competition law compliance issues and represents clients in merger control matters and competition authority proceedings. She also advises clients on legal issues that relate to the interface between the public and private sectors. Ms Kuusniemi-Laine has special expertise in the life science, construction and energy industries. She is a well-known lecturer on competition law and public procurement law in Finland, and she has published articles on these topics in Finnish and international publications. She holds an LLM degree in EU business law from the University of Amsterdam. *Chambers Europe*, *The Legal 500*, *Best Lawyers* and *Who's Who Legal* rank Ms Kuusniemi-Laine among Finland's top legal experts.

**CIRU LONGDEN**

*Anjarwalla & Khanna*

Ciru Longden is a professional support lawyer at Anjarwalla & Khanna. Prior to joining Anjarwalla & Khanna Advocates, she worked with Howells LLP in Sheffield, England. Mrs Longden has been involved in M&A transactions and regulatory advice. She is a member of the Law Society of Kenya.

**SALLA MÄNTYKANGAS-SAARINEN**

*Castrén & Snellman Attorneys Ltd*

Salla Mäntykangas-Saarinen joined Castrén & Snellman Attorneys Ltd's EU and competition law practice as counsel in 2013. With her law firm background of more than a decade, she has versatile experience in advising clients across a wide range of industries, including regulated industries, in all aspects of competition law, with a particular focus on competition and private enforcement proceedings. Ms Mäntykangas-Saarinen has, *inter alia*, been involved in landmark competition cases, including by far the largest cartel case ever tried in Finland and the related damages cases. In addition to her LLM degree from the University of Turku, she holds an LLM degree in EU law from the University of Leuven, Belgium, and a postgraduate diploma in competition law economics from King's College London. Ms Mäntykangas-Saarinen has co-authored several competition law articles, is the Finnish editor of *Competition Nordic* blog and has been recognised in *Chambers Europe* for her extensive work in competition law.

**ANA PAULA MARTINEZ**

*Levy & Salomão Advogados*

Ana Paula Martinez is a partner at Levy & Salomão Advogados. Ms Martinez served in Brazil's federal government from 2007 to 2010, where she was responsible for government antitrust investigations and enforcement actions. As part of her government service, she also served as the co-chair of the cartel subgroup of the International Competition Network (ICN), alongside the US Department of Justice, and represented Brazil before the OECD. Ms Martinez served as an antitrust adviser to UNCTAD, the World Bank and the government of Colombia, and is currently a non-governmental adviser to the ICN. Before entering government, Ms Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP and Levy & Salomão Advogados. She is a frequent speaker at both Brazilian and international colloquiums. *Global Competition Review* (*GCR*) named her on its lists 'Top Women in Antitrust' and '40 under 40'. *Chambers and Partners*, *The Legal 500* and *Who's Who Legal* listed her among the world's leading competition practitioners. In 2015, she was selected as one of the top five lawyers globally in merger clearance matters by *GCR,* and in 2014 and 2016 *GCR* awarded her 'Lawyer of the Year – Under 40'. Ms Martinez is admitted to practise in New York and Brazil. She holds master of laws degrees from both Harvard Law School and the University of São Paulo (USP) and a PhD degree in criminal law from USP.

**HENRY MOSTYN**

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Henry Mostyn is an associate in the London office of Cleary Gottlieb Steen & Hamilton LLP, having joined the firm in 2012. He is a barrister of England and Wales. Mr Mostyn's practice focuses on all aspects of EU competition law.

**MORGAN L MULVENON**

*Cleary Gottlieb Steen & Hamilton LLP*

Morgan Mulvenon is based in Cleary Gottlieb Steen & Hamilton LLP's Washington, DC office and practises in a broad range of antitrust matters, including litigation, mergers and counselling, across a broad range of industries.

Ms Mulvenon received her JD, *magna cum laude*, Order of the Coif, from Georgetown University Law Center in 2012, where she was an executive editor for the Georgetown Law Journal, and received her AB, *magna cum laude*, in public policy studies and history from Duke University in 2009.

**EDGAR ODIO**

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Edgar Odio is a founding partner of Pragma Legal. He has been licensed to practise in Costa Rica since 1989. He has a master's degree in economic development from Essex University and postgraduate degrees in EU competition law and economics for competition from King's College London. His practice has focused on foreign investment and mergers and acquisitions.

He has served as local consultant for the Competition and Consumer Protection for Latin America programme (COMPAL) implemented by the United Nations Conference on Trade and Development (UNCTAD) to draft the amendment to the Competition Law. Mr Odio also served for four years as member of the local competition authority, COPROCOM, as senior adviser on competition to UNCTAD in Geneva, and is a member of the advisory group of experts for COMPAL. In this capacity he has participated in training and advisory

missions to countries such as Bolivia and Guatemala. He teaches a competition course at La Salle University and a postgraduate distance-learning course on competition and intellectual property at the National University of Distance Education (UNED). He is regularly invited to workshops and training sessions by local and multinational companies, and offers advice on competition matters to local and foreign clients.

**ANAND S PATHAK**

*P&A Law Offices*

Anand S Pathak practises in the areas of US, European and Indian mergers, acquisitions and joint ventures, and technology licensing, distribution and agency arrangements. He attended all of the European Council negotiation meetings leading to the adoption of the EU Merger Control Regulation and assisted in the drafting of the implementing regulations and guidelines issued by the European Commission. He has represented clients in European Commission proceedings, investigations and notifications of concentrations under EU competition laws, including Toyota, General Electric, Dresser Industries, Ingersoll-Rand, Pepsico Inc and Waste Management, and more recently Ranbaxy Laboratories Limited in a competition law proceeding before the European Commission. He has represented several clients in proceedings before the Indian Competition Commission, the Competition Appellate Tribunal and the Supreme Court of India, including Apple Inc, MCX-SX, Financial Technologies (India) Limited, Sony Pictures Entertainment, Daiichi Sankyo, Eli Lilly, General Motors, Bull Machines, Ericsson, Amazon, Super Cassettes and DLF Limited.

Mr Pathak has practised law for more than 25 years. Prior to joining P&A Law Offices, he was a lawyer in Brussels, Cleveland and Palo Alto. He is admitted to practise law in India and the states of Ohio and California in the United States. He is a graduate of Cambridge University and Yale University and has worked at both the European Court of Justice and in the Competition Division of the Legal Service of the European Commission. He has received several awards for M&A and competition law, including 'Best M&A Lawyer in India in 2008'; 'India M&A Legal Counsel of the Year' in 2009; 'India M&A Lawyer of the Year' in 2011; 'India Competition Lawyer of the Year' in 2012; 'India M&A Lawyer of the Year–2012'; and 'India Competition Lawyer of the Year' in 2013, 2014 and 2015.

**ERIK PIJNACKER HORDIJK**

*De Brauw Blackstone Westbroek NV*

Erik Pijnacker Hordijk specialises in EU and Dutch competition law and European Union law. His practice ranges from high-profile second-phase merger control cases before the European Commission and the ACM, to litigation on complex state aid and internal market issues before the European Courts of Justice. He has appeared in over 100 cases before the European courts and won the largest ever damages case against the European Union on account of unlawful legislation.

Mr Pijnacker Hordijk has authored the leading Dutch commentary on public procurement law as well as numerous other publications. He lectures regularly. He is also a substitute judge in one of the four courts of appeal in the Netherlands.

*Chambers* says: 'Erik Pijnacker Hordijk stands out as a "brilliant" and experienced practitioner.'

**DOMINIC REBELO**

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Dominic Rebelo is a partner at Anjarwalla & Khanna. He has wide-ranging experience in competition, corporate mergers and acquisitions, capital markets, energy and natural resources. Prior to joining Anjarwalla & Khanna, he was a partner at Daly & Figgis Advocates.

Mr Rebelo has advised domestic, regional and international private and public listed companies on a variety of commercial transactions including antitrust concerns, share acquisitions, privatisations and public listings. He has also assisted a variety of foreign investors in setting up operations in Kenya.

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Ken Reinker is based in Cleary Gottlieb Steen & Hamilton LLP's Washington, DC office and practises in a broad range of antitrust matters, including litigation, mergers, cartels and counselling, across a broad range of industries.

Mr Reinker received his JD, *magna cum laude*, from Harvard Law School in 2006, where he was on the Harvard Law Review, and received his BS, *magna cum laude*, in economics from Duke University in 2003. Before joining Cleary, he clerked for the Honorable Michael Boudin of the US Court of Appeals for the First Circuit, served as a consultant with Harvard Professor Einer Elhauge on a wide variety of antitrust matters, and taught antitrust economics at Harvard as a teaching fellow.

**NUNO RUIZ**

*Vieira de Almeida & Associados*

Nuno Ruiz was a legal adviser to the European Law Department of the Ministry of Justice (1981 to 1982); assistant professor of international economic relations and community law at the University of Lisbon, Faculty of Law (1982 to 1997); assistant professor of competition law at the Institute for European Studies of the Portuguese Catholic University (1983 to 1992); member of the Portuguese Competition Council (1984 to 1998); assistant professor of competition law at the European Institute of the University of Lisbon, Faculty of Law (1985 to 1999). He has also been a legal adviser to the European Commission and to the United Nations in several programmes for the development of competition law in Latin America (1998 to 2001). He was a partner at Botelho Moniz, Magalhães Cardoso & Ruiz (1987 to 1999) and at PMBGR (1999 to 2001). He joined Vieira de Almeida & Associados in 2002 as partner, heading the EU and competition law practice.

**MAURICIO SERRALDE RODRÍGUEZ**

*Creel, García-Cuéllar, Aiza y Enríquez SC*

Mauricio Serralde Rodríguez is a partner at the competition and antitrust practice at the firm. He obtained his law degree (LLB) from the Instituto Tecnológico Autónomo de México in 2005. Mr Serralde has been recognised as an associate to watch in antitrust and competition by *Chambers Latin America* from 2011 to 2013, and in 2014 as a star associate, and selected in *Best Lawyers* since 2013, in the practice area of antitrust in Mexico. He joined the firm in 2005 and is a member of the Mexican Bar Association.

Mr Serralde is co-author of 'A tough sheriff', published in the *International Financial Law Review* in December 2006; 'Overcoming the Constitutional Difficulties: Recent Trends in Mexican Competition Law', published in *Latin Lawyer* in July 2006; 'Competition and antitrust developments in Mexico' published by *Euromoney* in 2012; and the 'Mexico'

chapters in *Cartel Regulation: Getting the fine down* in 2011; *PLC Cross-border Competition Handbook 2011*; *The Merger Control Review*, published by Law Business Research, in 2010, 2011 and 2012; *The Cartels and Leniency Review*, published by Law Business Research, in 2013, 2014 and 2015; *Immunity, Sanctions & Settlements*, published by Global Competition Review, in 2014 and 2015; and 'Mexico: New Antitrust Authorities and a New Federal Economic Competition Law', published by the *Journal of European Competition Law & Practice*, Oxford University Press in 2014.

**RAHMAT SS SOEMADIPRADJA**

*Soemadipradja & Taher*

Rahmat SS Soemadipradja is a founding partner of Soemadipradja & Taher (S&T), which he founded with Hafzan Taher in 1991. Mr Soemadipradja holds a Sarjana Hukum (bachelor of laws) degree from the Faculty of Law, University of Indonesia, Jakarta, majoring in commercial law, and an LLM (master of laws) degree from the University of Virginia School of Law. He is also a sworn translator of legal documents and a former lecturer at the University of Indonesia.

He has been practising law for over 25 years and is recognised as a leading lawyer in the Indonesian energy and natural resources area.

Mr Soemadipradja is recognised by *Who's Who Legal* as a leading mining lawyer, by *Chambers Global* as a leading lawyer in corporate and commercial law, by *Chambers Asia* as one of the leading individuals in projects and natural resources, and by *The Asia Pacific Legal 500* as a leading corporate and energy lawyer.

He is a founding member of the Indonesian Legal Consultants Association (AKHI), the Capital Markets Legal Consultants Association (HKHPM), and a member of the Indonesian Advocates Association (PERADI), Association of International Petroleum Negotiators (AIPN) and International Bar Association's (IBA) Section on Energy Environment Resources and Infrastructure Law (SEERIL) and an active member of the Mining Law Committee.

**PRUDENCE J SMITH**

*Jones Day*

Prudence Smith is a highly experienced competition law practitioner who advises clients on a full range of competition regulatory law issues. She has extensive experience in merger clearance, cartel and anticompetitive conduct investigations and litigation, ACCC immunities, authorisations and notifications of contracts affecting competition. Prudence's background includes more than 14 years at the Australian competition regulator (ACCC), many of those years as a senior ACCC internal lawyer.

**SONG YING**

*AnJie Law Firm*

Song Ying graduated from the University of Bonn in Germany with a doctoral degree in competition law and is a partner at AnJie Law Firm. She has extensive experience in representing multinational and domestic corporate clients in antitrust investigations and has advised clients in a broad range of sectors such as the internet, aviation, automobile, electronics, telecommunications, energy, household electrical appliances, infant formula, food and semiconductors. Also, Ms Song has filed many concentration notifications with the Ministry of Commerce of the People's Republic of China (MOFCOM) in respect of clients' transactions, and has also defended clients against competitors' objections. With in-depth experience in Chinese antitrust enforcement, Ms Song has also assisted many companies

with their antitrust compliance projects. She has also been involved in the drafting, advising, discussion and formulation of the supporting regulations of the Antimonopoly Law of the People's Republic of China (AML).

**NICOLAS J TAYLOR**

*Jones Day*

Nick Taylor advises clients on the full range of competition law matters. Nick's practice extends beyond his native Australia, and he has in-depth knowledge of many Asia-Pacific competition regimes. Nick has also worked with the Organisation for Economic Co-operation and Development (OECD) for several years as its representative on its joint venture with the Korean government, the OECD-Korea Regional Centre for Competition Law. During his time at the OECD, he organised training events for Asian competition authorities and judges.

Nick and Prudence have co-authored a number of pieces on misuse of market power provisions in Australia, including pieces with former ACCC chair, Professor Alan Fels AO. With Professor Fels AO, Nick and Prudence submitted a draft bill to the Harper Review calling for simplification of Australia's competition laws.

**EVA WARDEN**

*Baker & McKenzie LLP*

Eva Warden is an associate in Baker & McKenzie's global antitrust and competition practice group. She practises mainly in the area of antitrust and competition law, including merger control and compliance advising and training in a variety of industries. She joined the firm's Toronto office in 2011 and has also worked with the firm's EU competition and trade practice group in London.

**ANTOINE WINCKLER**

*Cleary Gottlieb Steen & Hamilton LLP*

Antoine Winckler is a partner based in the Brussels office and his practice focuses on European and French competition law. Mr Winckler has advised clients in numerous cartel, merger control and abuse of dominance cases.

Mr Winckler also has extensive experience in representing corporate clients and financial institutions, as well as governments and public entities, regarding EU state aid rules.

Mr Winckler regularly represents clients before the European Commission, the European Courts in Luxembourg, the French Competition Authority and the Court of Appeal in Paris.

Mr Winckler joined the firm in 1985 and became a partner in 1992. Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr Winckler was an administrative judge. He received law degrees from the Université de Nice Sophia Antipolis in 1984 and from the Institut d'études politiques de Paris in 1979. Mr Winckler graduated from the French Ecole nationale d'administration in 1983 and the Ecole normale supérieure in 1976.

Mr Winckler is a member of the Bars of Paris and Brussels, and teaches EU and French competition law at the Law School of the Institut d'études politiques de Paris. He has written extensively about EU competition law matters.

**THOMAS WOOLFSON**

*Cleary Gottlieb Steen & Hamilton LLP*

Thomas Woolfson is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Woolfson's practice focuses on EU and Belgian competition law, as well as other regulatory fields of EU law. Mr Woolfson graduated *magna cum laude* from the Université catholique de Louvain (UCL, Belgium) in 2010 and worked as a teaching and research assistant at UCL's Centre for international and European law before earning an LLM at New York University School of Law (2012). Mr Woolfson is a member of the Bars in New York and Brussels. His native language is French, he is fluent in English and has a working knowledge of Dutch.

**ZHAN HAO**

*AnJie Law Firm*

Zhan Hao is the managing partner of AnJie Law Firm. He has assisted many multinational and state-owned enterprises (SOEs) in concentration antitrust filings in China and to date he has secured approvals for all transactions he has represented. He has served in multiple fields, including automobile, energy, finance, machinery, electronics, textile, aviation high-tech and consumer goods.

Dr Zhan also has abundant experience in representing clients in antitrust investigations. For instance, he represented respondents in China's first antitrust investigation into price cartels and obtained suspension of the investigation.

Dr Zhan has successfully defended clients in antitrust litigation in Chinese courts and has also offered competition law training and conducted antitrust analysis for numerous companies, including Fortune 500 companies, listed companies and SOEs.

Dr Zhan has been extensively involved in the drafting, advising, discussion and formulation of the Antimonopoly Law of the People's Republic of China (AML) and its supporting regulations.

Dr Zhan has written many academic books on the AML and he has obtained a PhD in law and extensive experience in postdoctoral microeconomic research. He is an arbitrator of the China International Economic and Trade Arbitration Commission (CIETAC) and the vice president of the International Committee of the All China Lawyers Association.

## Appendix 2

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