

THE
DOMINANCE AND
MONOPOLIES
REVIEW

EIGHTH EDITION

Editors

Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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MONOPOLIES
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PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate ‘European champions’ to emerge: ‘We need to adapt the EU competition law: [It’s] too focused on consumer rights and not enough on EU champions’ rights.’

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that ‘competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.’ Similarly, Professor Joseph Stiglitz contends that ‘current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace’.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental, and other considerations (sometimes referred to as ‘hipster antitrust’).

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today’s problems result from too much ‘toxic’ competition overall, driven by ideologues, lobbyists, and privatisation, and that we need to promote a kind of ‘noble competition’, where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorientating the goals of antitrust policy away from the consumer welfare standard towards a broader societal test; reversing the burden of proof; per se bans on certain categories of conduct (including prophylactic controls on vertical integration); lowering the standard of judicial review; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly-evolving rules concerning abuse of dominance? Helpfully, this eighth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing an accessible and easily-understandable summary of global abuse of dominance rules. As with

previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime’s enforcement activity in the past year; and sets out a prediction for future developments. From those thoughtful contributions, we identify three notable points from last year’s enforcement.

Exploitative abuses pre- and post-covid-19

Exploitative abuses have in recent years enjoyed somewhat increased attention from regulators. The covid-19 pandemic intensifies that trend. It is leading to extreme demand and price volatility for certain products, as well as fluctuations in firms’ costs. As firms struggle to manage these changes, agencies are aggressively seeking to show they are preventing consumer exploitation during the crisis. Charging excessive prices or imposing unfair terms and conditions constitutes an abuse of dominance in many countries, including almost all OECD members. In the US, excessive prices are not in and of themselves a matter for competition enforcement at the federal level, but many states have laws that prohibit price gouging and the current administration recently issued an executive order designed to prevent hoarding and price gouging.

Governments across the world have indicated that they will remain vigilant to sudden and significant price hikes during the pandemic. For example, in March 2020 the European Competition Network issued a statement identifying excessive pricing as a particular concern during the outbreak, noting that ‘it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g., face masks and sanitising gel) remain available at competitive prices’. In a similar vein, on 27 March, Commissioner Vestager explained that ‘a crisis is not a shield against competition law enforcement’ and that the European Commission (EC) ‘will stay even more vigilant than in normal times if there is a risk of virus-profiteering’. Several national authorities have opened investigations or created task forces dedicated to preventing excessive prices during the crisis.¹

Even before covid-19, however, EU agencies were increasingly pursuing exploitation theories. In 2016, Commissioner Vestager stressed that the EC would seek to ‘intervene directly to correct excessively high prices’. So far, most recent exploitation cases have been in the pharmaceutical sector, but the French and German agencies have pursued exploitative abuse theories in the technology sector. We pick out four developments over the last year.

First, the Court of Appeal judgment in *Pfizer/Flynn*, discussed in the UK chapter of this book, brings helpful clarity to evidence required to bring an excessive pricing case. As a recap: in 2016, the Competition and Markets Authority (CMA) imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the Competition Appeal Tribunal (CAT) on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. In March 2020, the Court of Appeal upheld the CAT’s judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a ‘good result.’

¹ For further discussion, see Cleary Gottlieb, *Exploitative Abuse of Dominance and Price Gouging in Times of Crisis*, 31 March 2020.

In a nutshell, the Court of Appeal held that competition agencies have a ‘margin of manoeuvre’ in deciding how to prove their cases, including the ‘Cost Plus’ method that the CMA had used. Importantly, though, if a defendant adduces evidence that challenges the agency’s methodology (as the defendants did in this case), the agency should consider that evidence. The extent of the agency’s duty to consider the evidence adduced by the defendant will depend on the extent and quality of the evidence (i.e., there is no need to investigate each and every claim the parties bring up if those claims are not sufficiently substantiated). On the facts of the case, the Court held that there was an obligation on the CMA to evaluate the defendants’ evidence regarding the prices of phenytoin capsules because it was *prima facie* evidence that prices were fair.

Second, in the *Sanicorse* case, discussed in the France chapter, the Paris Court of Appeal annulled the French Competition Authority’s (FCA) decision of imposing a €199,000 fine on Sanicorse for imposing excessive price increases for medical waste treatment. The FCA had found that Sanicorse had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Repeating the dictum from the *United Brands* ruling, the Court emphasised that an exploitative abuse arises in a situation where a dominant firm ‘has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition’. The Court of Appeal found that the authority had failed to demonstrate that Sanicorse’s price increases were unfair, and it accordingly annulled the decision.

Third, in December 2019, the FCA found in its *Gibmedia* decision (also discussed in the France chapter of this book) that Google’s termination of three advertisers’ Google Ads accounts was abusive. The authority’s theory is that termination policies that allegedly lack objectivity and transparency, and are discriminatory, are a form of exploitation of customers. An apparent problem with the theory, however, is that a decision to terminate supply cannot, by definition, exploit the customer – it does not ‘reap a trading benefit’ from the trading partner, as required by *United Brands* and stressed by the Paris Court of Appeal in its *Sanicorse* decision.

Fourth, in February 2019, the Bundeskartellamt found that Facebook’s terms and conditions relating to its collection of user data constitute an abuse (discussed in the Germany chapter). The Bundeskartellamt held that Facebook’s terms and conditions, under which users agreed to the combination of their data from, for example, WhatsApp, Instagram and Facebook, violated the GDPR. Relying on German law principles that unlawful terms and conditions can constitute an abuse of dominance, the Bundeskartellamt held that Facebook committed an exploitative abuse by combining data from different sources. In August 2019, however, the Düsseldorf Court of Appeal granted suspensive effect to Facebook’s appeal against the decision, holding that there are serious doubts about its legality. The Court found that users are not exploited by Facebook’s use of data because, unlike financial payments, the data can be replicated and used again. Users freely decide whether to allow use of their data by balancing pros and cons of using ad-funded social network. The Court also held that the Bundeskartellamt had failed to prove the required causal link between Facebook’s abuse and its market power: it failed to show that Facebook’s terms deviated from the terms that would exist in a more competitive scenario. The judgment on the merits is pending.

Despite the renewed appetite to bring exploitation cases, these cases should in our view – in line with Advocate General Wahl’s warning in the *Latvian Banks* case – remain rare and

exceptional. Otherwise, there is a risk that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law and that require broader discussion outside individual cases.

A greater push for interim measures

The second notable development in abuse of dominance enforcement in 2019 was the EC's decision – for the first time in an antitrust case in almost 20 years – to impose interim measures on Broadcom (this decision is discussed in the EU chapter). The decision orders Broadcom to cease to apply exclusivity provisions in six agreements with manufacturers of TV set-top boxes and modems, while the Commission's full investigation continues. On announcing the decision, Commissioner Vestager stressed that interim measures decisions are 'so important', especially in 'fast-moving markets'. The Commissioner emphasised that she is 'committed to making the best possible use of this important tool' so as to enforce competition rules 'in a fast and effective manner'.

Like other developments at EU level, push for greater use of interim measures has been encouraged by national authorities, particularly in France, with the Commissioner citing France as a source of inspiration. The UK CMA has also stated that greater use of interim measures is 'essential if the CMA is to respond to the challenges thrown up by rapidly changing markets', and Germany is adopting new rules to accelerate proceedings and apply interim measures.

Two examples discussed in the French chapter illustrate the FCA's expansionist approach to interim measures, both in cases involving Google. First, in *Amadeus*, the authority found Google's decision to suspend the Google Ads accounts of a paid phone directory services operator to be an exploitative abuse (similar to the theory in the *Gibmedia* case discussed above). The Paris Court of Appeal subsequently partly annulled the decision. Second, in early 2020, the authority found that Google's refusal to pay news publishers for showing preview snippets in search results alongside a link to the publisher's site may also amount to an exploitative abuse. The decision orders Google to enter into good faith negotiations with publishers, although it also makes clear that the negotiations may result in zero monetary compensation to publishers (considering that Google sends traffic to the publishers that they can monetise via ads on their page or convert users to paid subscribers).

Several points of caution should be heeded from the appetite to bring interim measures cases. Interim measures decisions should focus on the most egregious and clear-cut abuses, such as exclusivity clauses by obviously dominant firms, rather than seeking to create new law or go against existing precedent. The efficiency and effectiveness of competition procedures should not come at the expense of investigative rigour, due process, and the right to be heard. Interim measures should not prejudice the final decision from the authority on the merits. Accordingly, they should be tailored to implementing measures that are possible in principle to reverse, if it subsequently turns out that on a full merits review there is no case to answer. Finally, the new appetite to impose interim measures should not slow down the speed of the main proceedings, as agencies get caught up duplicating investigations and satellite appeals.

Per se bans on self-preferencing

The third development is the wide-ranging proposals to overhaul competition rules to address the perceived challenges of the digital economy. Proposals in the pipeline include the EC's suggestion for further regulation of digital platforms; mandatory codes of conduct in Australia to address perceived bargaining power imbalances between platforms and media

companies; and, in the UK, the CMA's aim to develop 'a coherent and innovation-friendly approach to governing digital technologies to ensure their benefits are shared far and wide'.

Describing all these proposals is beyond the scope of the present editorial. We instead focus on one eye-catching suggestion: the suggestion – included in several of the reports commissioned by governments and agencies, such as the EU Special Advisors' Report, the Furman Report in the UK, the German ARC Amendments, and the Stigler Report – to introduce per se bans on digital platforms or companies that perform a 'regulatory function' from engaging in 'self-preferencing.' The reports, however, do not explain precisely what they mean by 'self-preferencing'. Self-preferencing is a generic expression that covers a range of different practices, for example, margin squeezing, tying and refusal to supply.

For example, keeping an indispensable asset to oneself and refusing to supply it to rivals is an example of abusive self-preferencing. But the refusal to deal in case law makes clear that it is, so far, not abusive for a dominant company to favour itself by reserving for its own use an asset that is not indispensable, but merely 'advantageous.' On the contrary, it is generally pro-competitive for companies to develop their own innovations, and use those innovations as the tools to compete against one another. As Advocate General Jacobs explained in *Bronner*:

it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business . . . Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it”.

This makes sense, for several reasons. First, there is an inherent contradiction between competition and duties to supply rivals; competition rules seek to encourage companies to compete vigorously against each other, not cooperate. Second, a duty to supply interferes with fundamental rights to dispose of property and to conduct business. Third, duties to supply reduce incentives to innovate for both the supplying company and the company that receives supply. Fourth, in industries with fast innovation cycles, a duty to integrate rivals into constantly-evolving technologies may delay – or preclude – new developments.

The Courts, therefore, only allow interference with the freedom to contract in exceptional and limited circumstances. By contrast, we are concerned that a per se ban on self-preferencing could have several unintended consequences: hampering vertical integration, which is presumptively efficient; eliminating synergies; and leading to delayed or mothballed product improvements.

Consider Google's introduction of a thumbnail map on its results pages in response to location-based queries: the UK High Court held that this was 'pro-competitive' and an 'indisputable' product improvement. Not only was Google's introduction of the thumbnail map not likely to harm competition, but the conduct was also objectively justified. This was because showing rival maps would have degraded the overall quality of Google's search services, for example, via delays in returning results. Under the contemplated presumptions against self-preferencing, however, companies would have to ask themselves before launching this type of improvement whether they could prove the negative (i.e., that it would not lead to long-run exclusionary effects). That appears to be a difficult threshold to cross before launch.

Accordingly, we believe we should be looking at measures that make a real improvement to consumer welfare and avoid chilling innovation and investment. Neat-sounding slogans – such as a presumptive and generic ban on self-preferencing – can prove harmful in practice.

As a recent CMA report into competition and regulation recognised, ‘greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.’ Similarly, in her speech on ‘Remembering Regulatory Misadventure’, FTC Commissioner Wilson recalled that attempts to prescribe ‘fairness’, ‘non-discrimination’, and ‘reasonable and just’ prices in the airline and railroad industries led to distortions of competition and restricted output. Removing these regulations ‘significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus’. This is not to say that regulation is not desirable for objectives other than fostering competition, but regulation to encourage competition is likely to result in outcomes that any pro-competition and pro-innovation regime should avoid.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this eighth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn

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London

June 2020

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 antitrust law in the United States. This Act was replaced by Act No. 12,906, which was in turn replaced by Act No. 22,262 in 1980.

The enforcement of Act No. 22,262 resulted in the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC), which focuses on targeting and sanctioning anticompetitive conduct.² Finally, on 25 August 1999, this Act was abrogated and replaced by Act No. 25,156, which was complemented by regulations regarding the procedures established in them.³ Some of the sections of Act 25,156 were modified in September 2014 under Act No. 26,993.

On 24 May 2018, a new Antitrust Law entered into force, Law No. 27,442 (the new Antitrust Law), which is the current law. On the same day, the new Antitrust Law was complemented by Decree No. 480/2018. This new Law has implemented substantial changes in the antitrust system, in both the analysis of anticompetitive conduct and merger control review. With this new Law, Argentina has moved forward as regards antitrust legislation.

Further to the aforementioned specific regulations, the Argentine Constitution promotes effective competition and efficiency among markets in Argentina and intends to protect consumers' welfare.

Currently, and with the enactment of the new Antitrust Law, the authority that will enforce the new Antitrust Law and its complementary regulations is the National Competition Authority (ANAC). Further, the Anticompetitive Conducts Trial Secretariat, the Economic Concentrations Secretariat and the Antitrust Tribunal will operate within this new independent authority. However, until the ANAC is established, the enforcement of the new Antitrust Law is in the charge of the Secretariat of Domestic Trade, with the aid of the CNDC, currently led by its president, Mr Rodrigo Luchinsky.

Further, the CNDC is also still the agency that investigates both anticompetitive conduct and merger and acquisition procedures as a formal requirement of the Secretariat, which has full power to investigate and decide on the existence of anticompetitive conduct, either at the request of a party or *ex officio*,⁴ until the ANAC is created.⁵

1 Camila Corvalán is a senior associate at Beccar Varela.

2 Section 6 of Act No. 22,262.

3 Resolutions 40/2001, 26/2006 and 164/2001.

4 Section 20 of the new Antitrust Law.

5 Section 80 of the new Antitrust Law.

The investigations of anticompetitive conduct or analyses of mergers and acquisitions made by the CNDC end with a non-binding recommendation to the Secretariat, which will make the final decision in the case, subject to analysis (this applies to both merger and acquisition reviews and investigation procedures). The decisions of the Secretariat may be appealed by parties to the judicial courts.

II YEAR IN REVIEW

In 2019, according to public sources,⁶ the antitrust authorities closed investigations in 26 anticompetitive cases. These 26 cases involved the analysis of claims and investigations of possible anticompetitive conduct (including but not limited to abuse of dominant position). According to the antitrust agency database⁷, the cases closed in 2019 were closed without fines, accepting the explanations given by the companies under investigation.

In 2019, the antitrust authorities, through the CNDC, opened two market investigations that concluded in pro-competitive recommendations.

In the first one, regarding the supermarkets sector⁸, the CNDC recommended:

- a* guaranteeing the predictability and transparency in the commercial relations between supermarkets and suppliers;
- b* facilitating the access to the market to new big suppliers' chains;
- c* establishing some mechanism that brings certainty regarding the prices that the suppliers will charge for the products purchased by big supermarket chains; and
- d* avoiding interference by the lead suppliers in the allocation of exhibition shelves or in the prices of their competition, among others.

In the second one, regarding the pharmaceutical market⁹, the CNDC concluded that:

- a* the distributors' activities have high entry barriers and a significant market power. However, most of the laboratories may easily choose between then or sell directly to the drugstores without great difficulties;
- b* drugstores and pharmacies may be unable to offer lower prices than those established by laboratories; and
- c* due to the particular competitive conditions of this market, the pharmaceutical market shall continue to be in the centre of attention of the CNDC.

Finally, it is worth mentioning that on November 2019, the CNDC published a report made by the OECD entitled 'Fighting bid rigging in the Procurement of Public Works in Argentina'. In this report, after examining the practices of the main public agencies in the topic (such as the Ministry of Home Affairs, Public Works and Housing, and the Ministry of Transport, among others), the OECD made the following recommendations:

- a* to design procurement procedures based upon appropriate information;
- b* to maximise participation of genuine competing bidders;
- c* to improve tender terms and contract awards criteria;
- d* to promote transparency, disclosure and integrity in submitting bids;

6 www.argentina.gob.ar/defensadelacompetencia.

7 https://www.argentina.gob.ar/sites/default/files/conductas-im-rp_resueltas_1.27.442_al_17.01.20.pdf.

8 'IM 5 – Investigación de mercado sobre las condiciones de competencia en el mercado de supermercados'.

9 'IM 4 – Investigación de mercado sobre las condiciones de competencia en el mercado de medicamentos'.

- e* raising awareness of the risk of bid rigging; and
- f* to detect and punish collusive agreements.

Further, it is worth mentioning that on November 2019, the CNDC published a report made by the OECD entitled 'Fighting bid rigging in the Procurement of Public Works in Argentina'. In this report, after examining the practices of the main public agencies in the topic (such as the Ministry of Home Affairs, Public Works and Housing, and the Ministry of Transport, among others), the OECD made the following recommendations:

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- c* to improve tender terms and contract awards criteria;
- d* to promote transparency, disclosure and integrity in submitting bids;
- e* raising awareness of the risk of bid rigging; and
- f* to detect and punish collusive agreements.

III MARKET DEFINITION AND MARKET POWER

According to Argentine legislation and usual practices, the analysis of anticompetitive acts, conduct or behaviour follows a procedure in which, as a first issue, the definition of the scope of the 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. Further to the analysis of the market shares of the companies, the antitrust authorities also focus their attention on barriers to entry, efficiency gains, technological advantages, chains of commercialisation and market power, among other things.

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 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 demand¹⁰ and supply¹¹ side.

10 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 goods and services offered by other companies. So that the replacement on the demand side is effective, consumers must evaluate the products as being 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 from those offered by other vendors. The degree of substitution given in these attributes is usually the result of a qualitative analysis that assesses the extent to which 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 or non-transitory manner.

11 Once current competitors are determined and identified on the demand side, the CNDC analyses a second aspect in its determination of the relevant market for the product associated with the probability of a new

Having reached the stage of defining the relevant market for a product, the next step is to do the same in geographical terms. Defining a geographic market involves the same considerations 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 new Antitrust Law applies to all behaviours that have effects in the Argentine territory. This means that the new Antitrust Law is applied not only to acts and behaviours that occur in the Argentine territory, but also to certain acts or behaviours that take place in other countries and that have effects on the Argentine market.

With the enforcement of the new Antitrust Law, certain practices are considered per se illegal; this is new in the Argentine antitrust system, taking into consideration that, before the enforcement of the new Antitrust Law, all anticompetitive conducts were analysed by the rule of reason criterion. These practices, which are considered per se illegal, must be deemed null and will not generate any kind of effect. Practices considered per se illegal are listed under Section 2 of the new Antitrust Law, as follows:

- a* fixing, directly or indirectly, the price of the purchase or sale of products or services;
- b* establishing obligations of manufacturing, distributing, buying or commercialising a limited amount of goods, or providing a limited number, volume or frequency of services;
- c* dividing, distributing or horizontally imposing areas, portions or segments of the markets, clients or supply sources; or
- d* establishing or coordinating submissions or abstentions in public tenders.

Section 1 of the new Antitrust Law establishes that acts or behaviours relating to the production or trading of goods and services that limit, restrict or distort competition or constitute abuse of a dominant position in a market in a way that may result in (potential or actual) damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of the Law.

Further, Section 3 of the new Antitrust Law provides a detailed list of anticompetitive conduct that could be considered unlawful by the competition authorities. The types of anticompetitive conduct that will be analysed by the rule of reason criterion are:

- a* fixing, agreeing or manipulating, directly or indirectly, the price for the sale or purchase of goods and services in the market, as well as exchanging information for the same purpose or to the same effect;

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 the following factors: 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 most important, the level of barriers to entry to the market.

- b* establishing obligations to produce, process, distribute, purchase or commercialise only a restricted or limited quantity of goods, or rendering a restricted or limited number, volume or frequency of services;
- c* agreeing upon the limitation or control of the technical development or investments bound to the production or commercialisation of goods and services;
- d* preventing or precluding third parties from entering or staying in a market, or excluding them from a market, or rendering this difficult;
- e* regulating goods or services markets, by agreeing to limit or control research and technological development, the production of goods or the rendering of services, or rendering difficult the investments bound to the production or distribution of goods and services;
- f* subordinating the sale of an asset to the acquisition of another or to the use of a service, or subordinating the rendering of a service to the use of another or the acquisition of an asset;
- g* submitting a purchase or sale to the condition of not using, acquiring, selling or supplying goods or services produced, processed, distributed or commercialised by a third party;
- h* imposing discriminatory conditions to the acquisition or alienation of goods or services, with no reason grounded on commercial uses and customs;
- i* refusing, without justification, to meet specific orders for the purchase or sale of goods or services, made in the conditions standing in the market involved; or
- j* suspending the supply of a dominant monopoly service in a market to a user of public utilities or public interest service.

The two basic offences under Section 3 of the new Antitrust Law are the limitation, restriction or distortion of competition or access to the market, and the abuse of dominant position. To be illegal, the two offences must be able to cause damage to the ‘general economic interest’;¹² this concept, while included in the new Antitrust Law, is not defined in the text of the Law, and has been interpreted, on several occasions, by courts and scholars in various ways. Currently, the undefined term ‘general economic interest’ is mostly likened to ‘consumer welfare’, which may be damaged if a conduct, act or behaviour has the potential to cause an increase in price or a reduction of the offer of the relevant product defined within the framework of an investigation.

Section 3 of the new Antitrust Law details 12 practices that are, to the extent that they fit in any event described in Section 1, anticompetitive. This list is not exhaustive; any conduct shall be considered anticompetitive when actions of Section 1 are involved.

Chapter 2, Section 5 of the new Antitrust Law is exclusively focused on dominant position. The definition of dominant position is stated in the new 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 supply or demand in the national market

12 This concept was confirmed by the Supreme Court of Justice in *In Re A Gas and Others v. AGIP Argentina SA and Others, concerning infringement of Act No. 22,262*.

*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.*¹³

To establish the effective existence of dominant position, Section 6 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, the offer of products or demand in the markets involved; and
- c* the extent that the allegedly responsible party may unilaterally have influence in the formation of prices or restrict the supply or demand in the market, and the extent to which its competitors are able to counterbalance such power.

Dominant position is not forbidden by the new Antitrust Law – the prohibition is only focused on the abuse of 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’.¹⁴ Further, in May 2019, the CNDC published a guide for the analysis of exclusionary abuse of dominant position. The aim of the guide is to establish different guidelines for foreseeable decisions.¹⁵

ii Exclusionary abuses

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

In general terms, and considering the provisions established in Section 5 of the new 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.

13 Section 5 of the new Antitrust Law.

14 Secretary of Trade, CNDC, *Clorox Argentina SA*, concerning infringement of Act No. 25,156 (case 1122).

15 www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_mayo_2019.pdf.

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 previously mentioned, there is no specific prohibition in the new 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, was in 2002.¹⁶

Yacimientos Petroliferos Fiscales (YPF) is one of the largest suppliers of liquefied petroleum gas (LPG) 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 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 from re-exporting the product into Argentina.

16 *National Commission for the Defence of Competition v. Yacimientos Petroliferos Fiscales.*

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

V REMEDIES AND SANCTIONS

i Sanctions

Penalties for anticompetitive conducts are detailed in Section 55 of the new Antitrust Law.

Infringements of the new 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, penalties for infringing the new Antitrust Law are determined as follows: fines will increase to the higher of:

- a 30 per cent of the turnover of the business associated with the infringement in the previous fiscal year, multiplied by the number of years of the infringement (the latter with a cap of 30 per cent of the total Argentine consolidated turnover of the infringing parties in the previous fiscal year); or
- b twice the amount of the economic benefit caused by the infringement.

In the event that both methods can be used, the method that achieves the higher amount for the fine will be used.

Further, if the foregoing criteria cannot be applied, fines will be imposed by the ANAC with a cap of 200 million *unidades móviles*.¹⁷ In the case of a repeat offence, offenders' fines may be doubled. As well as the fine, the ANAC may require the immediate ceasing of the acts or conducts and, if considered necessary by the ANAC, the removal of offenders' effects.

To determine the sanctions, the authorities take into account, among other things:

- a the loss suffered by all the individuals and companies that have been affected by the unlawful activity;
- b the benefit obtained by all the individuals and companies that were involved in the activity;
- c the market positions of the companies involved in the investigation;
- d the accounts of the companies involved in the investigation;
- e the duration of the conduct subject to investigation;
- f an estimation of the inflated prices generated by the conduct subject to investigation;
- g the characteristics of the products involved and their contribution to the welfare of society; and
- h the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The CNDC has stated in a precedent¹⁸ that when sanctioning collusive conduct, penalties should be established for an amount that 'may compensate society for the damage caused; and be superior to the benefits obtained by the companies involved in the case'.

17 The *unidad móvil* is a coefficient updated annually by the Argentine inflation index. The value of one *unidad móvil* is currently fixed at 40.61 Argentine pesos.

18 CNDC, *Oficina anticorrupción*, concerning an intervention request (case 1142), 4 December 2015.

The logic behind the pecuniary fine is that the imposition and the amount of the fine act as disincentives for those considering engaging in anticompetitive conduct.

In the case of a re-offence, 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 new Antitrust Law has been achieved, the Secretary of Trade may enforce conditions aimed at neutralising the distorting 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) performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of a 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 acts and behaviours forbidden by the new 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 new Antitrust Law may be declared null and void.

ii Behavioural remedies

As mentioned above, the antitrust authorities may enforce conditions aimed at neutralising the distorting aspects of competition or may ask a judge that the offending companies be dissolved, liquidated, deconcentrated or divided.

VI PROCEDURE

Abuses of dominant position cases usually occur through a filing made by any natural or legal person. Notwithstanding this, an investigation may also be initiated *ex officio* by the antitrust authorities.

Complaints must be filed before the antitrust authorities, detailing, among the formal requirements, the complaint subject, the facts that ground the complaint and the legal basis considered for filing the claim.

The procedure will be initiated by communicating the investigation to the denounced company, 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 company 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. Further, the authority may convene a public audience review at any step of the procedure if the investigation merits it or 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, interested parties may appeal it.

Despite this, the new Antitrust Law gives the opportunity for the denounced company 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

Regarding private enforcement, Section 62 of the new Antitrust Law provides that 'any person damaged by anticompetitive practices may bring an action for damages in accordance with civil law before a judge having jurisdiction over the matter'.

Two relevant cases that involved claims for damages, and had previously been sanctioned by the CNDC, were initiated as a consequence of anticompetitive conduct. One was a cartel case and the other focused on an abuse of dominant position.

The first¹⁹ was rejected by the judge for lack of legitimacy. In the second case,²⁰ the judge estimated that the damages amounted to 13,094,457 Argentine pesos plus the costs of the process.

The new Antitrust Law includes new provisions regarding private enforcement; the changes focus on establishing a more efficient and faster procedure. The parties in a case should file the claim once the administrative decision imposing a sanction is final. The administrative decision will be binding on the civil judge and the case will be heard under expedited procedural rules. Further, parties who have benefited from leniency applications will be exempted from civil liability. This last rule has the following exceptions: claims by defendants' purchasers or their direct and indirect suppliers, and cases in which the defendants could not obtain complete redress of their claim from parties who have not benefited from leniency applications.

VIII FUTURE DEVELOPMENTS

Further, as a first step after taking office as the president of the CNDC, Esteban Greco undertook CNDC internal audits. He has also released the results of internal audits that were performed with regard to anticompetitive conduct. Mr Greco acknowledged that the antitrust authorities in the past had failed to comply with the terms established under the new Antitrust Law as regards conduct and merger control cases. Specifically regarding anticompetitive cases, he has stated that conduct cases that were initiated with an aim differing from the protection of market competition will be dismissed and closed.

19 *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA and others.*

20 *Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA and others*, Supreme Court of Justice Decision of 2 October 2015.

Finally, as mentioned before, the new Antitrust Law created a new, independent competition authority, the ANAC, which is still not operational. In March 2019, by means of Resolution No. 84/2019, the Secretariat of Domestic Trade initiated the selection process for the candidates to constitute the ANAC. In October 2019, Resolution No. 638/2019 was issued, approving the list of nominees to fill the vacant positions.

The Executive Branch shall now appoint the new members of the competition authority with the approval of Congress. The former president of the CNDC, Esteban Greco, ended up as the frontrunner among the nominees. However, the new national administration led by Mr Alberto Fernández, appointed Mr Rodrigo Luchinsky as the new President of the CNDC until the new competition authority starts to operate.

AUSTRALIA

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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 engaging in conduct that has the purpose or likely effect of substantially lessening competition in the market in which the corporation² has market power or in any other market in which the corporation supplies or acquires the goods or services.

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. It should also be noted that it is not a contravention for a corporation to have, or to merely exercise, its market power: see, for example, the decision of the Privy Council in *Commerce Commission v. Carter Holt Harvey Building Products Group*³ in relation to a similar provision under the NZ Commerce Act 1986:

The law of New Zealand does not disable a trader who is in a dominant position in a market from competing with other traders in that or any other market. It is open to the trader to compete on price as well as quality so long as he does not use his dominant position for the purposes of producing an effect which is anti-competitive . . . More over the trader is entitled, before he enters upon a line of conduct which is designed to affect his competitors, to know with some certainty whether or not what he proposes to do is lawful . . . The question which lies at the heart of the appeal to the Board is how, in this difficult area, lawful conduct can be distinguished from unlawful conduct.

Predatory pricing will contravene Section 46 if engaged in by a corporation with market power and with the likely effect of substantially lessening competition in any relevant market, or where that is its purpose.

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2 Through corresponding legislation enacted by each of the Australian states equivalent provisions also apply to persons other than corporations. References to corporation throughout this chapter should, therefore, be read to apply equally to all other types of entities carrying on a business.

3 *Commerce Commission v. Carter Holt Harvey Building Products Group* [2007] AU ER (D) 235 (Jul).

Previous versions of the provision

On 6 November 2017, an amendment to Section 46 of the CCA came into effect. The amended provision is unchanged to the extent that it requires that it be established that a corporation has a substantial degree of power in a market. From that point on, the provision has changed. Formerly, the requirement of Section 46 was that a corporation take advantage of that market power for a prescribed purpose: eliminating or substantially damaging a competitor; preventing the entry of a person into that or any other market; or deterring or preventing a person from engaging in competitive conduct in that or any market.

Following the amendment, the focus has shifted from proscribed purposes to whether the conduct itself substantially lessens competition or has that purpose. Specifically, the CCA prohibits corporations that have a substantial degree of market power from engaging in conduct that has the purpose, or likely effect, of substantially lessening competition in a market in which the corporation has market power; in any other market in which the corporation has market power; or in any other market in which the corporation supplies or acquires goods or services.

The CCA previously contained two provisions prohibiting predatory pricing that were both repealed in November 2017. Such conduct is now subject to the general provisions.

Until November 2017, Section 46 provided that corporations with a substantial degree of market power could not use that power, in any market, for the purpose of:

- a substantially damaging or eliminating a competitor;
- b substantially damaging or eliminating competitors generally, a class of competitors or any particular competitor; or
- c preventing or deterring anyone from engaging in competitive conduct in any market.

To make out a contravention, an applicant had to establish that a corporation was using its market power (as opposed to any other power), and that it was doing so for a proscribed purpose. This was established by assessing the way in which the corporation would have acted in a competitive market, or how a profit-maximising firm functioning in a competitive market would have acted.

The provision was focused on the purpose for which the market power was used or was intended to be used, instead of whether conduct had an anticompetitive effect.⁴

The amendment followed recommendations in which it was proposed to expand the ‘purpose’ element to a ‘purpose, effect or likely effect’ test; remove the ‘take advantage’ element; and shift the legislative focus from damage to a specific competitor to damage to the competitive process itself.⁵

The proposed Competition and Consumer Amendment (Misuse of Market Power) Act 2017⁶ passed the House of Representatives on 28 March 2017 and came into effect on 6 August 2017. These amendments were in part intended to remedy a significant perception that the Australian Competition and Consumer Commission (ACCC) has not been able to bring enough Section 46 actions under the previous form of the prohibition, and of those

4 In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* [1989] HCA 6; (1989) 167 CLR 177; 83 ALR 577; 63 ALJR 181; (1989) ATPR 40-925.

5 2015 Australian Competition Policy Review Final Report.

6 The Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Act 87 of 2019).

that it has brought, it has had a relatively low success rate.⁷ The ACCC itself had been a vocal supporter of changes to Section 46, with Chairman Rod Sims stating that the prohibition was ‘almost unusable’ in addressing misuse of market power by dominant corporations.⁸

II YEAR IN REVIEW

While it was anticipated that the amended Section 46 provision would result in a significantly higher number of cases being brought by the ACCC, this has not been the case. Prior to 2019, no cases had been brought by the ACCC under the new provision.

The ACCC brought its first case under the amended Section 46 provisions in December 2019, instituting Federal Court proceedings against Tasmanian Ports Corporation Pty Ltd (TasPorts) alleging that TasPorts had engaged in conduct in breach of Section 46 by seeking to prevent Engage Marine Tasmania Pty Ltd (Engage Marine) from competing effectively in providing towage and pilotage services in Tasmania.

The ACCC alleges that in response to Engage Marine’s attempted entry into the Tasmanian market, TasPorts:

- a* imposed new charges which would require Engage Marine’s sole customer to pay A\$750,000 in fees to TasPorts after the customer switched service providers from TasPorts to Engage Marine;
- b* prevented Engage Marine from expanding in Australia by failing to provide long term berths for its boats and refusing to place it on the shipping schedule, which is necessary for it to provide towing services; and
- c* prevented Engage Marine from providing pilotage services by failing to provide training to Engage Marine’s employees, which only they could provide.

The claim alleges that:

- a* TasPorts has a substantial degree of power in the markets for the supply of marine services in Tasmania;
- b* in engaging in this behaviour, TasPorts was attempting to prevent or hinder Engage Marine from competing effectively with its marine pilotage and towage businesses in the relevant markets;
- c* TasPort’s actions were driven by an anticompetitive purpose, with the purpose, effect and likely effect of substantially lessening competition; and
- d* TasPort’s actions substantially lessened competition in the relevant markets by denying Grange and other Tasmanian customers the benefits of competition in the supply of marine services in this market.

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 M Hefernan ‘Misuse of market power laws “almost unusable”, ACCC chairman Rod Sims says’, *Sydney Morning Herald*, 30 April 2017.

The ACCC is seeking injunctions, declarations, penalties and costs. In a defence filed in March 2020, TasPorts admitted to charging additional fees to the owner of the local port, but has denied that those actions constituted a misuse of market power and that they substantially lessened competition in Tasmania.⁹ The trial has been tentatively set for February 2021.

In its claim, the ACCC has made use of the broader ‘effects’ test post-amendment, claiming that in addition to having a purpose of substantially lessening competition, the actions also had the effect or likely effect of doing so. The outcome of this proceeding is likely to provide further clarity on the interpretation of the amended provision, and is also likely to influence the appetite of the ACCC to instigate further proceedings pursuant to Section 46 in the future.

Since the amended rule was introduced, the larger portion of cases invoking Section 46 that have come before the courts have been a result of private actions. As a result, there were several judgments in respect of private actions considering Section 46 in 2019.

- a Of particular note was the decision in *B&K Holdings (Qld) Pty Ltd v Garmin Australasia Pty Ltd*,¹⁰ the first to consider the amended Section 46 provisions. The Court considered an application for summary judgment on a claim regarding predatory pricing practices alleged to have been engaged in by Garmin. The application was unsuccessful, as the Court was not satisfied that B&K Holdings had no reasonable prospects of succeeding at trial. In relation to the amended Section 46 as it relates to predatory pricing, the Court noted that ‘If a business with substantial market power utilises it for the purposes of substantially lessening competition by engaging in below cost pricing, the mere fact that the cessation of that conduct will cause prices to increase does not immunise the conduct.’¹¹
- b The applicants in *Black & White Cabs Pty Ltd & Ors v Regent Taxis Limited*¹² and *RSA Express Pty Ltd v Aaron Guilfoyle, Work Health and Safety Prosecutor*¹³ sought interlocutory injunctions, relying on the amended Section 46. Both applications were dismissed due to the applicants’ failure to establish a prima facie case. In *Black & White Cabs*, while it was accepted that the respondent had a substantial degree of power in the market, the applicants had not demonstrated any substantial lessening of competition.¹⁴
- c Further proceedings seeking to rely on Section 46 of the CCA dealt with the issue in a summary way. In *Zaghloul v Jewellery and Gift Buying Services Pty Ltd & Anor*,¹⁵ the Court considered that there was no breach of the consumer law or oppressive conduct by the respondent; and in *Zierholz@UC Pty Ltd v University of Canberra* [2019] ACTSC 310, the Court noted that while the respondent had a substantial degree of market power, there was no evidence that this market power had been used at all, noting that even if it had been used, it would have needed to have been used for a proscribed purpose (pursuant to the previous formulation of Section 46).

9 M Bolza, ‘TasPorts slams ACCC case, says extra fees don’t amount to misuse of market power’, Lawyerly, 31 March 2020.

10 *B&K Holdings (Qld) Pty Ltd v Garmin Australasia Pty Ltd* [2019] FCA 64.

11 *ibid* at [29].

12 *Black & White Cabs Pty Ltd & Ors v Regent Taxis Limited* [2019] QSC 50.

13 *RSA Express Pty Ltd v Aaron Guilfoyle, Work Health and Safety Prosecutor* [2019] FCA 1605.

14 *Black & White Cabs Pty Ltd & Ors v Regent Taxis Limited* [2019] QSC 50 at [39].

15 *Zaghloul v Jewellery and Gift Buying Services Pty Ltd & Anor* [2019] ACTSC 310.

A decision was recently handed down in *ACCC v Ramsay Health Care Australia Pty Ltd*,¹⁶ a proceeding brought by the competition regulator alleging that Ramsay had contravened Sections 46 and 47 of the CCA (as they stood in August–September 2015) which prohibited misuse of market power and exclusive dealing. The ACCC alleged that in four pleaded conversations, Ramsay conveyed words to the effect that if certain surgeons were to open a new day surgery in Coffs Harbour, their access to operating theatre time at Ramsay’s private hospital in Coffs Harbour ‘would be substantially reduced or entirely withdrawn’.

With respect to misuse of market power, the ACCC needed to establish that Ramsay had a substantial degree of power in a market. The Court favoured the view of the ACCC which provided a purposive approach.¹⁷ Griffith J accepted that there was a market in which private hospitals competed to attract surgeons. Upon finding that there were no close competitors in the relevant market, a high barrier to entry to the market, and that Ramsay was not constrained by surgeons, the Court concluded that Ramsay did possess a substantial degree of market power (which was corroborated by Ramsay’s own internal documents).

The second and third limbs of the previous Section 46 provision required the ACCC to establish that Ramsay took advantage of its substantial market power for a proscribed purpose. The Court distinguished between the purpose and motive of conduct and cautioned that the two were not to be equated, holding that ‘purpose’ relates to the end sought to be accomplished by the conduct.¹⁸ In order to establish that a corporation took advantage of substantial market power for a proscribed purpose, the Court held, and the ACCC accepted, that a corporation must ‘use’ that market power to engage in impugned conduct.¹⁹ On this point, however, the Court refrained from making any findings given that it had already found that no communications to the effect alleged by the ACCC had taken place. However, even upon the assumption that the alleged contravening conduct did occur, the Court opined that Ramsay’s alleged conduct (if it did occur) would have been justified by legitimate business rationale (including considerations of economic profitability, and balancing day and overnight surgery).

Considering exclusive dealing, the Court clarified that the practice of exclusive dealing involves supply upon condition, and that conditions need not be legally binding but must have ‘attributes of compulsion and futurity’.²⁰ In light of this, the ACCC failed to establish that Ramsay offered to supply services to surgeons on condition that they not acquire services from a competitor. The alleged contravention was framed as a threat to revoke or withdraw operating theatre lists in the event a competitor entered the market (an event which was at least two or three years in the future). The Court held there could not exist a supply or offer to supply services on the condition that surgeons would not acquire services from a competitor in circumstances ‘where there were no services to acquire and there was no competitor’.²¹

16 *Australian Competition and Consumer Commission (ACCC) v Ramsay Health Care Australia Pty Ltd* [2020] FCA 308.

17 *ibid* [339].

18 *ibid* [388] citing *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, [18].

19 *ibid* [391].

20 *ibid* [422].

21 *ibid* [425].

Proceeding to nonetheless consider whether there was likely to be a substantial lessening of competition, the Court found against the ACCC on the evidence, given that even after the relevant pleaded conversations, the surgeons continued to explore planning the new day surgery for many months.

Active competition authority cases

The active competition authority cases are set out in the following table.

Sector	Investigating authority	Conduct	Case opened
Ports and infrastructure	ACCC	Alleged misuse of market power in relation to conduct by Tasmanian Ports Corporation, which sought to prevent a new entrant, Engage Marine Tasmania, from competing effectively	December 2019

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(8)(b) and 4E of the CCA provide that, for the purposes Section 46, a reference to ‘market’ is a reference to a market for goods or services, and 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 is a market in Australia.

Given the definition of market in the CCA, analysis focuses initially on the identification of substitutes. Both the ACCC and the Australian courts often commence an analysis of the borders of a market using the hypothetical monopolist test (HMT).²² The HMT examines the effect of a small but significant non-transitory increase in price by 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.²³ This analysis consists of physical characteristics and portability in addition to 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 many 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. Market shares are helpful in identifying the degree of market power;

²² 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].

²³ ACCC’s Merger Guidelines.

however, a large market share does not necessarily mean that a corporation holds a substantial degree of market power. Section 46(7) provides that more than one corporation may have a substantial degree of market power in a market. Australian courts place significant focus on the existence and scale of barriers to entry in determining to what extent an entity possesses market power.²⁴ Courts have also placed weight on other evidence of related but distinct indications of market power,²⁵ including:

- a the ability of the firm to raise prices above the supply cost without rivals taking away customers in due time;
- b the extent to which a 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);²⁶ and
- d the existence of vertical integration.

In its interim guidelines for market power, the ACCC indicates that market power exists where a firm can only engage in the conduct in question absent competitive constraint. This freedom, the ACCC notes, can be assessed having regard to the factors indicated in *Queensland Co-operative Milling Association Limited and Defiance Holdings Limited*:

- a the number and size of distribution of independent sellers, especially the degree of market concentration;
- b the height of barriers to entry; that is, the ease with which new firms may enter and secure a variable market;
- c the extent to which the products are characterised by extreme product differentiation and sales promotion;
- d the character of 'vertical relationships' with customers and suppliers, and the extent of vertical integration; and
- e the nature of any formal, stable and fundamental arrangements between firms that restrict their ability to function as independent entities.²⁷

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',²⁸ or put another way, 'large or weighty' or 'considerable, solid or big'.²⁹

Courts have held that merely because a corporation is not profitable does not mean that it lacks market power.³⁰ Financial power is also not evidence of market power.³¹

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

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

26 A market share of 30 per cent has been referred to as indicative of market power in *Boral Besser Masonry Ltd v. ACCC* [2003] HCA 5; 215 CLR 374.

27 (1976) 8 ALR 481, 512.

28 *Mark Lyons Pty Ltd v. Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581.

29 *Dowling v. Dalgety Australia Pty Ltd* (1992) 34 FCR 109.

30 *Seven Network Ltd v. News Ltd* (2009) FLAFC 166; (2009) 262 ALR 160; 282 FCR 160; (2009) ATDR 42-301.

31 *NT Power Generation Pty Ltd v. Power & Water Authority* [2004] HCA 48; (2004) 219 CLR 90; 210 ALR 312; 79 ALJR 1; (004), ATDR 42-201.

Since the amendment, the provision no longer explicitly provides that a corporation with a substantial market share is prohibited from supplying, or offering to supply, goods or services for a sustained period at below the relevant cost of supplying goods or services where the corporation's purpose was to substantially damage or eliminate a competitor, competitors generally, a class of competitors or any particular competitor; or prevent or deter anyone from engaging in competitive conduct in any market. Such conduct will now be subject to the general prohibition.

iii Purpose or likely effect of substantially lessening competition

Substantial market power

For the provision to apply, it is necessary to establish that a corporation has substantial market power. Such market power can be described to be 'considerable', 'big' or 'not merely nominal'.³² The explanatory memorandum accompanying the bill introducing the concept in 1986 indicated that substantial was to be regarded as 'large or weighty' or 'considerable, solid or big'.³³

While the introduction of the competition test is recent for the operation of Section 46, the test is well established in the Australian legal landscape in relation to anticompetitive contracts, arrangements or understandings, and mergers or acquisitions, which have all been prohibited where the conduct concerned has been likely to result in a substantial lessening of competition for some time. These authorities are informative as to the likely approach of the courts in relation to application of the test in the context of Section 46.

The ACCC, in its interim guidelines, has observed that 'conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deferring, preventing or limiting competition. This can be done by raising barriers to entry or to entry into a market'.³⁴ As noted elsewhere in this chapter, 'substantial' must be meaningful to the competitive process.^{35, 36} The ACCC identifies at Paragraph 2.26 of its interim guidelines that lessening competition means that the field of rivalry is diminished or lessened, or that the competitive process is compromised or impacted. The ACCC notes that the commercial rationale for the conduct will be relevant to the assessment.³⁷

IV ABUSE

i Overview

The prohibition in Section 46 requires not only satisfaction of the elements of market power and engaging in conduct with the purpose or likely effect of substantially lessening competition.

Section 46(4) provides the following non-exhaustive list of factors the court may consider to determine whether a corporation has taken advantage of market power:

32 See *Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees Union* (1979) 27 ALR 367; (1979) ATPR 40-138.

33 See also *Eastern Express Pty Ltd v. General Newspaper Pty Ltd* (1992) 106 ALB 297; 35 FCR 43; (1992) ATPR 4-16 at 63 (FCR).

34 ACCC, Interim guidelines on misuses of market power; 6 November 2017, Paragraph 2.22, p. 8.

35 *ibid.* at Paragraph 2.27.

36 See *Stirling Harbour Pty Ltd v. Bunbury Post Authority* [2000] FCA 38.

37 *ibid.* at Paragraph 2.27.

- 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.

ii Purpose

The purpose element in Section 46(1) will be established where it can be shown merely that there is an intention to achieve a result,³⁸ rather than the fulfilment of that intention.³⁹

While courts have taken a range of approaches to determining purpose, including assessing conduct on a subjective basis,⁴⁰ it appears likely that the position going forward is that, while there are subjective elements to assessing purpose, the ultimate test is objective.⁴¹ In the *Telstra Corporation* case, the Federal Court placed weight on the requirement, which provides that the court may find that a corporation's purpose where that purpose is ascertainable only by inference from the corporation's conduct or 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 the conduct, it can be said that the substantial purpose for that conduct was to substantially lessen competition, or if such a purpose can be inferred, it is not necessary to consider the subjective reasons for the conduct.⁴²

To contravene Section 46(1), the proscribed purpose need not be the sole purpose of the conduct, merely a substantial purpose.⁴³ If the conduct was motivated by both a legitimate purpose and purpose to substantially lessen competition, and both are substantial purposes, the corporation will have contravened Section 46(1).⁴⁴ However, Section 46(1) will not be contravened where a corporation was motivated entirely by a legitimate purpose, or dual purposes where the purpose of substantially lessening competition was not substantial.⁴⁵ 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.⁴⁶

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

39 *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].

40 *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].

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

42 *ibid.* at [71].

43 CCA Section 4F.

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

45 *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.

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

iii Exclusionary abuses

Predatory pricing

Predatory pricing will now be dealt with under the general misuse of market power prohibition in Section 46(1), and will be prohibited if engaged in by a corporation with market power, and the purpose or likely effect of the conduct substantially lessens competition in any relevant market. Conduct will be considered predatory pricing if the corporation has market power and is selling below cost. Typically, the conduct drives competition from the market, following which the offender will increase its price and recover its losses. As per Finkelstein J in *ACCC v. Cabcharge Australia Limited*:

Firms engage in predatory pricing 'to drive rivals out of business and scare off potential entrants' . . . Then, they raise prices, capturing monopoly oligopoly rents.
*Once firms gain monopoly/oligopoly power, it is often extremely difficult to take that power away and firms are likely to be deterred from entering the market because they know that the incumbent has the ability to undercut them and to engage in predatory pricing.*⁴⁷

To establish that a firm has engaged in predatory pricing in contravention of Section 46, two questions will arise. First is assessing when will the price be sufficiently low to be regarded as predatory. In relation to costs, the courts have yet to settle on the appropriate costs measure to establish predatory pricing. In *Eastern Express Pty Ltd v. General Newspaper Pty Ltd*,⁴⁸ the court found that no specific category of pricing tends to imply a misuse of market power. On the question of recoupment, the Australian courts have not yet established that recoupment is necessary to establish a contravention. In *Boral Besser Masonry Ltd*⁴⁹ v. *ACCC*, per Gleeson CJ and Callinan JJ, 'While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of Section 46, it may be of factual impertinence'.⁵⁰ Accordingly, although not a necessary precondition to establishing a contravention, the ability to recoup may be an indication of market power.

Margin squeeze

While there is no judicial precedent, a possible theory of harm of a 'price squeeze' that may fall within Section 46(1) suggests 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.⁵¹

47 *ACCC v. Cabcharge Australia Limited* [2010] FCA 126; (2010) ATPR 42-331.

48 (1992) 106 ALR 297; 35 FCR43; (1992) ATPR 41-167.

49 Now Boral Masonry Ltd.

50 (2003) HCA 5; (2003) 215 CLR 374; 195 ALR 609; 77 ALJR 623; (2003) ATPR 41-915.

51 CCA Section 47(1).

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 a refusal to supply one of a number of competing retailers in a generally competitive market.⁵²

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

- 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 a person to whom a 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);⁵³ 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 a 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).⁵⁴

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.⁵⁵

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 a 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

The general position is that there is no obligation to deal with everyone seeking to deal. Operators have the freedom to choose whom they deal with, and under what conditions. This is subject to the prohibition in Section 46. To contravene Section 46(1), there must be a connection between a refusal to deal and market power. A court considers the business rationale for the refusal, and whether a corporation would have refused to deal even if it was 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 this dealing, a court may require evidence of some change in circumstances justifying the refusal to continue that relationship. The court will also need to be persuaded that the purpose or likely effect of the conduct is to substantially lessen competition in a relevant market.

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

53 CCA Section 47(6).

54 CCA Section 47(7).

55 CCA Section 93.

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.

Refusal to license intellectual property rights can also attract Section 46(1) if the criteria are met.⁵⁶

iv 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 1995 following a government report concluding that price discrimination generally enhances economic efficiency except in cases otherwise falling within Section 46.⁵⁷ Price discrimination will only be prohibited if there is a misuse of market power where the purpose or likely effect of the conduct is the substantial lessening of competition in a relevant market. 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).

v 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 have the purpose or effect of substantially lessening competition.⁵⁸

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-bars at an 'excessively high' price, which would have made it impossible for QWI to compete with BHP in the downstream rural fencing products market.⁵⁹

V REMEDIES AND SANCTIONS

i Sanctions

Section 76 of the CCA provides that a contravention of a provision of Part IV (on 'restrictive trade practices'), including Section 46, can lead to pecuniary penalties of the largest of the following: A\$10 million; 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 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.⁶⁰

For an individual, a penalty of up to A\$500,000 may apply.

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

57 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.

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

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

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

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.⁶¹

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.

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;⁶²
- b* non-punitive orders, being:
 - community service orders;
 - probation orders;
 - orders for disclosure of information; and
 - orders requiring the offender to publish an advertisement on the terms specified in the order;⁶³
- c* an adverse publicity order in relation to a person who has been ordered to pay a fine for a contravention of Section 76;⁶⁴ and
- d* a disqualification order preventing a person from managing corporations for a period the court considers appropriate.⁶⁵

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.⁶⁶

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.⁶⁷ 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.⁶⁸

61 CCA Section 82.

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

63 CCA Section 86C.

64 CCA Section 86D.

65 CCA Section 86E.

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

67 CCA Section 87(1).

68 CCA Section 87(2).

iii Structural remedies

The CCA does not currently provide any structural remedies for contraventions of Section 46.⁶⁹

iv Statutory immunity

The ACCC guidelines on misuse of market power provide that parties can seek authorisation of conduct that would potentially breach Section 46 of the CCA.

Authorisation provides protection against legal action for future conduct, and parties can apply to the ACCC for authorisation where they believe that there is some risk that the conduct they propose to engage in would or may breach Section 46 and they require the certainty provided by an authorisation to undertake the activity.⁷⁰

Authorisation requires that the applicant satisfy the ACCC that the proposed conduct is either unlikely to substantially lessen competition or that it is likely to result in a net public benefit.

VI PROCEDURE

The ACCC is Australia's peak competition and consumer protection 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 and 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,⁷¹ and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

The ACCC also has the option to seek 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.

69 CCA Section 81.

70 Australian Competition and Consumer Commission, 'Guidelines on misuse of market power', August 2018, page 17.

71 CCA Section 155(7).

Recent amendments to this provision provide that a ‘reasonable search’ may provide a defence to compliance with such a notice. While this addition is yet to be subject to judicial consideration, the search need only extend to information in the addressees’ knowledge or control.

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. An 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.

However, few cases concerning breaches of Section 46 have been fully litigated, as commencement of legal proceedings often encourages parties to resolve a matter by negotiating and settling a statement of agreed facts and consent orders.⁷²

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.⁷³ Further, while it is increasingly common for high-profile ACCC proceedings to trigger subsequent private damages suits (in ‘piggy-back’ proceedings),⁷⁴ these were historically limited in number.

The reframing of Section 46 to include an ‘effects test’ was 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. Interestingly, the provisions have not been significantly utilised by the ACCC, with the first case under these provisions being brought in December 2019, and private actions have been the main avenue for cases invoking Section 46 coming before the courts as noted in Section II.

⁷² See, for example, *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489.

⁷³ C Beaton-Wells and K Tomasic, ‘Private Enforcement of Competition Law: Time for an Australian Debate’ (2012) 35 *UNSW Law Journal* 648.

⁷⁴ C Beaton-Wells and K Tomasic, ‘Private Enforcement of Competition Law: Time for an Australian Debate’ (2012) 35 *UNSW Law Journal* 648, 649.

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 owing to the conduct of another party in contravention of Section 46.⁷⁵ 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 46.⁷⁶ 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.⁷⁷

iii Calculation of damages

Courts are largely guided by general common law principles in assessing damages.⁷⁸ To rely upon Section 82, the person must have suffered actual loss or damage (thus, potential damage is not sufficient).⁷⁹ 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.⁸⁰

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.⁸¹ A collective action may be commenced only if seven or more persons have claims against the same person; the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and all the claims give rise to a substantial common issue of law or fact.

75 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).

76 CCA Section 80(1).

77 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 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 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]).

78 *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.

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

80 *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).

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

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.⁸² 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, although 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.

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). Thus, they 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 it has 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

With respect to enforcement going forwards, the Chairperson of the ACCC, Rod Sims has indicated that misuse of market power will remain a focus for the regulator in 2020, stating that ‘We will continue to pursue companies that we consider use their market position to harm competition and consumers, and are expecting to deal with further matters involving the amended section 46 misuse of market power prohibition in 2020.’⁸³

It is likely that the question of market power which may be alleged to be held by digital platforms, will be a particular focus for the ACCC in the near future. In August 2019, the ACCC delivered its final report following an 18-month inquiry into digital platforms.

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

83 R Sims, ‘Australia: Competition and Consumer Commission’, *Asia-Pacific Antitrust Review 2020*, Global Competition Review, 27 March 2020.

The report highlighted the substantial market power enjoyed by Google and Facebook, and warns of the ability and incentive of these platforms to favour their own business interests. The report identified that Google and Facebook hold substantial power in crucial digital markets (Google for its general search and search advertising services, and Facebook for its social network and display advertising services), and that this poses a risk to competitive processes.

The ACCC has indicated that a major area of focus going forward will be consumer protection in the digital space. In its final report, the ACCC recommended that mandatory codes of conduct be developed to govern relationships between digital platforms and media businesses.⁸⁴ In addition, it has indicated a commitment to building its capacity to aggressively enforce the competition rules as they relate to digital platforms, recommending the government establish a specialist branch within the ACCC, with the role of proactively monitoring digital platforms and identifying potentially anticompetitive conduct, or conduct that may breach Australian consumer laws.

84 Australian Competition and Consumer Commission, 'Digital Platforms Inquiry: Final Report', June 2019, page 32.

AUSTRIA

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I INTRODUCTION

The Austrian legal regime regulating market dominance is set out in Part II (Sections 4 to 6) of the Austrian Cartel Act (KartG), stipulating the prohibition on abusing a (single or collective) dominant position and retaliation measures imposed by dominant companies against companies initiating cartel court proceedings or lodging a complaint with the Federal Competition Authority (FCA) and the Federal Cartel Prosecutor (FCP) (together the Official Parties). Further, abusive behaviour of companies having ‘relative’ market power in relation to their suppliers or customers is also prohibited.

In addition to the general provision prohibiting abuse of a dominant position, Section 5 KartG also contains examples of abusive behaviour: the examples in Section 5, Paragraph 1, Nos. 2 to 4 KartG are based on Article 102, Letters b to d of the Treaty on the Functioning of the European Union (TFEU). Section 5, Paragraph 1, No. 1 KartG does not follow the exact wording of Article 102 Letter a TFEU, but prohibits requesting prices or other conditions that differ from those prices or conditions that would exist under a functioning competitive environment.

Another distinct characteristic of Austrian antitrust law is the specific (rebuttable) statutory presumptions of dominance based on market shares (Section 4 KartG), which are stricter than the market dominance presumptions developed by the EU institutions in the case law of Article 102 TFEU.

In addition, even for companies not holding a dominant position, the Austrian Act on Local Supply and Improvement of Competition Conditions (NahversorgungsG) contains specific provisions governing certain types of unilateral behaviour such as dissimilar trading terms.

In Austria, there exists no formal guidance on the application of the statutory rules on abuse of a dominant position in general. However, guidance can be derived from the case law of the cartel court (Higher Regional Court of Vienna (OLG) and the Supreme Court acting as a higher and appellate cartel court (OGH)). Moreover, the FCA has published

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sector-specific notices on market dominance in the field of funeral services,² motor vehicle distribution³ and on media cooperation between concert promoters and radio stations,⁴ as well as a notice on unfair trading practices in the supply chain.⁵

No special rules apply to public sector or state-owned enterprises. Thus, Austrian antitrust law also applies to companies entirely or partially, directly or indirectly, owned by the state if these companies carry out an economic activity (functional approach).⁶ However, special rules apply to certain regulated industries, such as electricity, gas, telecommunications, post and railway, which are under the jurisdiction of industry-specific national regulatory authorities (e.g., the Telekom-Control Kommission, the Regulatory Authority for Broadcasting and Telecommunications (RTR), E-Control and Schienen-Control GmbH). When applying the provisions of the Austrian Cartel Act, the FCA shall ensure consistency with the decisions of regulators. Further, the FCA can exchange information with regulators in accordance with the principles of data protection. In this regard, the RTR's telecommunications and postal services unit and the FCA have recently announced that they will set up a joint task force in order to work together more closely on competition issues in the area of digital platforms.⁷

In the course of the amendment of the KartG in 2013, the legislator intended to enact specific rules for energy supply companies in a dominant position. However, the parliament's judicial committee in the review process rejected this proposal, as its legal implications were considered premature (apparently, the proposal faced heavy opposition from some Austrian federal states owning incumbent local electricity suppliers).⁸

II YEAR IN REVIEW

Compared to the number of proceedings initiated by the FCA in previous years in the field of agreements and concerted practices restricting competition, public enforcement in the area of abuse of dominance has been very limited. This might also stem from the fact that in a number of recent cases the FCA has not been successful in arguing its case before the cartel courts; examples include the *Taxi app* case relating to exclusivity clauses,⁹ and more recently, the *Liquid gas tank* case relating to tying clauses.¹⁰ In both of these cases, the OGH did not follow the FCA's arguments claiming an abuse of a dominant position.

2 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20zum%20Bestattungswesen.pdf (last accessed 10 April 2020).

3 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20KFZ-Vertrieb.pdf (last accessed 10 April 2020).

4 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20-%20Medienkooperationen%20zwischen%20Konzertveranstaltern%20und%20H%C3%B6rfunk.pdf (last accessed 10 April 2020).

5 An English version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf (last accessed 10 April 2020).

6 ECJ, 23 April 1991, case C-41/90, *Höfner and Elser*; 12 July 2012, case C-138/11, *Compass-Datenbank v. Republic of Austria*; OGH 8 October 2015, 16 Ok 3/15z.

7 An English version of the joint announcement is available on the website of the FCA at https://www.bwb.gv.at/en/news/news_2019/detail/news/rtr_telecommunications_and_postal_services_and_bwb_stepping_up_digital_cooperation_development_of_a/ (last accessed 10 April 2020).

8 A German version of the judicial committee's report is available at https://www.parlament.gv.at/PAKT/VHG/XXIV/II/I_02035/fname_277230.pdf, p. 3 (last accessed 10 April 2020).

9 OGH 27 June 2013, 16 Ok 7/12.

10 OGH 1 December 2015, 16 Ok 4/15x.

In early 2019, the FCA initiated an investigation against Amazon Services Europe Sàrl (Amazon) concerning unfair trade practices imposed on Austrian retailers active on Amazon's market place after having received a number of complaints collected and submitted by the Austrian Retail Association.¹¹ These proceedings were conducted in close cooperation with the German Federal Cartel Office. After the opening of the proceedings, Amazon revised some terms and conditions of its business solutions agreements. These modifications removed some of the competition concerns of the FCA. However, the FCA declared that it will continue to monitor individual aspects (such as communication and logistics), which remain subject to further investigations.¹² The detailed case report on the matter¹³ particularly deals with the discriminatory clauses imposed on retailers by Amazon, inter alia, allowing the immediate termination or suspension of a retailer's account, the obligation to disclose purchase prices, the provision of incorrect delivery details by Amazon for deliveries by the retailers, unjustified deletion/loss of product rankings and choice of law and choice of court clauses that make it difficult for a retailer to take legal action.

In the *Flight ticket booking* case, a private enforcement case initiated by an association of undertakings (professional association of travel agencies) against Lufthansa, the application of different prices on the Graz to Frankfurt route for flight bookings made in Austria and abroad was considered an unlawful price discrimination pursuant to Section 5, Paragraph 1, No. 3 KartG (applying different conditions for equivalent services) and Article 102 TFEU.¹⁴

Another recent case involved contracts on the supply of distribution data from pharmaceutical wholesalers to an information service provider in the healthcare sector,¹⁵ which contained a multi-supplier clause providing for reductions of the contractual remuneration in the event of the conclusion of a contract by the pharmaceutical wholesaler with a competitor of the information service provider. The contractual clause was contested by a competitor of the information service provider, and the OLG (in the interim relief proceedings) ordered the defendant to stop abusing its dominant position by applying multi-supplier clauses leading to a disproportionate reduction (in particular, a reduction of 40 per cent) of the contractual remuneration.

Other than that, the most recent published dominance case dates back to December 2015: in the *Old-packaging recycling* case, a competitor requested that another competitor be prohibited from abusing its dominant position by offering unprofitable prices for its services, for which the OGH confirmed the finding of an abuse of a dominant position by predatory pricing.¹⁶

11 An English version of the announcement of investigations of 14 February 2019 is available on the website of the FCA at https://www.bwb.gv.at/en/news/news_2019/detail/news/austrian_federal_competition_authority_initiates_investigation_proceedings_against_amazon/ (last accessed 10 April 2020).

12 An English version of the press release dated 17 July 2019 is available on the website of the FCA at https://www.bwb.gv.at/en/news/detail/news/bwb_informs_amazon_modifies_its_terms_and_conditions-1/ (last accessed 14 April 2020).

13 An English version of the case summary of the FCA of 17 July 2019 is available at https://www.bwb.gv.at/fileadmin/user_upload/Fallbericht_20190911_en.pdf (last accessed 14 April 2020).

14 OGH 12 July 2018, 16 Ok 1/18k (16 Ok 2/18g), *Fachverband Reisebüros v. Lufthansa – Flugticketbuchung*, OLG Vienna 6 December 2017, 27 Kt 13/16p (published 13 May 2019).

15 OLG Vienna, 19 December 2017, 25 Kt 2/17g, 25 Kt 3/17d, *INSIGHT Health GmbH & Co KG v. IQVIA Information Solutions GmbH*.

16 OGH 8 October 2015, 16 Ok 9/15g.

A case not directly relating to abuse of a dominant position under the KartG concerns a monopoly undertaking's obligation to enter into a contract that was published very recently.¹⁷ In this decision, the OGH sets out the obligation of a subsidiary of a publicly owned company operating an airport with a taxi area (on private ground) to conclude a contract with taxi drivers who depend on access to this area for providing airport taxi services to their customers. The OGH's ruling again confirms previous rulings that a monopolist's refusal to contract or termination of a contract can only be based on justified reasons.

Another interesting Austrian case on a possible abuse of a dominant position, which has already kept the courts busy for more than eight years, relates to the newspaper boxes in front of and inside the Viennese underground stations offering the (free) Austrian yellow-press newspaper, *Heute*.¹⁸ The case was initiated by a competitor publishing another yellow-press newspaper, *Österreich*, also offered free of charge, which requested that the Viennese underground operator be prohibited from only allowing one (other) competing newspaper publisher to offer its newspaper (*Heute*) in front of and inside the Viennese underground stations free of charge. The competitor argued that this practice constitutes a violation of Section 5, Paragraph 1, No. 2 KartG (restricting offerings to the detriment of consumers), Section 5, Paragraph 1, No. 3 KartG (applying different conditions to equivalent services) and Article 102 TFEU. The OLG granted the request with regard to three specific underground stations but dismissed the remainder of the claim. Both parties appealed against this decision, and the OGH set aside the ruling and referred the case back to the OLG to further assess the exact market definition in order to assess the alleged dominant position of the Viennese underground station operator. In October 2018, the FCA reported that the parties had entered into a settlement pursuant to which the Viennese underground operator, inter alia, undertakes to not discriminate the publisher of *Österreich* against *Heute* or other competitors.¹⁹

Owing to the small number of cases related to abuse of a dominant position, the table below lists the most important (fine) decisions in abuse of dominance cases before the Austrian cartel courts in recent years.

Year	Sector	Company	Conduct	Fine
2007	Financial services	Europay Austria Zahlungsverkehr GmbH	Discriminatory pricing, exclusionary practices	€7 million
2009	Telecommunication	Telekom Austria TA AG	Abuse of a dominant position (not specified)	€1.5 million
2011	Film distribution	Constantin Filmverleih	Refusal to supply	€150,000 and an obligation to provide copies of films to all requesting cinemas
2012	Rail freight transport		Alleged discriminatory prices depending on whether the main run was procured together with the pre-carriage and delivery	No infringement found by the cartel court

17 OGH 20 February 2018, 4 Ob 13/18t.

18 OGH 11 June 2015, 16 Ok 8/14h.

19 A German version of the publication is available at https://www.bwb.gv.at/news/detail/news/verfahren_zwischen_der_mediengruppe_oesterreich_und_den_wiener_linien_mit_vergleich_vor_dem_kartellge/ (last accessed 10 April 2020).

III MARKET DEFINITION AND MARKET POWER

i Market definition

The assessment of whether a company enjoys a dominant position is closely linked to the definition of the relevant product and geographic market. Before the Austrian courts, the market definition is an issue of fact when it comes to examining the objective delimitation criteria, and a legal question when it comes to choosing the methods to define a market.²⁰

When defining the relevant product market, the FCA and cartel courts follow the demand-side substitution concept, and thus analyse the substitutability of the goods or services from the demand-side perspective.²¹ However, in cases where the market position of a supplier or manufacturer is to be determined, it is also necessary to include the substitutability of the goods or services from the supply-side perspective (i.e., whether other suppliers or manufacturers are able and willing to adapt their product portfolio or production within a short time and without significant costs) when defining the relevant product market.

The small but significant and non-transitory increase in price test is often used when defining the relevant market. However, in accordance with the European Commission,²² the OGH takes the view that in cases of abuse of dominance, this test should be dealt with carefully, as the prices of a company holding a dominant position might already be above market level, with a further small price increase causing the demand-side to switch to a (false) substitute that could result in a too-broad market definition.²³

In accordance with EU law, the geographic market comprises the area in which the companies concerned compete, in which the conditions of competition are sufficiently homogeneous, and that can be distinguished from neighbouring areas because of appreciably different competitive conditions.²⁴ Factors for determining the relevant geographic market are thus the characteristics of the product (i.e., durability, limited transport capacity), the existence of market entry barriers or consumer preferences as well as significantly varying market shares of competitors in neighbouring areas. Thus, the geographic market is also defined through a substitutability test. In practice, in legal proceedings before the cartel court, questions concerning market definition are very often dealt with by court-appointed experts, with the cartel court frequently and to a large extent relying on the expert's opinion. Thus, challenging an expert's findings as regards the relevant markets in an appeal (which is limited to questions of law) can be quite difficult.

ii Dominance

While single dominance has a long tradition in the Austrian antitrust rules, specific rules on joint dominance have only been incorporated into the Austrian legal regime with the Cartel Amendment Act 2012, which entered into force on 1 March 2013.

20 OGH 25 March 2009, 16 Ok 4/08; 12 December 2011, 16 Ok 8/10.

21 See, for example, OGH 2 December 2013, 16 Ok 6/12.

22 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 19.

23 OGH 25 March 2009, 16 Ok 4/08.

24 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 8.

Single dominance

According to the definition in Section 4, Paragraph 1 KartG, a company has single dominance if it is not subject to any or only insignificant competition, or in comparison to all other competitors holds a 'superior market position'. Section 4, Paragraph 1, Sentence 2 KartG further substantiates that a company's financial strength, its links to other companies, its access to the supply and sales markets as well as market barriers for other companies should all be taken into account when determining the existence of single dominance.

In addition to the characteristics of the respective company, it is also necessary to consider the market structure, particularly the number of competitors and their respective market shares.

When calculating market shares, the activities of all companies belonging to the same group active on the relevant market have to be taken into account. As an Austrian company particularly, the turnover of any non-controlling participations of at least 25 per cent may also have to be taken into account when it comes to market share calculation.²⁵

Overall, the respective market share of a company (including its group companies) is still considered the most important factor in determining market power in case law. The OGH has classified a company having a 95²⁶ and 65²⁷ per cent market share as holding a dominant position. In cases of market shares below 60 per cent, particular consideration is given to the market position of the other competitors: that is, whether they have similar market shares, or whether one company is the only 'major' player with its competitors playing just a minor role in the market. In its assessment, the authorities and courts also take into account how market shares have developed to date and what is to be expected in the near future.

In addition to the market share of a company and under the criteria set out in Section 4, Paragraph 1, Sentence 1 KartG, the authorities and courts also take into account possible technical leadership or commercial know-how, outstanding innovation capability, access to public funding or vertical integration of the company when determining single dominance.

In addition to the general clause of Section 4, Paragraph 1 KartG, Austrian antitrust law foresees (rebuttable) market dominance presumption thresholds in Section 4, Paragraph 2 KartG in the case of a company holding a market share of:

- a* at least 30 per cent;
- b* more than 5 per cent, with only two other competitors being active in the same market; or
- c* more than 5 per cent, with the company belonging to the four biggest companies in the market, which together hold a combined market share of at least 80 per cent.

In these cases, the onus is on the company to prove that it does not have a market dominant position as stipulated in Section 4, Paragraph 1 KartG. To rebut the above presumptions of market dominance, companies generally base their arguments on the presence of strong competitors, low market entry barriers, a strong countervailing market side and overall significant competition in the market.

25 However, indirect participations of at least 25 per cent normally will only be considered if there is also a controlling influence at the preceding level (see OGH 17 December 2001, 16 Ok 9/01).

26 OGH 11 October 2004, 16 Ok 11/04.

27 OGH 22 June 1999, 4 Ob 90/99k.

In practice, the threshold of a 30 per cent market share receives a great deal of attention, in particular in merger control proceedings, while the other two presumptions so far have not gained any major practical importance, especially since the entry into force of the new presumptions for collective dominance (Section 4, Paragraph 2a KartG).

Collective dominance

Section 4, Paragraph 1a KartG was incorporated into the Cartel Amendment Act 2012 and defines collective dominance under Austrian antitrust law. According to this provision, two or more companies hold a collective market dominant position if there is no significant competition between them, and they are not subject to any or only insignificant competition or together hold a 'superior market position' in comparison to all other competitors.

When determining whether two or more companies collectively hold a dominant position, the same principles relevant for the assessment of single dominance are used (see above). However, so far, we are not aware of any published Austrian case law where collective dominance was established.

As for single dominance, a (rebuttable) presumption for collective market dominance exists if three or less companies hold a combined market share of at least 50 per cent, or five or less companies hold a combined market share of at least two-thirds.

In these cases, the onus is on these companies to prove that they do not hold a collectively dominant market position as stipulated in Section 4, Paragraph 1a in connection with Section 4, Paragraph 1 KartG. Thus, for a rebuttal of the presumption of collective dominance, companies have to either show that there is significant competition between them or that they do not collectively fulfil the dominance criteria set out in Section 4, Paragraph 1 KartG.

'Relative' dominance

A company is also considered dominant if it has a paramount market position relative to its customers or suppliers; in particular, 'relative' market dominance exists when customers or suppliers are dependent on continuing their business relationship with a company if they do not want to suffer severe economic disadvantages.

'Relative' market dominance exists if the respective business partner depends on a specific good or service (only) offered by a company taking into account possible alternative sources of supply or demand.²⁸ So far, the Austrian courts have established 'relative' market dominance in cases of a (vertically integrated) film distributor in relation to its customers (i.e., independent film theatres).²⁹

Prohibition on granting dissimilar trading conditions for non-dominant companies

As outlined above, the cartel courts are also competent to enforce the NahversorgungsG, which is not limited to companies holding a dominant market position. In particular, Section 2 NahversorgungsG allows an injunction against a supplier on the wholesale level (or a dealer on the retail level) requesting or granting dissimilar conditions to retailers (or

28 OGH 1 July 2002, 16 Ok 5/02.

29 OGH 1 July 2002, 16 Ok 5/02; 16 July 2008, 16 Ok 6/08.

wholesalers, respectively) without an objective justification. Claimants often try to use the provisions of the NahversorgungsG in the event that they have difficulties establishing the dominant market position of a defendant.

Note that while the title of the NahversorgungsG might suggest that it only applies to sectors relevant for local (food) supply (e.g., food retailers, supermarkets), the OGH has also applied its provisions to other economic sectors such as round timber³⁰ and running shoes.³¹

IV ABUSE

i Overview

Section 5, Paragraph 1 KartG contains a general prohibition on abusing a dominant market position, and further sets out a non-exhaustive list of specific types of abusive conduct (Section 5, Paragraph 1, Nos. 1 to 5 KartG). In general, the concept of abuse of a dominant market position under Section 5 KartG largely corresponds to the provision in Article 102 TFEU. Therefore, the case law of the European Commission as well as the EU courts in the field of dominance is also relevant to domestic Austrian cases.

ii Exclusionary abuses

Section 5 KartG prohibits exclusionary conduct ranging from predatory pricing to margin squeeze, loyalty rebates and (long-term) exclusivity clauses in vertical agreements, as well as tying and bundling, price tying and refusal to deal or supply.

With regard to predatory pricing, the Austrian Supreme Court followed the European Court of Justice (ECJ) rulings in *AKZO*,³² *Tetra Pak II*³³ and *Post Danmark*,³⁴ according to which prices below the average variable costs are considered an indication of exclusionary conduct. It further held that in cases where prices are set above the average variable costs, but still below the overall costs, they are only considered abusive if it can be demonstrated that they are used to exclude competitors.³⁵

By reference to the *Post Danmark* judgment, the Supreme Court confirmed the long run incremental cost method used in a case by a court-appointed expert to establish the existence of predatory pricing.³⁶

Further, Section 5, Paragraph 1, No. 5 KartG (as Article 102 TFEU) specifically stipulates the abusive character of selling goods below cost. Based on the case law of the Austrian cartel courts, this provision only applies to the selling of goods below cost for a certain period and not to selling services.³⁷ Moreover, Section 5, Paragraph 2 KartG stipulates that the dominant company may rebut an appearance of sales below cost or provide an objective justification (e.g., because the expiry date of the products is approaching).

To date, the OGH has not had to issue a material decision on a margin squeeze case. However, the OLG held in an *obiter dictum* in 2002 that a company with a dominant

30 OGH 16 July 2008, 16 Ok 3/08; 25 March 2009, 16 Ok 2/09 (16 Ok 3/09); 9 June 2010, 16 Ok 1/10.

31 OGH 26 June 2014, 16 Ok 12/13.

32 ECJ, 3 July 1991, case C-62/86, *Akzo*.

33 ECJ, 14 November 1996, case C-333/94P, *Tetra Pak v. Commission*.

34 ECJ, 27 March 2012, case C-209/10, *Post Danmark*.

35 OGH 9 October 2000, 16 Ok 6/00.

36 OGH 8 October 2015, 16 Ok 9/15g.

37 OGH 16 December 2002, 16 Ok 10/02.

position is not obliged to set its prices at a level to guarantee its competitors commercial success. According to the OLG, this is also true for cases where competitors purchase an intermediate product from the dominant company.³⁸ Once a question of material law related to margin squeeze conduct has reached the OGH, it will be seen whether it will uphold this rather sceptical approach by the OLG or will follow the ECJ's case law.³⁹

With regard to rebates, the OGH follows the ECJ's distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.⁴⁰ However, case law on exclusionary conduct stemming from inadmissible rebates is rather limited in Austria.

The OGH has dealt with a number of cases relating to the obligation to contract by dominant companies.⁴¹ For example, the OGH recently affirmed the obligation of the Austrian Federal Railways to allow its only private competitor, Westbahn, to participate in the Austrian Federal Railways electronic timetable information system.⁴²

iii Discrimination

Section 5, Paragraph 1, No. 3 KartG prohibits discrimination of contract partners by the application of dissimilar conditions to equivalent transactions, thereby placing them at a competitive disadvantage. A similar prohibition of discrimination for wholesalers and retailers (even if not in a dominant position) is contained in Section 2, Paragraph 1 NahversorgungsG (see above; a violation against this prohibition allows the contracting party to claim for injunctive relieve but does not lead to any fines). Under both provisions, the most common discriminatory behaviour is discriminatory pricing.

A transaction is considered to be equivalent and requires equal treatment where the various contract partners are in the same position towards the supplier.⁴³ With regard to possible objective justifications, the OGH takes the view that, inter alia, different delivery terms, transportation costs or statutory frameworks in different countries can provide objective justifications for applying different conditions to equivalent transactions.⁴⁴

iv Exploitative abuses

The main statutory provision prohibiting exploitative abuses, including (but not limited to) excessive pricing is Section 5, Paragraph 1, No. 1 KartG. This provision was amended with the Cartel Amendment Act 2012, and changed from a wording that corresponded to Article 102, Letter a TFEU to an almost identical wording as Section 19, Paragraph 2, No. 2 of the German Act against Restraints of Competition. However, the case law relating to the former Section 5, Paragraph 1, No. 1 KartG may still be used for interpretation purposes.⁴⁵

38 OLG 14 May 2002, 29 Kt 554, 555/00.

39 ECJ, 14 October 2010, case C-280/08P, *Deutsche Telekom v. Commission*; 17 February 2011, case C-52/09, *TeliaSonera*.

40 OGH 22 June 1999, 4 OB 90/99k; 11 October 2004, 16 Ok 9/04.

41 OGH 20 December 2005, 16 Ok 23/04; 4 April 2004, 16 Ok 20/04; 16 July 2008, 16 Ok 6/08.

42 OGH 11 October 2012, 16 Ok 1/12.

43 OGH 10 March 2003, 16 Ok 1/03.

44 OGH 9 June 2010, 16 Ok 1/10.

45 OGH 12 September 2007, 16 Ok 4/07.

So far, there has been only one case before the OGH based on this amended provision. Therein the OGH, by referring to German case law,⁴⁶ held that requesting excessive prices or other exploitative conditions from a contract partner is not limited to contract negotiations, but is also applicable to an ongoing contractual relationship when refusing to lower prices or allow changes to the contract.⁴⁷ Moreover, it stipulated that only a significant price excess compared to the price that would have to be paid in a competitive environment falls under Section 5, Paragraph 1, No. 1 KartG.

V REMEDIES AND SANCTIONS

i Sanctions

The legal nature of fines imposed for antitrust violations under Austrian law is not clear. Austrian antitrust fines share some of the characteristics of criminal sanctions as well as of the sanctions under administrative criminal law, but are imposed by the cartel courts as civil courts, and not by the criminal courts or an administrative authority. The OGH considers them to have a hybrid nature having some similarities with criminal sanctions.⁴⁸

According to Section 29 KartG, a fine requires an intentional or negligent violation of the antitrust law. Thus, when imposing a fine upon a company for abusing a dominant position, it is necessary to identify one or more individuals who have committed the infringement intently or negligently, and whose acts or omissions can be attributed to the company.⁴⁹ However, similar to that found under EU competition law, the standard for proving an intentional or negligent infringement is not very high. In an abuse of dominance case, the FCA can request a cartel court to impose a fine of up to 10 per cent of the overall group turnover of the last business year.

Section 30, Paragraph 1, KartG stipulates that the amount of a fine shall be based on the gravity and duration of the infringement, the illicit gain from the infringement, the degree of liability and the economic strength of the perpetrator. Since 1 March 2013, Section 30, Paragraphs 2 and 3 KartG sets out aggravating (e.g., repeat offender) and mitigating (e.g., own termination of infringement, cooperation, damage payments) factors.

Fines are imposed on the undertaking normally being the company that committed the abuse. However, as under EU law, fines may also be imposed on a parent company in cases where a subsidiary did not act autonomously in the market but followed the instructions of the parent company (single-economic entity doctrine).⁵⁰ In a vertical price-fixing case, the OGH already has used the EU law concept of parental liability to fine the company committing an infringement as well as its four direct and indirect controlling shareholders.⁵¹ Thus, it can be assumed that the Austrian cartel courts will follow the single-economic entity doctrine for calculating fines and attributing liability also in cases of fines for abuse of a dominant market position.

46 BGH KVR 13/83, WuW/E BGH 2103.

47 OGH 16 September 2014, 16 Ok 13/13.

48 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.

49 OGH 5 December 2011, 16 Ok 2/11.

50 ECJ, 10 September 2009, case C-97/08P, *Akzo Nobel ao v. Commission*.

51 OGH 8 October 2015, 16 Ok 2/15b (16 Ok 8/15k).

ii Behavioural remedies

Section 26, Sentences 1 and 2 KartG allows the OLG to issue (proportionate) restraining orders to end an abusive behaviour. These orders require a prior request by the Official Parties or by an interested company to the cartel proceedings. Often such requests to end an abusive behaviour are combined with a request for an interim injunction according to Section 48, Paragraph 1 KartG.

As an alternative to ordering a company to cease an infringement, the OLG may issue binding commitments if it can be expected that these preclude an abusive behaviour in the future (Section 27, Paragraph 1 KartG). In contrast to commitment decisions of the European Commission, such decisions can only be passed on the basis of the (tacit) assumption that there was an infringement. In cases of commitments, the OLG has to reopen a case if the facts have changed significantly, the company in question does not comply with its commitment, or if the decision was based on incomplete, incorrect or misleading information.

iii Structural remedies

In a proceeding requesting the ending of an abuse of dominance, the OLG may also order structural remedies (i.e., a change in the company structure). However, such structural measures may only be imposed if no other effective remedies are available, or if these alternatively effective remedies would result in a greater burden for the company (Section 26, Sentence 3 KartG). The OGH explicitly held that such structural remedies may only be imposed in particularly severe cases of an abuse of dominance and are in any case subsidiary compared to all other available measures.⁵²

VI PROCEDURE

Abuse of dominance cases are either investigated by the FCA (*ex officio* or on the basis of complaints) or are commenced directly by parties claiming harm from an alleged abusive behaviour initiating proceedings in front of the cartel court.

i Commencement of proceedings

Proceedings may be commenced by the Official Parties, in particular based on market investigations or more often on third-party complaints (i.e., consumer associations, competitors, customers or suppliers). The FCA may send formal or informal information requests and questionnaires to the investigated undertaking and to third parties, or (subject to a court order) may also conduct surprise inspections or dawn raids to gain further evidence in connection with an alleged abusive conduct to copy or seize documents and electronic files.

Alternatively, parties claiming harm from an alleged abusive behaviour can directly commence proceedings in the cartel court (requesting that a certain behaviour is stopped or that it is determined that past behaviour was an abuse of dominance). In addition, in some cases parties may also claim that a certain behaviour was an illegal abuse of a dominant market position in a civil law proceeding before the ordinary courts. In particular, a violation of Section 5 KartG can also constitute a 'breach of law' within the meaning of Section 1 of the Austrian Federal Act Against Unfair Competition, which can be used as a basis for an action before the ordinary courts.

52 OGH 19 January 2009, 16 Ok 13/08.

ii Right to be heard

During the proceedings of the cartel court, based on the fundamental right to a fair trial, every party has the right to be heard during all stages of the proceedings, and is entitled to be represented by an attorney-at-law at all times.

In the event that the FCA plans to initiate proceedings before the cartel court following an investigation, it has to inform the (prospective) defendant about the results of its investigation and give the defendant the possibility to comment on them.⁵³ In the event that the FCA's investigation does not give a reason for the commencement of proceedings before the cartel court, the defendant also has to be informed within a reasonable period.⁵⁴

iii Settlements

Informal settlements between the FCA and the (alleged) perpetrator before the commencement of proceedings before the cartel court make up the majority of antitrust fine cases in Austria. The FCA published a guidance paper on settlements in 2014.⁵⁵ After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,⁵⁶ where the OGH multiplied the fine initially imposed by the OLG by 10, the incentive for companies to settle fine cases has increased even further (at least in cases where it is likely that an infringement ultimately can be proved by the Official Parties).

In dominance cases, those types of settlements are not yet that common. At the same time, in the case of proceedings initiated by private claimants, sometimes the parties agree on a settlement in the cartel court proceedings or out of court (by means of a settlement agreement).

iv Appeal proceedings

Decisions of the OLG may be appealed with the OGH. The OGH may only review decisions on questions of law, and therefore typically cannot review decisions as regards questions of fact. Thus, the review is rather limited, and in particular does not encompass the consideration and assessment of the evidence made by the OLG.

VII PRIVATE ENFORCEMENT

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the Official Parties. The OGH, in several cases, has affirmed the possibility of claims for damages for directly damaged parties⁵⁷ as well as for indirectly damaged parties,⁵⁸ including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).⁵⁹

53 Section 13, Paragraph 1 of the Act on the foundation of the Federal Competition Authority (Wettbewerbsgesetz).

54 Section 13, Paragraph 2 Wettbewerbsgesetz.

55 An English version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/BWB_Settlements_english.pdf (last accessed 10 April 2020).

56 OGH 8 October 2015, 16 Ok 2/15b, 8/15k.

57 OGH 26 May 2014, 8 Ob 81/13i.

58 OGH 2 August 2012, 4 Ob 46/12m.

59 OGH 29 October 2014, 7 Ob 121/14s.

i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive,⁶⁰ the Austrian private enforcement regime changed significantly. The provisions on the compensation of harm caused by infringements of the antitrust law (Section 37a to 37m KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines). Thus, the substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

ii Collective actions

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). Recently, Austrian-style 'class actions' have been brought before courts mainly by the Association for Consumer Protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.⁶¹ However, courts have differed in their treatment by either treating them as separate single proceedings, by joinder of claimants, or by having one 'test proceeding' (while staying the other proceedings) that then serves a similar function to a 'precedent' for the other claims.⁶²

iii Calculating damages

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profits plus statutory default interest⁶³ calculated from the date when the harm occurred. Thus, Austrian law does not allow claims for punitive or treble damages and does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.⁶⁴

Further, Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damages owing to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).⁶⁵

60 Directive 2014/104/EU 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, OJ 2014 L 349, p. 1.

61 Kodek, 'Haftung bei Kartellverstößen in WiR – Studiengesellschaft für Wirtschaft und Recht' (eds), *Haftung im Wirtschaftsrecht* (2013), pp. 63 and 77.

62 Kodek in Neumayr, *Beschleunigung von Zivil- und Strafverfahren*, 2014, p. 9.

63 The applicable statutory default interest is 4 per cent (Section 1000, Paragraph 1 General Civil Code), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code).

64 OGH 15 May 2012, 3 Ob 1/12m.

65 In one case, the allegedly injured party was not able to establish that it had suffered damages in follow-on litigation from the *Escalator* cartel as the claimant (owing to lack of contractual documentation) was only able to make estimates of the prices paid to the cartel members rather than the actual prices paid (see OGH 15 May 2012, 3 Ob 1/12m).

iv Interplay between government investigations and private litigation

Section 37i, Paragraph 2 KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants ‘only’ have to establish the damage incurred and a causal link between the infringement and such damage.

VIII FUTURE DEVELOPMENTS

In view of the current covid-19 crisis, as the FCA has already highlighted that it will prioritise complaints about excessive prices, artificially induced scarcity of supply or other abusive behaviour concerning health products (e.g., face masks, sanitising gels and protective clothing).⁶⁶ In this regard, the European Competition Network (ECN), which includes the FCA together with the European Commission and other national competition authorities in the EU Member States, has also emphasised in a joint statement that its members will not hesitate to take action against companies taking advantage of the current situation by abusing their dominant position.⁶⁷ Moreover, considering the investigations against Amazon and the (digital) cooperation with the regulator RTR, there is a clear trend towards enforcement against the abuse of dominance behaviour in the digital sector, in particular concerning digital platforms.

However, based on the limited activity of the FCA in dominance cases in the past, we do not consider it very likely that the FCA will suddenly change its approach towards being more active in this area in the near future. Rather, we would expect that the public enforcement focus will remain on agreements and concerted practices restricting competition (in particular, vertical agreements) and merger control. Therefore, enforcement activity in the field of dominance to a large extent will depend on private parties pursuing their claims directly (on a stand-alone basis and not as a follow-on action).

66 An English version of the announcement is available at the website of the FCA at https://www.bwb.gv.at/en/news/detail/news/coronavirus_covid_19_and_its_impact_on_competition_law_in_austria_joint_statement_by_the_europea/ (last accessed 10 April 2020).

67 An English version of the joint statement of the ECN is available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf (last accessed 10 April 2020).

BELGIUM

Robbert Snelders, Nuna Van Belle and François-Guillaume de Lichtervelde¹

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 therefore very common before the BCA and the Belgian courts, which rely heavily on EU precedents in their decisions and judgments irrespective of whether Article IV.2 of the CEL and Article 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

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2 Draft Bill on the Protection of Economic Competition, Explanatory memorandum, Documents of the Parliament (Chamber of Representatives), Ordinary Session, 2005–2006, No. 2180/001, p. 19.

3 *ibid.*, p. 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, Chamber 51-2180/001, p. 36 (see discussion on Article 2, which became old Article 1 of the 2006 APEC).

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. In theory, the Belgian and EU rules on dominance are therefore perfectly aligned.⁷

In 2019, Belgium deviated from this approach and made use for the first time of the flexibility afforded by Article 3(2) of Regulation 1/2003, that is, of ‘adopting and applying on [its] territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’.⁸ The Belgian federal parliament adopted a new legislation introducing, among other changes, the concept of ‘abuse of economic dependency’ in Book IV of the CEL, thereby allowing enforcement against non-dominant undertakings who abuse their position of market power created by the economic dependency of another undertaking.⁹ Article IV.2/1 of the CEL prohibits conduct that reach the level of an abuse of economic dependency. The provision works in the same way as Article 102 of the TFEU; it provides an indicative list of potentially abusive conduct, which is identical to its EU counterpart, save for the addition of ‘refusing a sale, a purchase or other transaction terms’. The BCA will be competent to investigate abuses of economic dependency under the same procedural rules as those applicable to abuses of dominance. The only difference with this regime concerns fines, which are capped at 2 per cent of yearly turnover, and penalty payments, which are limited to 2 per cent of daily turnover.¹⁰ As in dominance cases, a finding of abuse may give rise to follow-on damages claims, requests for cease-and-desist orders or actions for annulment of contracts.

The new provisions will cover unilateral practices that are compliant with Article IV.2 of the CEL. This regime therefore does away with the previously applicable theory of the ‘reflex effect’ of competition law on the law of unfair trade practices,¹¹ which did not allow 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), to constitute an unfair trade practice insofar as the essence of the plaintiff’s claim related to an impediment to the functioning of the free market resulting from that practice (save for a case of abuse of right). The Belgian regime for abuses of economic dependency is inspired by existing regulations in France, and follows the footsteps of several other Member States.¹² To date, there have been limited applications of these provisions by competition authorities across the EU; most cases have concerned private enforcement before national courts. As for Belgium, while public

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 For an example of such alignment in the past, see Brussels Court of Appeal, 27 February 2014, *Bureau d’Assurances Desert/AXA* (case 2013/AR/1783), Paragraph 6, as published in *TBM/RCB*, 2014/4, p. 353.

8 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.

9 Law of 4 April 2019 amending the Code of Economic Law in relation to abuses of economic dependency, abusive clauses and unfair trade practices between undertakings (Belgian Official Gazette, 24 May 2019). The provisions on abuse of economic dependency will enter into force on 1 June 2020.

10 Article IV.70, Paragraph 2 of the CEL.

11 This theory was upheld by the Belgian Supreme Court in 2000 (see Belgian Supreme Court, 7 January 2000, *Multipharmal/Louis Widmer*, RCJB, 2001, p. 255).

12 To date, Austria, Cyprus, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania and Spain have adopted rules on abuses of economic dependency.

enforcement will be constrained by the limited resources of the BCA, the broad definition of the concept of economic dependency in the CEL suggests an increase in private litigation in the future.¹³

Shortly following the adoption of the rules on abuse of economic dependency, the Belgian legislator passed a new law introducing important substantive and procedural changes to Book IV of the CEL.¹⁴ The main change concerns the basis for the calculation of the 10 per cent cap on the fines imposed for infringements of competition law (with the exception of abuses of economic dependency), which shifts from the national to the worldwide consolidated turnover,¹⁵ in line with the requirements of the ECN+ Directive 2019/1.¹⁶

Belgian law does not contain specific provisions on unilateral practices applying to specific sectors of the economy, such as the energy or telecommunications sectors,¹⁷ and, as is the case at the EU level, competition rules apply to state-owned enterprises and undertakings benefiting from special rights ‘insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’.¹⁸

Finally, Belgian law has long been characterised by the same tensions that 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 practice, some differences could be observed as Belgian courts sometimes relied on somewhat formalistic reasoning and tended 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).¹⁹

II YEAR IN REVIEW

Over the past decade, the BCA adopted approximately one-third of its decisions on the basis of Article IV.2 of the CEL and Article 102 of the TFEU. This high average conceals a drop over the past couple of years, which suggests convergence between the BCA and competition authorities in neighbouring jurisdictions and at the EU level (independent of commitment

13 Article I.6, 4° of the CEL defines ‘economic dependency’ as a ‘position of subjection of an undertaking towards one or more other undertakings characterised by the absence of a reasonable equivalent alternative, available within a reasonable period of time, and under reasonable conditions and costs, allowing this or each of these undertakings to impose obligations or conditions that cannot be obtained under normal market circumstances’.

14 Law of 2 May 2019 amending Book I ‘Definitions’, Book XV ‘Enforcement’, and replacing Book IV ‘Competition Law’ of the Code of Economic Law (Belgian Official Gazette, 24 May 2019). The Law entered into force on 3 June 2019.

15 *ibid.*, Article IV.84, Paragraph 1, 2°.

16 Article 15(1) of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ, 14 January 2019.

17 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, 10 December 2012, Decision 2012-P/K-32, *Publimail, Link2Biz International and G3 Worldwide Belgium/lpost*, Paragraph 281). See also the presumption of discriminatory abuse of dominance provided for at Article 23 *ter* of the 1999 Electricity Act (Belgian Official Gazette, 11 May 1999).

18 Article IV.12 of the CEL.

19 See, for example, Antwerp Commercial Court, 17 July 2008, *Base v. Belgacom* (case A/07/6775).

decisions). The decrease of abuse of dominance cases was also visible in 2019, although the high number of mergers approved through the simplified procedure dilute their share of the total number of BCA decisions.

i BCA

In 2019, the BCA adopted one decision granting interim measures and closed one investigation due to insufficient evidence. In the first quarter of 2020, the BCA also adopted two decisions regarding interim measures, one positive and one negative.

On 23 January 2019, the College imposed interim measures to ensure continuity of the FM broadcasts of the Flemish Radio and Television Broadcasting organisation (VRT), in the execution of its public service mission.²⁰ VRT's FM broadcasts are transmitted through masts. After a public tender, some of these masts were sold by VRT to Norkring Belgium along with a service level agreement (SLA) to ensure continuing use thereof for FM broadcasting. With the end of the SLA in sight, VRT made a public tender request for FM broadcasting services, which was not awarded to Norkring, but to Broadcast Technology and Development (Broadcast Partners). To provide VRT with FM transmission services, Broadcast Partners was dependent on Norkring's masts, as there were no alternatives available. However, it was unable to enter into an agreement on reasonable terms with Norkring for the use of these masts. While VRT did not demonstrate that this was *prima facie* likely to constitute an abuse of dominance, the BCA held that the general economic interest of continuing the VRT's public service mission to provide FM broadcasts was sufficiently large to conclude for a likely *prima facie* abuse of dominance if continuity is not guaranteed. The BCA required Norkring to provide the transmission masts for FM transmissions under the same conditions that it offered in its tendering bid, until an agreement had been reached, or until the court ruled on the matter, and in any case, not after the decision on the merits of the case had been taken by the BCA. The case on the merits is still ongoing.

On 10 July 2019, the BCA closed its *ex officio* investigation into whether Proximus had abused its dominant position on the wholesale market in its relation interactions with Alpha 11, a group of telecommunication services providers.²¹ Alpha 11 had provided the BCA with information that Proximus kept its prices – and hence Alpha 11's costs – artificially high, thereby foreclosing Alpha 11 from the market and preventing it from launching a new television platform called 'Choice'. The BCA, however, closed the investigation due to insufficient evidence found to indicate this conduct or strategy by Proximus.

On 23 January 2020, the BCA imposed interim measures on the Belgian Golf Billiards League (BGB). Hector Cue Sports Belgium (HCSB), a Belgian bumper-pool balls manufacturer, submitted a complaint before the BCA claiming that BGB restricted competition in the market for supply of billiard balls. In fact, the BGB 2019–2020 rules designated a single specific brand of balls, excluding the use of other brands in competitions and games organised by the association or its clubs. The BCA held that the exclusion of certain balls without objective justification is to be qualified *prima facie* as an abuse of dominance. BCA's interim measures allowed BGB to choose, for the season 2020–2021 until a BCA decision on the substance, between two options: (1) suspension of the contractual or regulatory obligations accepting only one type of bumper pool balls – allowing BGB to

20 College, 22 January 2019, Decision BMA-2019-V/M-01.

21 Audiorate, 10 July 2019, Decision BMA-2019-I/O-21-AUD, *Proximus / Alpha 11*.

restrict use of certain balls on objectively identified characteristics; or (2) organisation of a tender to select billiard balls based on objectively identified characteristics. BGB opted for organising a tender.

Similarly, on May 14, 2019, the Belgian Arbitration Court for Sports (CBAS) had found that the Belgian Billiards Association breached Article 102 TFEU by approving only one specific brand of billiard cloth, without any objective justification, for the competitions organised. The CBAS is an arbitration tribunal with jurisdiction over sport matters when opted for in the statutes or rules of sport federations. The CBAS recalled the EU *Meca-Medina* precedent which held that EU law prevails over the regulations of sport federations.²²

On 16 March 2020, the College rejected a request for interim measures on computer hardware maker HP Belgium and HP Industrial Printing Solutions Europe (together 'HP').²³ HP decided to discontinue the availability of printheads and ink cartridges for certain printers. DPI, a Belgian printing company, filed a complaint against HP, claiming abuse of dominance by interrupting the availability of these products such measures. The BCA, however, held that DPI provided insufficient evidence to conclude for a likely *prima facie* abuse of dominance. DPI did not provide sufficient support to define the relevant product and geographic market, which meant that the BCA did not assess whether HP's conduct was an abuse of dominance. The BCA, nevertheless, reiterated that in the absence of essential facilities, the termination of production cannot constitute an abuse of dominance. Interestingly, the BCA followed HP's argumentation that, in any event, the Stockholm Convention on persistent organic pollutants forbids the availability or use of the ink after December 2020.

ii Courts

In 2019, the Belgian courts were less active than the BCA. The Brussels Court of Appeal issued one interlocutory judgment asking a preliminary ruling from the European Court of Justice.

On 19 February 2020, the Brussels Court of Appeal issued an interlocutory judgment in *bpost*, requesting a preliminary ruling from the European Court of Justice on the interpretation of the *ne bis in idem* principle under EU law. This court judgment is the latest development in a protracted legal dispute between *bpost*, the incumbent postal services provider and the sectoral regulator, the Belgian Institute for Postal services and Telecommunications (BIPT). At the core of the debate is the interplay between competition law and sector-specific regulation.

In 2011, the BIPT fined *bpost* for carrying out a discriminatory rebate scheme.²⁴ In a separate decision in 2012, the BCA (then the Competition Council) found the scheme to be abusive because of its loyalty-inducing effect and fined *bpost* (after deducting the BIPT fine from the initial fine amount). On 10 March 2016, the Brussels Court of Appeal annulled the BIPT's decision, finding that the rebate system was not discriminatory, in line with a preliminary ruling issued by the European Court of Justice the year before.²⁵ Although *bpost*

22 College, 16 March 2020, Decision BMA-2020-V/M-13.

23 European Court of Justice, C-519/04 P, *Meca-Medina v European Commission*, 18 July 2006.

24 *Bpost* had applied a per-sender rebate model, whereby quantity rebates are based on the volume of mail supplied by senders. This model was found to discriminate against 'consolidators', which act as intermediaries by preparing, processing and transporting mail to *bpost*'s distribution points, as these were not considered as single senders.

25 Case C-340/13, *bpost v. IBPT* [2015].

was acquitted from the BIPT fine, the Brussels Court of Appeal annulled the BCA decision on 10 November 2016 for breach of the *ne bis in idem* principle.²⁶ The Court considered that the facts underlying the BCA's decision had already been subject to scrutiny by the BIPT in a final decision and the sanctions that both authorities could impose were of a criminal nature under the European Convention of Human Rights. The conditions for the *ne bis in idem* principle to apply were, therefore, met even though the two authorities operate under different legal regimes (competition law and postal regulation, respectively).²⁷ On 22 November 2018, the Belgian Supreme Court overturned the Brussels Court of Appeal judgment for having annulled the BCA decision based on insufficient legal grounds.²⁸ The Court examined the recent case law of the European Court of Justice²⁹ and concluded that the *ne bis in idem* principle is no obstacle to parallel proceedings if these have complementary objectives with regard to different aspects of the same conduct. The Belgian Supreme Court therefore overturned the judgment and referred the case back to the Brussels Court of Appeal.

In its interlocutory judgment of 19 February 2020, the Brussels Court of Appeal considered that the *Toshiba* judgment (a 2012 case that had not been discussed until then in the proceedings) could shed light on the appropriate way to apply the *ne bis in idem* principle.³⁰ In this case, the European Court of Justice confirmed that an identity of the 'legal interest protected' under parallel competition law proceedings at the EU and national levels was required for the principle to apply (in addition to the identity of facts and parties). The Brussels Court of Appeal then asked the European Court of Justice whether this third condition also applies in the context of the concurrent application of two different legal regimes (here, competition law and postal regulation) and, if not, whether a restriction of the *ne bis in idem* principle could be justified by their complementary objectives. The Brussels Court of Appeal considered that, should the identity of legal interest protected not be required, the *effet utile* of competition law, which by essence applies horizontally across all sectors, could be undermined. The European Court of Justice's preliminary ruling on these questions is now awaited (and will be the second rendered by the EU's top court in this case).

Interestingly, the European Commission intervened in the challenge before the Belgian Supreme Court and is intervening in the procedure pending before the Brussels Court of Appeal. The European Commission frequently uses its *amicus curiae* prerogatives under Article 15 of Regulation 1/2003 to submit written observations to national courts, with a view to ensuring a consistent application of EU competition law. Here, the Brussels Court of Appeal followed the Commission's recommendation to consult the European Court of Justice and followed the enforcer's qualification (also endorsed by the BCA) as to how to formulate the questions to be asked to the court.

26 Enshrined in Article 50 of the European Charter of Fundamental Rights and Article 4 of the Seventh Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

27 The BIPT and the BCA respectively applied postal regulation and competition law to bpost's rebate scheme.

28 Belgian Supreme Court, 22 November 2018, *Belgian Competition Authority/bpost* (case C.17.0126.F/1).

29 Case C-524/15, *Menci* [2018], Paragraphs 40 and 44; and case C-537/16, *Garlsson Real Estate and Others* [2018], Paragraphs 42 and 46; joined cases C-596/16 and C-597/16, *Enzo Di Puma* [2018], Paragraphs 39–42.

30 Case C-17/10, *Toshiba Corporation e.a.* [2012].

BCA significant decisions				
Sector	Conduct	Decision	Auditorate or College	Case opened
Print supplies	Refusal to deal/sell printheads and ink cartridges	Interim measures rejected	College	February 2020
Golf billiards	Exclusive dealing with a billiard ball manufacturer	Interim measures	College	November 2019
TV broadcasting service	Excessive pricing	<i>Ex officio</i> instruction closed	Auditorate	February 2019
Weather forecasting	Refusal to share meteorological data	Interim measures rejected	College	January 2019

BCA active cases		
Sector	Conduct	Case opened
Print supplies	Refusal to deal/sell printheads and ink cartridges	February 2020
Golf billiards	Exclusive dealing with a ball manufacturer	November 2019
Pharmaceuticals	Excessive pricing practices	April 2019
Weather forecasting	Refusal to share meteorological data	January 2019
Radio broadcasting service	Refusal to access/use broadcasting antennas	November 2018
Electricity meters	Price discrimination	May 2018
Show-jumping competitions	Different treatment of teams under federation regulations	November 2017
Broadcasting of cycling competitions	Acquisition of long-term exclusive licensing rights without a bidding procedure	September 2015
Postal services	Loyalty rebates	November 2005 (currently before Brussels Court of Appeal in second review of the case, pending preliminary ruling from the European Court of Justice)

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 above, 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*. As under EU law, it is essential under Belgian law to first define the relevant markets before assessing whether an undertaking holds a dominant position.

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.

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 the European or Belgian level (but also by the competition authorities of neighbouring countries) are generally considered a useful, if not decisive, starting point.³¹ Potentially converging arguments of the parties involved are further likely to influence the market definition.³² 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.³³

In line with practices at the EU level, the assessment of dominance requires consideration of various factors that, taken separately, are not necessarily determinative.³⁴ 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.³⁵ 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.³⁶ Conversely, the BCA 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'.³⁷ Overall, Belgian practice recognises the need to assess the position of an allegedly dominant company in comparison with the position of its competitors and to consider in particular,³⁸ as a proxy for the ability to circumvent competitive constraints and as evidence of a possibility to behave independently of competition: the differences in market

31 See, for example, Competition Council, 28 September 2010, Decision 2010-P/K-42-AUD, *Freedom CVBA/InBev Belgium NV*, Paragraph 75.

32 For example, in *Base/Belgacom Mobile*, the Competition Council found that, with regard to the geographical scope, all parties seemed to agree that the relevant market was the Belgian territory, and the Competition Council subsequently adopted such a decision (Competition Council, 26 May 2009, Decision 2009-P/K-10, *Base/BMB*, Paragraph 130).

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

34 Competition Council, 21 March 2008, Decision 2008-P/K-10-AUD, *FEGE/Idelux*, p. 6; Competition Council, 26 May 2009, Decision 2009-P/K-10, *Base/BMB*, Paragraph 139.

35 See, for example, Auditorate, 26 March 2015, Decision ABC-2015-P/K-09-AUD, *Lampiris/Electrabel*, Paragraphs 101–118.

36 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., Brussels Court of Appeal, *Bureau d'Assurances Desert/AXA Belgium*, 27 February 2014 (case 2013/AR/1783), *TBM/RCB*, 2014/4, p. 352.

37 Competition Council, 26 May 2009, Decision 2009-P/K-10, *Base/BMB*, Paragraphs 150 and 154.

38 *ibid.*, Paragraph 155 et seq; Competition Council, 27 October 2009, Decision 2009-P/K-26-AUD, *vzw Federatie HoReCa Wallonie/Vlaanderen et al/InBev NV*, Paragraphs 62–64; Competition Council,

shares;³⁹ 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; competing firms' respective economic and financial power; and the nature of the contentious practices. The BCA has also relied on earlier findings of dominance in its own decisions.⁴⁰

Finally, there are only a small number of precedents in which the BCA has had recourse to the concept of collective dominance. The main example to date is the 2014 decision dismissing a complaint brought against various film studios.⁴¹ 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,⁴² which it found inapplicable to the case at hand and therefore rejected the allegation of collective dominance on the part of the majors. Moreover, the Auditorate 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.

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 use criteria or tests similar to those developed to that effect by the European Commission and the European Court of Justice. Article IV.2 of the CEL was modelled after Article 102 of the TFEU, and, accordingly, contains a non-exhaustive list of practices that may be considered abusive depending on the circumstances. Moreover, as at the EU level, the BCA, and courts take as a starting point that holding a dominant position is not problematic per se,⁴³ and that 'the existence of a dominant position does not deprive an undertaking in this position from the right to protect

3 July 2008, Decision 2008-I/O-41-AUD, *Electrabel NV*, Paragraphs 77–78; and Competition Council, 5 October 2007, Decision 2007-V/M-25-AUD, *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV and MSD Overseas Manufacturing Company*, Paragraph 21.

39 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 Competition Council, 5 October 2007, Decision 2007-V/M-25-AUD, *Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV and MSD Overseas Manufacturing Company*, Paragraph 21).

40 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 ABC-2014-I/O-15).

41 Auditorate, 2 December 2014, Decision 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*. 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 BMA-2015-I/O-02-AUD, *Cargo handling at Brussels National Airport*. For a case mixing concerted practices and collective dominance considerations, see judgment of the Liège Court of Appeal of 5 February 2009 in *AGIM/Oxycure, TBM/RCB*, 2009/3, p. 60.

42 Case C-413/06 P, *Sony/BMG* [2008], Paragraphs 122–124, summarised by the Auditorate in Paragraph 52 of the decision.

43 Ghent Court of Appeal, 1 October 2014, *Ducati/DD Bikes* (case 2010/AR/3351).

its own interests when they are jeopardised',⁴⁴ 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.⁴⁵ Belgian courts are more unpredictable than the BCA with respect to the application of these principles.

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 such 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.⁴⁶

ii Exclusionary abuses

Exclusionary pricing

With regard to predatory pricing, the leading precedent in Belgium is *Electrabel*.⁴⁷ The case involved allegations of predatory pricing on the part of the incumbent gas operator, Electrabel, at the time of the liberalisation of the sector. The allegations were dismissed for two main reasons: the short duration of the alleged predation (six months), which was considered too short to implement a credible predatory strategy; and the fact that no alternative operator had exited the market during that period.

This case is interesting in three respects:

- a* 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',⁴⁸
- b* much like under the US antitrust framework, 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 that the prospect of such a recoupment was not a prerequisite for the establishment of an exclusionary strategy; and
- c* the BCA did not perform a cost analysis in this case, but focused on the materiality of the foreclosure effects.

44 See, for example, Brussels Court of Appeal, 3 November 2005, *SABAM v. Productions & Marketing, TBMI/RCB*, 2006/4, p. 320.

45 See, for example, Competition Council, 26 May 2009, Decision 2009-P/K-10, *Base/BMB*, Paragraphs 190 and 275 et seq.

46 See, for example, Antwerp Commercial Court, 17 July 2008, *Base v. Belgacom* (case A/07/6775).

47 Competition Council, 3 July 2008, Decision 2008-I/0-41-AUD, *Electrabel NV*.

48 Commission Guidance Paper, Paragraph 69.

As a general matter under Belgian law, temporary below-cost prices associated with the launch of a new product or the liquidation of stocks is not abusive.⁴⁹

With regard to margin squeeze, the BCA's practice is generally in line with EU case law. The leading precedent on margin squeeze in Belgium is *Base/Belgacom Mobile* (BMB), in which the BCA established a margin squeeze on the basis of a comparison between the wholesale prices charged by BMB on the upstream market for call terminations 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.⁵⁰ 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 BCA 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'.⁵¹

In the *Lampiris/Electrabel* case, the BCA dismissed a margin squeeze allegation among other claims of price-related abuses of dominance by Electrabel.⁵² The BCA found no margin squeeze. Applying the 'as-efficient competitor test' on the basis of Electrabel's long-term average incremental costs, the BCA found that Electrabel's margins would have remained positive in the retail market even when paying the prices charged to customers in 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 *ABB Industrial Solutions* (ABB), the College imposed interim measures on ABB, a producer of 'smart' electricity meter boxes, following a complaint lodged by its competitor Teco NV.⁵³ In Belgium, electricity distribution is regulated at the regional level. Eandis (now Fluvius), the energy grid net operator in the Flemish region, set the mandatory standard type of electricity meter boxes to be installed and launched two public tenders for the boxes and the boxes' lids, respectively. The exclusive right to fabricate and deliver lids was obtained by GE Industrial Solutions (GE), but after its acquisition it was passed on to ABB. ABB then charged a substantially higher price for the lids than the price offered to Eandis in GE's tender bid, lowered its prices for electricity meter boxes, allowing it to squeeze the margin, and created uncertainties in supplies to other companies that were economically dependent on it for these lids. The College found it not manifestly unreasonable to assume prima facie that ABB abused its dominant position.

49 See, for example, Brussels Commercial Court, 20 November 2006, *Docpharma/Eli Lilly Benelux, TBM/RCB*, 2007/1, p. 90.

50 Competition Council, 26 May 2009, Decision 2009-P/K-10, *Base/BMB*, Paragraph 260.

51 *ibid.*, Paragraph 313, which refers to Commission Decision, 4 July 2007, case COMP/38.784, *Telefonica*, Paragraph 543; case T-271/03, *Deutsche Telekom/Commission* [2008] ECR II-477, Paragraph 166; and case T-203/01, *Michelin* [2003] ECR II-4071, Paragraphs 239 and 241.

52 Auditorate, 26 March 2015, Decision ABC-2015-P/K-09-AUD, *Lampiris/Electrabel*.

53 College, 3 September 2018, Decision BMA-2018-V/M-28.

Exclusive dealing

The offering of rebates characterised as exclusive tends to be treated somewhat strictly by the BCA and courts. On 27 September 2013, the Brussels Court of Appeal upheld the BCA's decision of 30 July 2012 imposing a €245,530 fine on Presstalis,⁵⁴ a French media distributor, for providing French publishers an extra 2.5 per cent discount (BSC discount) 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.⁵⁵ The BCA found that the BSC discount had had a 'strong fidelity effect', and enabled Presstalis to foreclose competitors both in the market for the export of French magazines, and, through its privileged relationship with Belgian distributor AMP, in the market for the distribution of those 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 holding that loyalty discounts provided in exchange for exclusivity are as such in violation of Article 102 of the 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 *Base/BMB*, 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.⁵⁶ The BCA dismissed the existence of an abuse on the grounds that it was unclear how said rebates were 'likely to have a real influence on the customer's choice'; and how 'the offers from the dominant undertaking on the one hand, and the competitors on the other hand' compared with each other.⁵⁷ In *Algist Bruggeman*, however, the BCA reviewed various loyalty-enhancing rebates and found that, because these rebates were aimed at enhancing the loyalty of distributors and bakers to exclude lower-priced competitors, and had no objective justification, they breached Article 102 TFEU and Article IV.2 of the CEL.⁵⁸

Volume rebates are generally unproblematic under Belgian law. The Brussels Court of Appeal 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.*⁵⁹

Leveraging

Leveraging allegations have occasionally been made in Belgium.

54 Competition Council, 30 July 2012, Decision 2012-P/K-20, *Tondeur Diffusion/AMP & Presstalis*.

55 Brussels Court of Appeal, 27 September 2013, *Presstalis SAS* (case 2012/MR/5).

56 Competition Council, 26 May 2009, Decision 2009-P/K-10, *Base/BMB*.

57 *ibid.*, Paragraphs 192–199.

58 Auditorate, 22 March 2017, Decision BMA-2017-I/O-07-AUD, *Algist Bruggeman NV*, Paragraphs 164–168.

59 Brussels Court of Appeal, 3 November 2005, *SABAM v. Productions & Marketing* (case 2004/MR/7), Paragraph 14, *TBM/RCB* 2006/4, p. 320.

In *National Lottery*, the National Lottery acknowledged forms of leveraging in a BCA settlement decision in 2015.⁶⁰ Following complaints, the Auditorate had investigated the National Lottery's conduct at the time of its launch of Scooore!, a new sports betting product. The Auditorate found that the National Lottery had abused its dominant position through a one-off use of customers' contact details to promote Scooore!. The contact details had been collected through its legal monopoly, where competitors were unable to collect data of a similar scope and nature at reasonable costs and within a reasonable period of time. In addition, the National Lottery had obtained commercially sensitive information about competitors, 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.

In *MediCare-Market*, the College's decision rejecting interim measures did not explicitly refer to leveraging, but found that the practices at hand could constitute an attempt to broaden the scope of pharmacists' legal monopoly beyond the limits set by the legislator (i.e., beyond pharmaceutical products to cover para-pharmaceutical products), which would amount to an abuse of dominance.⁶¹

Belgian case law does not contain recent discussions of the principles applicable to tying and bundling practices so that reference can be made to those developed at EU level.⁶²

Refusal to deal

The *Bofar* case, involving a company specialised in the export of pharmaceutical products, enabled the BCA to provide some guidance regarding refusal to deal practices. As is the case at the 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'.⁶³ Subsequently, the BCA appears to condition a finding of abuse on evidence of a clear intent to foreclose actual or potential competition; the strengthening of the company's dominant position; and the absence of objective justification. In this case, the BCA dismissed the existence of an abusive refusal to deal, relying heavily on the Commission Guidance Paper and modelled its decision on the *GlaxoSmithKline* case law of the European Court of Justice.⁶⁴

While the principle according to which dominant players should remain free to choose their trading partners 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 by *Ducati/DD Bikes*, in which the Ghent's Court of Appeal 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

60 Auditorate, 22 September 2015, Decision BMA-2015-P/K-27-AUD and Decision 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*.

61 College, 19 June 2017, Decision ABC-2017-V/M-24, *Interim measures against Order of Pharmacists*, Paragraph 48.

62 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 Auditorate, 17 February 2015, Decision BMA-2015-I/O-02-AUD, *Cargo handling at Brussels National Airport*.

63 Competition Council, 2 April 2009, Decision 2009-V/M-04, *Bofar NV*, Paragraph 103.

64 Joined cases C-468 to 478/06, *GlaxoSmithKline AEVE* [2008] ECR I-7139.

dealership agreement.⁶⁵ 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 (which is 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, holding Ducati's refusal to supply abusive, the Court imposed a number of obligations on Ducati aimed at ensuring that DD Bikes could effectively offer after-sales 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 a historical tendency on the part of Belgian courts to protect the interests of dealership holders.

Other practices

In *Algist Bruggeman*, the BCA found an abuse of dominance in denigrating practices against a competitor. The Auditorate found that Algist Bruggeman's circulation of biased internal reports about a competitor's product, aimed to create uncertainty about the microbiological aspects and quality of its competing yeast, and to discourage distributors or bakeries from supplying or using the product.⁶⁶ Also in 2017, the BCA rejected MediCare-Market's request for interim measures, yet found that the Order of Pharmacists' denigrating press campaign about MediCare-Market's potential harm to the profession of pharmacists and to patients could *prima facie* constitute an abusive practice.⁶⁷

In the same case, the BCA clarified in 2019 that, as a general principle, the mere fact for a dominant company of instituting legal proceedings against another company will not be considered as abusive.⁶⁸ The BCA recalled in this regard that, first, Article 780 *bis* of the Belgian Code of Civil Procedure already sanctions abuses of process and, second, there are strict conditions under the *Promedia* case law for entering into litigation to constitute an abuse of dominance, which were not met in this case.⁶⁹

At the EU level, concentrations are only reviewed under merger control rules and excluded from procedures for restrictive practices, pursuant to Article 21(1) of the Merger Regulation.⁷⁰ In Belgium, the question of whether mergers and acquisitions that do not meet notification thresholds can be subject to review under Article IV.2 of the CEL (and, in fact, Article IV.1 of the CEL) is a long-standing one, which seems to receive a positive, if qualified, response. In 2006, the Brussels Court of Appeal held that a transaction that does not meet the Belgian notification thresholds may be reviewed under Articles 101 and 102 of the TFEU or Articles IV.1 and IV.2 of the CEL.⁷¹ In 2016, the BCA had the opportunity to address

65 Ghent Court of Appeal, 1 October 2014, *Ducati/DD Bikes* (case 2010/AR/3351).

66 Auditorate, 22 March 2017, Decision BMA-2017-I/O-07-AUD, *Algist Bruggemans NV*, Paragraphs 191–194.

67 College, 19 June 2017, Decision ABC-2017-V/M-24, *Interim measures against Order of Pharmacists*, Paragraph 48.

68 College, 28 May 2019, Decision n°ABC-2019-I/O-14, *MediCare-Market – Ordre des Pharmaciens*, Paragraphs 235 to 241. The decision did not, however, engage with the potentially abusive nature of the denigrating practices considered in the interim decision.

69 Case T-111/96, *ITT Promedia v. Commission* [1998], Paragraphs 56, 72 and 73.

70 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ, 29 January 2004, L 24/1.

71 Brussels Court of Appeal, 15 December 2006, *Gabriella Rocco & Centro di Medicina Omeopatica Napoletano v. Dano-Invest and others* (case 2006/MR/1).

the question, after receiving a request for interim measures to suspend the non-notifiable acquisition of Brouwerij Bosteels by AB InBev.⁷² Alken-Maes contended that the acquisition constituted an abuse of AB InBev's dominance. The BCA referred to the European Court of Justice's *Continental Can* judgment and acknowledged that concentrations can lead to an abuse of dominance, but also noted the potential harm of interim measures against transactions.⁷³ The BCA then held that an acquisition escaping merger control can be assessed from an abuse of dominance perspective if there are *prima facie* restrictions on competition, distinct from the effect of the concentration itself, which can be qualified *prima facie* as an abuse of dominance. This was not the case in the transaction at hand. The Brussels Court of Appeal upheld the BCA decision in 2017.⁷⁴

iii Discrimination

Price discrimination under Article IV.2(2) and (3) of the CEL generally requires evidence of a difference in treatment applied to equivalent transactions with the effect of causing a material competitive disadvantage. In *Lampiris/Electrabel*, 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.⁷⁵ 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.⁷⁶ However, the BCA has not always adequately provided support for its decisions on price discrimination.

In *bpost*,⁷⁷ the BCA 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. The Brussels Court of Appeal annulled this decision on *ne bis in idem* grounds, and therefore did not review the finding of breach of equal treatment.⁷⁸ The Belgian Supreme Court overturned the appeal judgment in 2018, as the Brussels Court of Appeal had improperly applied the *ne bis in idem* principle.⁷⁹ The case is now back with the Brussels Court of Appeal, which has to make a new assessment on the merits.

Similarly, Belgian courts sometimes fail to inquire into the existence of an actual competitive disadvantage resulting from an allegedly discriminatory practice, in contradiction with the principles prevailing at the EU level since *Post Danmark*.⁸⁰ In *SABAM*, for example, the Brussels Court of Appeal found that services offered to 'major customers' were equivalent

72 College, 21 November 2016, Decision BMA-2016-V/M-36.

73 *ibid.*, Paragraph 77 et seq.

74 Brussels Court of Appeal, 28 June 2017, *Alken-Maes v. AB InBev* (case 2016/MR/2).

75 Auditorate, 26 March 2015, Decision ABC-2015-P/K-09-AUD, *Lampiris/Electrabel*, Paragraph 142.

76 Auditorate, 28 September 2010, Decision 2010-P/K-42-AUD, *Freedom CVBA/InBev Belgium NV*, Paragraph 80.

77 College, 10 December 2012, Decision 2012-P/K-32, *Publmail, Link2Biz International and G3 Worldwide Belgium/bpost*, Paragraphs 253–262.

78 Brussels Court of Appeal, 10 November 2016, *bpost/Spring, LINK2BIZ International, Publmail*, in the presence of the BCA (case 2013/MR/2).

79 Belgian Supreme Court, 22 November 2018, *Belgian Competition Authority/bpost* (case C.17.0126.F/1).

80 ECJ, 27 March 2012, case C-209/10, *Post Danmark*.

to those offered 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.⁸¹

iv Exploitative abuses

It is well known that 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. In the 2014 *Electrabel* electricity wholesale market 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,⁸² which was presented as an unjustified limitation of production.⁸³ 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, and found that Electrabel held a dominant position on both. The BCA then narrowed 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 of 50 to 200 per cent above the average wholesale price per MWh achieved on the Belpex trading platform in 2008, which was found ‘excessively disproportionate compared to the marginal cost of production’.⁸⁴

Similarly, in *Festival organisers/SABAM*, the Brussels Commercial Court concluded that SABAM’s tariffs for concerts and music festivals did not have a reasonable relation to the economic value of the product provided. The copyright collecting society SABAM had based its tariffs on the size of festivals (while this did not change the nature or cost of its services to provide licences), the festival’s total turnover (including turnover unrelated to music), and used pricing methods unrelated to actual use of music (while alternative methods of calculation that quantify use do not require additional costs).⁸⁵ The Court dismissed SABAM’s argument that the tariffs were increased to match those in neighbouring countries.⁸⁶

The BCA and the courts often dismiss excessive pricing claims. In *Lampiris/Electrabel* and *NMBS/Electrabel*, the BCA and the Brussels Court of Appeal both dismissed similar excessive pricing claims.⁸⁷ 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

81 Brussels Court of Appeal, 3 November 2005, *SABAM v. Productions & Marketing, TBM/RCB*, 2006/4, p. 319.

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

83 College, 18 July 2014, Decision ABC-2014-1/O-15, *Electrabel/Wholesale Electricity Market*. 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.

84 College, 18 July 2014, Decision ABC-2014-1/O-15, *Electrabel/Wholesale Electricity Market*, Paragraph 147.

85 Brussels Court of Appeal, 12 April 2018, *Festival organisers/SABAM* (case 2018/1712).

86 *ibid.*, Paragraph 20.

87 Brussels Court of Appeal, 14 January 2015, *NMBS/Electrabel* (case 2010/AR/3112), *TBM/RCB*, 2016/1, p. 33; and Auditorate, 26 March 2015, Decision ABC-2015-P/K-09-AUD, *Lampiris/Electrabel* (case CONC-P/K-09/0002).

allegedly excessive character of an increase in Electrabel's natural gas prices.⁸⁸ 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.

Moreover, loose findings of excessive prices are sometimes encountered in judgments of Belgian courts. This was the case in the *AMP* judgment,⁸⁹ where the Brussels Court of Appeal 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, in *Base/Belgacom*, the Antwerp Commercial Court has 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.⁹⁰ 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.⁹¹

The CEL grants the BCA the power to issue interim orders in cases of 'price or margin problems', 'abnormal evolution in prices' or 'structural market failures' established by a report of the Price Observatory, with the aim of preventing serious, actual and irreparable harm to companies, consumers, or the general economic interest.⁹² 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'.⁹³ 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 are a source of concern for the business community.⁹⁴ 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.⁹⁵

In 2019, Belgium saw the federal government using its price regulation powers under Article V.12 of the CEL to cap the price of a medicine. On 5 April 2019, consumer organisation Test Achats filed a complaint with the BCA, claiming that pharmaceutical company Lediand abused its dominant position by charging an excessive price for its drug CDCA. CDCA is indicated in the treatment of CTX, a rare genetic metabolic disorder. The drug had been launched in the Belgian market several years earlier for the treatment of

88 Competition Council, Decision 2008-I/O-41-AUD, *Electrabel NV*.

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

90 Antwerp Commercial Court, 17 July 2008, *Base v. Belgacom* (case A/07/6775).

91 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* (Brussels: Larcier, 2009), pp. 33 and 34.

92 Articles V.3 to V.4 of the CEL.

93 Article V.6 of the CEL.

94 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.

95 Articles V.3–V.4 of the CEL.

gallstones, however, at a price that was more than 300 times lower. On 4 September 2019, the Belgian Minister of Economy decided to cap the price of the drug for use in the CTX application to one quarter of the Leadiant's initial price. The Minister also requested the BCA to prioritise the investigation into Leadiant's potential abuse of dominance in relation to the sale of CDCA and called upon the European Commission to assess and review the rules governing 'orphan medicines'.

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 abusive character thereof. As at the EU level,⁹⁶ it was in a dominance case that the BCA imposed its highest individual penalty ever, of an amount of €66.3 million levied against Belgacom (now Proximus) in a margin-squeeze decision dated 26 May 2009.⁹⁷

Belgian remedial practice differs from that observed at the EU level in that, whereas this is extremely rare at the 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 worldwide turnover realised in the last full year preceding the adoption of a decision.⁹⁸ Below that limit, fines are calculated according to Fining Guidelines issued in 2014.⁹⁹ These Guidelines provide that the BCA applies the same methodology as the European Commission, with a limited number of exceptions destined to make it specific to Belgium.¹⁰⁰ 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 for 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).¹⁰¹

96 See the €4.34 billion fine imposed in case AT.40099, *Google Android* (18 July 2018).

97 Competition Council, Decision 2009-P/K-10, *BASE/Belgacom & Belgacom Mobile*.

98 Article IV.84 of the Law of 2 May 2019 amending Book I 'Definitions', Book XV 'Enforcement', and replacing Book IV 'Competition Law' of the Code of Economic Law (Belgian Official Gazette, 24 May 2019). Fines for infringements having started prior to the entry into force of the Law (on 3 June 2019) are still capped at 10 per cent of the turnover generated on the Belgian market (including the sale of goods for export) in the previous year.

99 The Guidelines are available on the website of the BCA at: www.abc-bma.be/fr/propos-de-nous/publications/lignes-directrices-concernant-le-calcul-des-amendes.

100 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.

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

ii Behavioural remedies

As previously noted, the BCA (and the 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 rarely used to date. Over the years, however, the BCA 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*]’.

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.¹⁰² Secondly, and importantly, 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 a request for interim measures.¹⁰³ Subsequently, the BCA will have to render its decision within one month of the oral hearing, with failure to do so amounting to a rejection of the request.¹⁰⁴

The BCA’s willingness to make use of interim measures was sustained by the Brussels Court of Appeal. In the 2016 *FEI* case, the BCA ordered the suspension of the FEI’s exclusivity clause, prohibited the FEI from suspending or otherwise sanctioning athletes or horses for participating in GCL competitions, and requested that the FEI inform its members (national federations), athletes, officials and organisers of these measures by 31 August 2015.¹⁰⁵ After finding that the FEI had not properly communicated the measures, the BCA 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.¹⁰⁶

Also in the *FEI* case, the BCA ordered the FEI and equestrian competition organisers to suspend their MoU setting the participation rules for FEI-accredited events insofar as it reduced the share of invitations based on official rankings below 60 per cent until the adoption of a decision on the merits, and prohibited any points for the official FEI ranking from being granted as a result of GCT competitions so long as invitations for these events did not comply with the requested share.¹⁰⁷ The BCA considered that the cumulative conditions to grant interim measures were fulfilled, namely that:

- a the MoU *prima facie* constituted an infringement of competition rules, as FEI fully controls the access to the market by virtue of its General Regulations and the invitation system discriminates against riders who are not part of a fee-paying team; and

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

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

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

105 College, 27 July 2015, Decision ABC-2015-V/M-23, *Interim measures against FEI*, Paragraphs 97–115. The FEI’s appeal to suspend the interim measures was dismissed by the Brussels Court of Appeal in a first judgment of 22 October 2015, *FEI/BCA* (case 2015/MR/1), Belgian Official Gazette, 17 November 2015, pp. 69 and 141), and confirmed by the judgment on the merits of 28 April 2016, *FEI/BCA* (case 2015/MR/1), *TBH/RDC*, 2016/8, p. 761.

106 College, 24 November 2015, Decision ABC-2015-V/M-68, *Interim measures against FEI*, pp. 29–31, upheld by the Brussels Court of Appeal, 28 April 2016 (case 2015/MHR/1).

107 College, 20 December 2017, Decision ABC-2017-V/M-38, *Interim measures against FEI, GCL and TTB*.

- b* there was a risk of serious and irreparable harm to the applicants, since the decrease in the invitations sent to riders on the basis of their ranking alone is likely to seriously affect the riders' short-term interests and their careers.

While the BCA imposed penalty payments in 2018 for non-compliance with the interim measures ordered the year before,¹⁰⁸ the Brussels Court of Appeal eventually annulled the BCA's decision later in the year on grounds of inappropriate reasoning.¹⁰⁹ Interestingly, since the BCA did not request in its submissions that the Court use its full appellate jurisdiction, the Court could neither rectify the College's reasoning nor review the case on the merits (i.e., examine whether the BCA rightly concluded that interim measures were justified).

In the *Telenet* case, the BCA's interim measures ordered Telenet and VV 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 to suspend the full exclusive agreement from the end of season 2015–2016 and reallocate the VV broadcasting rights, whether on an exclusive basis or not, under a transparent and non-discriminatory tender procedure.¹¹⁰

iii Structural remedies

There has been no recent reported case of structural measures (such as split-ups or divestitures) imposed or ordered at the 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, or at the request or injunction of the competent minister. Upon completion of its investigation, the Auditorate has a choice between closing a case and issuing a formal statement of objections to which parties are entitled to reply prior to the transmission of the case to the College for decision.¹¹¹ That transmission occurs by means of the issuance of a non-binding draft decision reflecting the replies to the statement of objections.¹¹² The College then hears the parties both in writing and orally before rendering its decision,¹¹³ which can then be appealed before the Brussels Court of Appeal. The procedure is controversial, however, primarily because it prevents parties from submitting new factual

108 College, 13 April 2018, Decision ABC-2018-V/M-11, *Demande de mesures provisoires de Madame Lisa Nooren and Henk Nooren Handelstal*, Paragraphs 52–54.

109 Brussels Court of Appeal, 27 June 2018, *GCL and TTB/Belgian Competition Authority* (case 2018/5782), Paragraph 38.

110 College, 5 November 2015, Decision BMA-2015-V/M-65, *Interim measures against Telenet* (case MEDE-V/M-15/0024), Paragraphs 72–81, upheld by the Brussels Court of Appeal, 7 September 2016, *Telenet/BMA* (cases 2015/MR/2 and 2016/MR/1).

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

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

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

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.¹¹⁴

Complainants 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'.¹¹⁵ As a rule, they do not have access to the case file unless the President of the BCA 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 the entire case file).¹¹⁶ Upon request, complainants can be heard orally by the College.¹¹⁷

The CEL provides for the possibility of closing cases by means of a commitment decision adopted by the College.¹¹⁸ Commitment decisions do not involve a formal finding of infringement, which implies that plaintiffs cannot solely rely on such decisions as establishing fault under Article 1382 of the Belgian Civil Code as the basis for a follow-on damages claim before Belgian courts. Whereas the Commission relies heavily on commitment procedures to deal with dominance cases, the BCA has adopted very few commitment decisions to date.¹¹⁹ Even though not formally a commitment decision, but a dismissal, the *Immoweb* case set a precedent in Belgium for *de facto* commitment decisions at the level of the Auditorate. In 2015, the Auditorate opened an investigation into Immoweb's use of most-favoured nation (MFN) clauses in its contracts concluded with software developers for real estate agencies. After a preliminary analysis, the Auditorate concluded that Immoweb, the operator behind Belgium's most-frequented real estate website, was dominant on a national market for web portals dealing primarily in real estate, and that the MFN clauses prevented Immoweb's competitors from negotiating more commercially favourable terms with software developers, which increased the barriers to entry. Immoweb committed unilaterally to terminate the clauses at issue and not to include such MFN clauses in contracts concluded in the following five years. On this basis, the Auditorate decided to close its investigation, essentially dismissing the case without coming to a final determination about any abuse of dominance under Article IV.2 of the CEL or Article 102 of the TFEU, and without issuing a formal commitment decision under Article IV.47 of the CEL.¹²⁰

In addition, the CEL contains formal and informal settlement procedures that are also applicable in dominance cases (i.e., not only in collusive cases). The formal settlement

114 These time limits can be extended if the president of the BCA '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 Articles IV.42(5), IV.45(3),(4) and (6) of the CEL).

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

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

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

118 Article IV.49 of the CEL.

119 The BCA has adopted commitment decisions in only two instances so far: see Competition Council, Decision 2005-I/O-52, *NV Distri-One/BVBA Coca-Cola Enterprises Belgium*; and Competition Council Decision 2006-I/O-12, *Banksys SA/FNUCM/Banksys SA*; *UNIZO/Banksys*. Both decisions ended seven-year investigations into alleged abusive conduct.

120 Auditorate, 7 November 2016, Decision ABC-2016-I/O-31-AUD, *Immoweb* (case CONC-I/O-15/0002).

procedure can be initiated at any time prior to the issuance of a draft decision.¹²¹ If an 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.¹²² 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 cannot be appealed. As is the case at the EU level, settlement discussions can be interrupted at any time. 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 represents the first settlement decision adopted in a dominance case.¹²³ 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.¹²⁴

The president of the BCA can also make use of an informal settlement procedure to resolve questions and disputes.¹²⁵ 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.¹²⁶

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).¹²⁷ However, Article IV.79(1) 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’.¹²⁸

121 Articles IV.51 to IV.57 of the CEL.

122 See the BCA’s Fining Guidelines, Paragraphs 9 and 10.

123 For a later example, see Auditorate, 22 March 2017, Decision BMA-2017-I/O-07-AUD, *Algist Bruggemans NV* (case MEDE-I/O-13/0001).

124 Auditorate, 22 September 2015, Decision BMA-2015-P/K-27-AUD; the Auditorate adopted a second decision on the same day, dismissing the complainants’ other allegations; see Auditorate, 22 September 2015, Decision BMA-2015-P/K-28-AUD, *Stanleybet Belgium NV/Stanley International Betting Ltd and Sagevas SA/World Football Association SPRL/Samenwerkende Nevenmaatschappij Belgische PMU*.

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

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

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

128 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).

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

A case in point is *Distripaints/Novelta*, where the Brussels Court of Appeal confirmed the BCA's determination of 'in-scope' documents, but only after having requested the BCA to provide an expanded statement of reasons to justify the relevance of the documents it collected during its inspections.¹²⁹

Regarding interim measures, the Court annulled the BCA's interim measures decision ordering the suspension of an MoU on grounds of inappropriate reasoning.¹³⁰ The Court noted that, while the College explicitly dismissed the MoU from the case file due to its confidential nature, the decision nevertheless contained multiple references to the MoU, including in the preliminary assessment of the College, which resulted in the suspension of the MoU. These internal contradictions vitiated the reasoning of the decision, which the Court therefore annulled.

Article IV.32 of the CEL provides that members of the BCA can be recused for the same reasons as those justifying the recusation of judicial judges under Article 828 of the Belgian Code of Civil Procedure. In 2018, these provisions were applied for the first time since the entry into force of the CEL in 2013. In *FEI*, the Brussels Court of Appeal ordered three members of the College (including the president of the BCA) involved in the adoption of the decision it annulled earlier in the same year to abstain from sitting in the College that would be responsible for reviewing the case.¹³¹ The president of the BCA and the two other assessors contended that, as the decision was annulled on procedural grounds, the administrative procedure could still be carried out by the College that adopted this decision.

The Brussels Court of Appeal, however, found that the criteria for recusation were satisfied in the case at hand. The Court held that the new decision would necessarily be based on the same circumstances of fact and law as those underlying the annulled decision; a College sitting in the same composition would therefore have an incentive to merely adjust its reasoning in a way that supports its original conclusions (i.e., that interim measures were justified) rather than starting over with an impartial assessment of the case. The Court, therefore, ordered the president of the BCA and the two assessors to abstain from sitting in the College that will examine the case in the future. The case on the merits is still ongoing.

Finally, the CEL contains an antitrust blocking statute, subject to exceptions to be set forth by Royal Decree.¹³² The principle of the 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.

129 Brussels Court of Appeal, 13 December 2017, *Distripaints & Novelta/Belgian Competition Authority* (case 2013/MR/9), *Competitio* 2018/1, p. 89.

130 Brussels Court of Appeal, 27 June 2018, *GCL and TTB/Belgian Competition Authority* (case 2018/5782).

131 Brussels Court of Appeal, 7 August 2018, *GCL and TTB/Jacques Steenberghe et al* (case 2018/AR/1293).

132 Article IV.13 of the CEL.

VII PRIVATE ENFORCEMENT

As previously noted, claims for abuse of dominance are also brought before Belgian courts. One avenue for such claims involves reliance on the rules on unfair trade practices. It is settled case law that claimants alleging breaches of Article IV.2 of the CEL can also obtain redress pursuant to the CEL's Unfair Trade Practices provisions (replacing the previous Belgian Act on Unfair Trade Practices).¹³³ 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.¹³⁴ The 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. In *BIT Marketing/SEB* and *Bierhalle Demeyer NV/Duvel Moortgat*, the claimants appealed judgments denying cease-and-desist orders. Their appeals were dismissed because the claimants had not provided sufficient evidence to find that either SEB and DM were dominant in their respective markets.¹³⁵

Damages claims can also be filed to obtain compensation for harm suffered as a result of an (alleged) abuse of dominant position, either on a stand-alone basis or as a follow-on action.¹³⁶ As the law currently stands, the CEL does not include a specific statutory basis for that purpose, so that 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.¹³⁷ In 2017, the Belgian legislator implemented the EU Damages Directive, and thereby provided a specific regime for damage claims based on Articles IV.1 and IV.2 of the CEL or Articles 101 and 102 of the TFEU, or on both. Whereas the Damages Directive provides for a presumption that cartels cause harm, it does not include such presumption for abuses of dominance. 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 recognise treble or punitive damages. In spite of the lack of clear precedent in the antitrust field, commentators have commonly admitted that the passing-on defence can be invoked by defendants, a position that should be formalised in the implementation of the Damages Directive. Upon request, damage awards can also include

133 Further, infringements of Chapter IV of the CEL are considered to fall within the scope of the notion of 'unfair trade practices' pursuant to Article VI.104 of the CEL.

134 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.

135 Ghent Court of Appeal, 7 March 2016, *BIT Marketing/SEB* (case 2015/AR/1594), *TBM/RCB*, 2016/4, p. 403; and Antwerp Court of Appeal, 27 October 2016, *Bierhalle Demeyer NV/Duvel Moortgat* (case 2015/AR/2657), *TBM/RCB*, 2016/4, p. 442.

136 As mentioned previously, commitment decisions do not involve a formal finding of infringement, which implies that plaintiffs cannot solely rely on such decisions as establishing fault under Article 1382 of the Belgian Civil Code as the basis for a follow-on damages claim before Belgian courts.

137 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 a contract, depending on the terms of the contract in question and the circumstances of the case.

(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 *Belgacom/Base & Mobistar* case, discussed in the 2016 edition of this chapter, addressed the question of an undertaking's fault in cases of abuse of dominance.¹³⁸ The former incumbent telecommunications operator, Belgacom, and mobile competitors Mobistar and Base had been involved in a long-running damages litigation for alleged pricing abuses. The abuses revolved around the different mobile termination rates charged by Belgacom depending on whether calls were initiated and terminated on its network (on-net) or initiated from other networks and terminated on its network (off-net). While the parties settled the litigation in October 2016, the Brussels Court of Appeal held before that Belgacom should have known, in light of established EU precedents, that its alleged practices would constitute breaches of Article 102 TFEU and therefore faults on its part (if they were confirmed by experts). With respect to the network effects in particular, the Court noted that the fact that the EU courts had not yet expressly decided on such practices did not mean that these could not amount to anticompetitive conduct. In particular, the Court held that the language of Article 102(a) TFEU,¹³⁹ existing EU case law and decisions, and Commission guidance, made it reasonable to predict 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 small number of unsuccessful cases,¹⁴⁰ recent practice appears extremely limited, as only two cases have been reported since 2004 of damages awarded based on a finding of abuse of dominance. The first case was peculiar, for the abuse was found to arise from meritless actions brought by Kinopolis, an (allegedly dominant) operator of film 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 Kinopolis' 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 stayed) in spite of parallel proceedings pending before the BCA.¹⁴¹

The second case to date is *Honda*, where the Ghent Commercial Court addressed the question of the statute of limitations of actions for damages.¹⁴² In its 1999 decision (which became final in 2011, after multiple appeals), the BCA (then Competition Council) found that Honda had abusively imposed overly burdensome conditions on parallel importers for

138 Brussels Court of Appeal, 26 February 2015, *Belgacom/Base & Mobistar* (case 2012/AR/1), *TBM/RCB*, 2016/3, 286.

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

140 See, for example, Brussels Court of Appeal, 25 January 2005, *Ann Prat Comm*, p. 743; and Brussels Commercial Court, 15 November 2006, RG 8069/02.

141 Brussels Commercial Court, 17 June 2010, *UGC Belgium v. Kinopolis Group, SA Compagnie de Promotion Liégeoise, SA Compagnie de promotion Charlemagne and SA Wilhelm & Co*, *TBH/RDC* 2013/1, p. 39.

142 Ghent Commercial Court, 23 March 2017, *NV Honda Motor Europe Logistics/NV Herman Verboven et al* (case A/12/02970), *TBM/RCB*, 2017/2, p. 162.

obtaining conformity certifications in Belgium; the parallel importers competed with Honda's official authorised distributors. In 2006, several parallel importers of Honda motorcycles filed an action for damages against Honda. Honda argued that the plaintiffs' claims were time-barred pursuant to Article 2262 *bis* of the Belgian Civil Code, which provides for a five-year limitation period for tort-based damages claims, in light of the 1999 BCA decision. The Court referred a request for a preliminary ruling to the Belgian Constitutional Court regarding the starting point of the limitation period for damages claims arising from breaches of competition law. In 2016, the Constitutional Court ruled that limitation periods of antitrust damages claims cannot expire before a final decision of the competition authority (or the end of the investigation by other means).¹⁴³ In its judgment, the Ghent Commercial Court applied this principle, and held that the parallel importers' damages claims were not time-barred because they were filed while the appeal against the BCA decision was still pending. The Court held that the harm, which stemmed from events dating back as far as 25 years, was practically impossible to quantify. The Court agreed with Honda that the plaintiffs could not bring forward sufficient evidence of the harm, but considered that not granting damages would be contrary to the objectives pursued by the rules on the private enforcement of competition law, and therefore assessed the harm *ex aequo et bono* and granted each plaintiff €20,000 in damages, plus interest accrued since 1997.

Finally, Belgian law permits plaintiffs to seek collective redress. Interestingly, the Collective Actions Act provides that only consumers 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.¹⁴⁴ 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 2019, the BCA identified among the priority areas for enforcement, telecommunications, retail, services to consumers, public procurement, pharmaceuticals and logistics (ports, and road, rail and water networks).¹⁴⁵ These sectors were substantially the same as in the BCA's 2018 policy statement. Interestingly, while these priorities remain focus areas for 2020, the BCA's 2020 enforcement agenda refers, for the first time in three years, again to the 'digital economy'. The BCA indicates that its main focus here will be on abuses of dominance facilitated by algorithms or data. This is not surprising considering the European Commission's and national competition authorities' increased scrutiny of the digital markets, in particular, of those involving data and algorithms.¹⁴⁶

The application in practice of the revised Belgian competition rules, which enter into force on 1 June 2020, are important to monitor. The new regime prohibiting abuses of economic dependency will allow the BCA to investigate abuses by non-dominant

143 Belgian Constitutional Court, 10 March 2016, *Honda* (case 38/2016), *TBH/RDC*, 2016/8, p. 755.

144 Articles XVII.35 to XVII.69 of the CEL.

145 BCA, Priority Policy for 2019, 19 February 2019.

146 BCA, Priority Policy for 2019, 26 February 2020.

undertakings under the same procedural rules as those applicable to abuses of dominance.¹⁴⁷ This development is likely to increase litigation over the coming years. Moreover, the increase of the cap on fines for competition law infringements from an undertaking's national to its worldwide turnover is likely to result in higher fines in dominance cases going forward. While the BCA has indicated its support for measures to fight against abuses of market power beyond Article 102 of the TFEU and Article IV.2 of the CEL, the BCA president has stated that the enforcement of such new provisions would require additional staff. The emerging administrative practice of the BCA and subsequent interpretation by the Belgian judiciary will have to articulate how the concept of economic dependency should be applied in practice. One topic of particular interest will be the concurrent application of the provisions on abuse of dominance and abuse of economic dependency.

¹⁴⁷ With the introduction of these rules, Belgium made use for the first time of the flexibility afforded by article 3(2) of Regulation 1/2003.

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. The 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 Tribunal for Economic Defence (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 cases investigated by the DG: all decisions are subject to judicial review.³ 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 began in Brazil. 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 ranked hardcore cartel prosecution as the top priority, making use of investigation tools such as dawn raids and leniency applications. A more recent development in Brazil's competition law enforcement is related to the increasing number of abuse of dominance cases, which is first and foremost a symptom of a system that is no longer in its infancy.

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Lucas Griebeler da Motta, Gabriela da Costa Carvalho Forsman and Isabella Tanuy for conducting the research needed to update this chapter.

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).

3 On average, judicial courts confirm 65 per cent of CADE's decisions (data from the yearbook of CADE for 2019).

The basic framework for abuse of dominance in Brazil is set out in 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 except 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 2019, CADE adjudicated 28 administrative proceedings. Out of these, 17 were dismissed, while in 11 cases, CADE found an infringement in relation to at least one defendant. Those figures are consistent the ones related to CADE's activities in 2018, when 25 cases were adjudicated in total, out of which, 12 resulted in a conviction. As most cases started by CADE in the context of Operation Car Wash were settled in 2018, there was a significant drop in the number of settlements reached between defendants and CADE, totalling 21 proposals that resulted in settlements executed in 2019. In 2019, fines reached 792.6 million reais, and the settlement sums agreed with CADE amounted to 165.6 million reais, approximately 10 per cent of the record achieved in 2018: 1.327 billion reais.

In 2019, cartels remained a priority for CADE, accounting for 15 out of the 28 investigations and infringements found. Other CADE decisions – whether to open, settle or dismiss a case, or recommend the conviction of defendants – included exclusionary practices, namely refusal to deal, price discrimination and the creation of difficulties for market players. To follow is a comprehensive list of 2019's abuse of dominance cases, including settlements.

i Digital and regulated industries

In 2019, CADE continued to be active in the review of alleged abuse of dominance practices in the digital and regulated industries, with a special focus on financial services, oil refining and natural gas.

Financial services

In April 2019, DG launched an investigation against Itaú-Unibanco and Redecard,⁴ respectively a bank and a payment processor belonging to the same economic group, after Itaú-Unibanco and Redecard had issued a joint statement communicating that all clients of

⁴ This case was preceded by another investigation against Itau-Unibanco and Rede, which was settled in 2018. Following probes opened by CADE into the payment industry in March 2016, Itaú-Unibanco, a

Redecard that operate Itaú-Unibanco bank accounts would benefit from shorter compensation and settlement periods with no additional costs.⁵ Redecard would start advancing - within two days – receivables derived from credit card transactions for Itaú-Unibanco clients for free, while Redecard's clients with bank accounts offered by competitors of Itaú-Unibanco would receive the amounts due within 30 days.

The SG sent several requests for information (RFIs) to market players and associations. Some of them accused Itaú-Unibanco and Redecard of predatory prices, margin squeeze, tie-in and discrimination, especially because independent, small and medium-sized payment processors would not be able to meet the same commercial conditions granted by Redecard. According to competitors, Itaú-Unibanco and Redecard have the ability to behave in such a way due to the fact that they are vertically integrated and have significant market power to leverage their operations in both segments and cross-subsidise themselves.

Following a market test, DG found that, after one month those commercial conditions had been in place, there were material increases in the number of Redecard's clients with Itaú-Unibanco bank accounts and new clients of Redecard, as a result of migrations from competing banks and payment processors.

In October 2019, a temporary restraining order (TRO) was issued by the DG against Itaú-Unibanco and Redecard to prevent them from: (1) conditioning the receivables advance offered by Redecard on maintaining bank accounts at Itaú-Unibanco; and (2) announcing via marketing campaigns the commercial conditions that are part of the scope of the antitrust investigation. The TRO also contemplated an obligation for Redecard to: (1) remove from the market all ads and campaigns of the new commercial conditions; and (2) send notices to the clients it acquired after the joint statement in the sense that they are not required to maintain bank accounts at Itaú-Unibanco to benefit from shorter compensation and settlement periods with no additional costs.

Itaú-Unibanco and Redecard appealed the DG's decision. Except for granting a reduction in the daily fines and an extension for Itaú-Unibanco and Redecard to comply with DG's decision, CADE's Tribunal upheld the TRO in December 2019. Following that, Itaú-Unibanco and Redecard extended the commercial conditions regarding the anticipation of receivables to Redecard's clients using bank accounts offered by all competitors of Itaú-Unibanco on a non-discriminatory basis. Notwithstanding that, Itaú-Unibanco and Redecard filed a writ of mandamus against CADE's TRO and they obtained a suspension of the TRO effects. The matter is still pending final adjudication as at April 2020.

major financial institution, and its vertically integrated subsidiary, Rede, a dominant payment acquirer, agreed to cease conduct that may have led to exclusive-payment arrangements in Brazil. Through an agreement reached on 4 July 2018, the parties committed: (1) to make available relevant information on the receivables portfolio of their clients to rival payment service providers hired by their clients, in order to facilitate the structuring of loan transactions and securitisation by small and medium-sized financial institutions; (2) to refrain from locking-in their clients, allowing them to switch the custody of the receivables processed by Rede from its controlling shareholder, Itaú-Unibanco, to other non-integrated financial institutions; (3) not to retaliate against clients that opt to shift from Itaú-Unibanco to another bank, maintaining the commercial relationship with Rede, or clients that choose to hold their accounts with Itaú-Unibanco, but process payments with other acquirers or processors; (4) not to offer better commercial conditions to their clients, conditional on the acquisition of both services (tie-in of banking services and payment processing services); and (5) to abstain from demanding their clients to meet minimum targets in terms of sales volume processed by Rede.

5 Administrative Proceeding No. 08700.002066/2019-77.

Automatic payment services for highway tolls and parking lots

In November 2018, Veloe, an entrant in the market for automatic payment services for highway tolls and parking lots, filed a complaint against Sem Parar, an incumbent in the aforementioned market.⁶ According to Veloe's arguments, ConectCar has been imposing difficulties on the development of Veloe through abusive conduct, such as refusing to share infrastructure (antennas for the communication between, on the one hand, tolls and parking lots, and, on the other hand, transponders installed on cars) and entering into exclusivity clauses with the main parking lot operator in Brazil, Estapar.

Veloe also reported that Sem Parar unjustifiably delayed to present answers to Veloe's queries on commercial and technical conditions for the sharing of infrastructure. Several months later, after Veloe having insisted on the discussions, Sem Parar submitted for Veloe's consideration a commercial proposal that was not consistent with market practice (higher prices and restrictions when compared to those applicable to competitor ConectCar, the second largest in Brazil). Following receiving inputs from market players, the DG formally opened an investigation against Sem Parar and ConectCar, once they have been sharing their respective infrastructures under terms and conditions that harm competing firms.

Veloe requested a TRO to refrain the investigated companies from practicing the conducts under scrutiny, but CADE's DG denied the request. In February 2019, Veloe appealed to CADE's Tribunal and in March 2019, Commissioner Paula Farani de Azevedo Silveira granted an injunction through which Sem Parar and ConectCar were obliged to: (1) immediately terminate all exclusivity agreements entered into by and between the incumbents and parking lots operators; (2) extend to all competitors the commercial and technical conditions applicable to the infrastructure sharing agreement between Sem Parar and ConectCar; (3) charge their competitors only for the actual use of their antennas, as opposed to all installed base in Brazil.

In her opinion, Commissioner Paula Farani pointed out that in 2015, Sem Parar and ConectCar submitted to CADE's consideration Consultation No. 08700.007192/2015-94, where they requested CADE's Tribunal's consent and views on the first infrastructure-sharing agreement they had envisaged executing. At that time, CADE's Tribunal affirmed that such an agreement may create incentives for Sem Parar and ConectCar to discriminate against their competitors and create barriers to entry. To address the antitrust concerns raised by CADE's Tribunal in the context of that consultation, Sem Parar and ConectCar stated that they would not foreclose the market and would make available their installed infrastructure to competitors on a non-discriminatory basis. Thus, it was found that Sem Parar and ConectCar did not follow their previous commitment to CADE.

The case is still pending final adjudication as at April 2020.

Consigned credit operations (salary-linked employee loans)

In December 2012, the DG started investigations against banks that lend and offer credit lines with lower interest rates to government employees (from federal, state, and local levels) called consigned credit operations (CCOs). CCOs are transactions through which an employee may take loans offering their salaries as a guarantee to the lender. Notwithstanding the similarities of facts, the DG opened seven probes, each of them targeted at a distinct bank.

⁶ Administrative Inquiry No. 08700.006268/2018-15.

The first one was launched in 2010 and involved Banco do Brasil (BB), the largest public bank in Brazil.⁷ Such an investigation was dismissed in 2012 after BB having agreed to end exclusivity clauses it practiced in the context of a wide commercial relationship it had with certain departments and entities of the public sector for the management of payroll accounts. Pursuant to the clauses that were challenged, BB had the exclusive right to offer CCOs to government employees whose employers had signed a master agreement with BB. As a result, the affected government employees – who had never consented to any exclusivity agreement – were obliged to maintain bank accounts at BB to receive their salaries and were not allowed to borrow at lower interest rates under CCO with competitors of BB.

The other six probes aimed at Banco de Brasília (BRB),⁸ Banrisul,⁹ Bradesco,¹⁰ Caixa Econômica Federal (CEF),¹¹ Itaú-Unibanco,¹² and Santander.¹³ The scope of those investigations was the same of that against BB, but the government employees supposedly harmed in those cases were not the ones impacted by the practices under scrutiny in the probe against BB of 2010. Whereas the investigations involving other banks were dismissed due to lack of market power, the one concerning BB, the largest bank offering loans to public employees, had a different outcome.

The DG and CADE's Tribunal found no evidence of harm derived from the practices of BRB, Banrisul, Bradesco, CEF, Itaú-Unibanco, and Santander. The cases were dismissed on 24 April 2019 without imposition of any penalties because: (1) the market shares of the aforementioned banks were low (in most cases, less than 5 to 10 per cent); (2) the exclusivity clauses were not unilaterally imposed by the banks, but rather requested by the government departments and entities, as they could sell to the banks a portfolio of clients (i.e., bank accounts for all employees to receive their salaries) at higher prices; (3) a significant part of all master agreements signed after 2011–2012 by and between the banks and the governments did not contemplate exclusivity clauses; (4) even in cases in which there were exclusivity provisions for CCO, those provisions were not enforced against the employees, so that these employees were free to take CCO from competing banks (some investigated banks reported that they had stopped enforcing those clauses after the settlement agreement between BB and CADE); and (5) except for BB, which accounted for more than 30 per cent of the CCO market, the structure of the CCO market was disperse, with several players active in the segment.

Oil and gas

The Brazilian oil and gas market has been subject to several monopolisation investigations across the years. Petrobras, the largest state-owned enterprise in the country, had a state monopoly over the whole supply chain of natural gas, crude oil and refining until the enactment of the Constitutional Amendment No. 9/1995 and Law No. 9,478/1997, which

7 Administrative Proceeding No. 08700.0030701/2010-14.

8 Administrative Proceeding No. 08700.005781/2015-38.

9 Administrative Proceeding No. 08700.005770/2015-58.

10 Administrative Proceeding No. 08700.005766/2015-90.

11 Administrative Proceeding No. 08700.005759/2015-98.

12 Administrative Proceeding No. 08700.005755/2015-18.

13 Administrative Proceeding No. 08700.005761/2015-67.

aimed at opening the sector to private companies. Notwithstanding the modifications in the legal framework, the conditions and the structure of the oil and gas market in Brazil materially remained the same.

With respect to the natural gas industry, it is worth pointing out to the two most recent probes that led Petrobras to execute a consent decree with CADE by means of which Petrobras committed, among other conditions, to divesting transportation pipelines (Nova Transportadora do Sudeste (NTS), Transportadora Associada de Gás (TAG) and Transportadora Brasileira Gasoduto Bolívia-Brasil (TBG), as known as Brazil–Bolivia pipeline) and shareholdings in natural gas utility companies by December 2021.

The first one relates to a complaint filed on 1 April 2014 by Companhia de Gás de São Paulo (Comgás), the largest independent piped natural gas distributor in Brazil.¹⁴ According to Comgás, from 2011 to 2015 Petrobras had sold natural gas to its vertically integrated companies under commercial terms and conditions more favourable than those available to independent and non-integrated competitors. On 5 August 2016, the DG issued an opinion recommending the conviction of Petrobras for abuse of dominance implemented via price discrimination and attempts to migrate large size customers from Comgás to Gás Brasileiro Distribuidora (GBD), a subsidiary of Petrobras in the State of São Paulo. On 26 June 2019, the Reporting Commissioner voted for the dismissal of the case, but on the same day another Commissioner requested the case files for further consideration.

The second case refers to a complaint filed by the Brazilian Association of Piped Natural Gas Distributors (Abegás) against Petrobras on 16 July 2015.¹⁵ Some aspects of this complaint overlapped with those of Comgás, but the second probe had a wider scope that encompassed discounts, ship-or-pay/take-or-pay clauses and refusals to deal with thermal powerplant operators. In short, Abegás sought to address all antitrust concerns it and its members perceived at the time of filing. Throughout the discovery stage of this case, the DG sent a number of RFIs to market participants to obtain their views on the competitiveness level of natural gas industry and issues that should be addressed by CADE. Due to the settlement reached by and between CADE and Petrobras, this case was suspended until Petrobras fulfils all the obligations set forth in the consent decree.

The refining segment was also a target of CADE's prosecuting efforts. An unusual investigation was started by an economic study jointly elaborated by CADE's Department of Economic Studies (DEE) and the National Agency of Oil & Gas (ANP).¹⁶ The study found that, apart from the quasi-monopoly in the exploration and production of crude oil, approximately 98 per cent of the refining capacity in Brazil is owned by Petrobras and its subsidiaries. According to CADE and ANP's findings, this configuration makes Petrobras also a monopsonist in the refining market, giving the company all the powers to set prices, supply level, and entry barriers. It was found that most private and independent refineries were sold to Petrobras over the decades and that the only two rivals have filed for bankruptcy due to margin squeezes supposedly practiced by Petrobras.

On 5 December 2018, CADE's President submitted the paper prepared by DEE and ANP for the review of CADE's Tribunal, and, by the majority of its Commissioners, it determined the SG to initiate a new probe against Petrobras. On 24 May 2019 Petrobras filed a draft commitment letter through which it had undertaken to divest eight refineries, which

14 Administrative Proceeding No. 08700.002600/2014-30.

15 Administrative Inquiry No. 08700.007130/2015-82.

16 Administrative Inquiry No. 08700.006955/2018-22.

represent almost 50 per cent of all assets of the company in the refining segment. The plants that will be sold are located in seven different states, and a single buyer may not acquire more than one refinery to avoid the creation of regional private monopolies. On 11 June 2019, the majority of CADE's Tribunal approved the settlement, and the deadline for Petrobras to divest is December 2021.

Due to the covid-19 outbreak, the uncertainty surrounding OPEC, and the drastic decrease in demand and crude oil prices, it remains uncertain whether Petrobras will be able to comply with the deadline to sell its assets in the natural gas and refining industries.

Other cases

On 21 March 2018, CADE made public a complaint filed by Nubank, a Brazilian fintech and card issuer, against the five major banks in Brazil: Banco do Brasil, Bradesco, Caixa Econômica Federal, Itaú-Unibanco and Santander.¹⁷ According to the allegations presented by Nubank, the banks had been creating barriers and refusing to provide Nubank with the services needed for its regular development. Moreover, Nubank argued that the banks had been jointly lobbying for banking and financial policies against fintechs. The investigation is still ongoing as at April 2020.

Another relevant case was initiated by a complaint filed by British Telecom (BT) in December 2015, against Claro, Oi and Telefônica, which collectively own most of the telecoms infrastructure in Brazil.¹⁸ In accordance with BT's allegations, the defendants refused to deal with BT and, therefore, the complainant was deprived of competing on the merits in the context of a public bidding launched by the Brazilian Postal Services, Correios, with the aim of improving the networks and the interconnection among all local agencies of Correios. BT also alleged that Claro, Oi and Telefônica foreclosed the market and impeded competition because they formed a consortium, and through this, collectively abused their market power. CADE has been collecting evidence on the case since August 2017, when the investigation was made public. The investigation is still ongoing as at April 2020.

ii Mergers and remedies adopted by CADE to address unilateral effects concerns

CADE has been actively reviewing mergers with vertical concerns in recent years – especially following the *AT&T/Time Warner* case in 2017 – imposing remedies to address antitrust concerns primarily raised by competitors. The participation of interested third parties in the design of merger control agreements is also a trend that should be highlighted.

In the global merger between Bayer and Monsanto, besides structural remedies resulting in the divestiture of some seed assets to BASF (cotton, soybean and herbicides), CADE imposed behavioural obligations in connection with the licensing of patent rights held by the parties, including provisions to guarantee isonomic access of rivals to new solutions and technologies developed by the parties, in particular those related to biotechnology enhancements designed for soybean and cotton.¹⁹ CADE also determined that the parties shall not require exclusivity from their distributors or practice tie-ins involving Bayer's or Monsanto's products. CADE and the parties signed a merger control agreement on 7 February 2018, and the transaction was cleared subject to conditions.

17 Administrative Inquiry No. 08700.003187/2017-74.

18 Administrative Inquiry No. 08700.011835/2015-02.

19 Merger Case No. 08700.001097/2017-49.

In the *Itaú-Unibanco/XP Investimentos* case, CADE analysed the acquisition, by Itaú-Unibanco (the largest financial institution in Brazil and Latin America), of 30 per cent of the voting shares of XP Investimentos, the major non-integrated investment firm in Brazil, which offers securities brokerage, investment advisory and insurance brokerage services.²⁰ To close the deal, the parties offered the following non-discrimination commitments:

- a XP Investimentos shall make available its online investment platform to non-integrated bond issuers and investment funds; and
- b Itaú-Unibanco shall make available its financial products and solutions offered via XP Investimentos to competing platforms.

The transaction was conditionally cleared on 14 March 2018.

In 2019, out of five cases that required the execution of a merger control agreement to be cleared by CADE, only one gave rise to vertical concerns: the acquisition of Mediplan, a local operator of hospitals and healthcare plans, by Grupo Notre Dame Intermédica (GNDI), one the largest vertically-integrated healthcare players in Brazil.²¹ In this case, the DG and CADE's Tribunal found that there may be incentives for GNDI to deny the access to its facilities for customers of competing healthcare plans, as well as to create difficulties for the beneficiaries of its healthcare plans to seek medical treatment at independent hospitals. By means of the merger control agreement executed on 22 May 2019, GNDI committed to, among other conditions, investing in the acquisition of medical equipment, expansion and refurbishment of its hospitals, as well as making them available to beneficiaries of rival healthcare plans. Furthermore, GNDI shall undertake to continue expanding the network of accredited independent hospitals and clinics for the use by its beneficiaries.

iii Digital markets: probes into Google's behaviour

During the past few years, CADE has been investigating Google's practices in digital markets through six different antitrust probes.²²

The first probe is the Brazilian case of *Google Shopping*, the same practice scrutinised by the European Commission, which imposed a fine of €2.42 billion for abusing dominance as a search engine by giving illegal advantage to its own comparison shopping service.²³ The inquiry was initiated by a complaint filed by e-Commerce, owner of the comparison websites Buscapé and Bondfaro, on 20 December 2011.²⁴ According to the complainant, Google, which operates a search engine website and a downstream-related product, its price comparison platform, has systematically placed its own price comparison service in prominent visual positions when a consumer enters a query into Google's search engine. Apart from this practice, e-Commerce also accused Google of: (1) manipulation of the potential traffic that rival price comparison platforms could have by means of an algorithm, demoting the ability of consumers to find attractive results and offers via competitors, which

20 Merger Case No. 08700.004431/2017-16.

21 Merger Case No. 08700.005705/2018-75.

22 Based on the best publicly available information.

23 Press release of the European Commission: 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service', 27 June 2017, http://europa.eu/rapid/press-release_IP-17-1784_en.htm.

24 Administrative Proceeding No. 08012.010483/2011-94.

were placed only on page four or five of Google's search engine; (2) discrimination against other comparison websites by blocking access to price listing ads (PLAs); and (3) tie-in sales, with abuse of dominance.

After seven years analysing factual and economic evidence, on 19 November 2018, the DG finally issued an opinion recommending the Tribunal to close the probe without imposing any penalties. On 26 June 2019, CADE's Tribunal dismissed the case, concluding there was no evidence of manipulation of Google's search algorithms in the Brazilian market and that the reduction of comparison websites in the Brazilian market was not a result of Google's commercial practices. In addition, the conducts regarding blocking access to an essential facility, refusal to sell and tie-in sales have not been confirmed since: (1) PLAs were not considered an essential facility (there are many substitutes); (2) there was no evidence of refusal to sell PLAs, since the matter involves issues related to functional compatibility; and (3) no tie-in sales conduct were detected, since the requirement of data is part of the market functioning and is not related to any kind of abuse. The Tribunal also agreed with the DG that the Brazilian antitrust case is different from the European case, since the European Commission found substantial evidence on discrimination and negative impacts on the market arising from Google's strategy. CADE's Tribunal also concluded that the Brazilian case points to a pro-competitive innovation, with the consequent increase of value for the Google platform for facilitating the matching between the two sides of the platform (users and advertisers).

The second inquiry concerned Bing and Microsoft's complaints that AdWords, an online platform owned by Google, responsible for the management and delivery of ads and marketing campaigns, was hindering the interoperability and 'multi-homing' of advertising campaigns between Google and Bing's search engines.²⁵ According to Bing and Microsoft, Google has created difficulties for providers of goods and services, as well as the advertising agencies used by those providers, to simultaneously launch ad campaigns for different search engines. As Google holds a majority in terms of the number of searches made, with an estimated market share greater than 80 per cent, most companies tend to prepare ad campaigns to be delivered to their prospective targets (i.e., users potentially interested in a given product or service – for instance, a car, a dress, a handset) only via Google, setting aside rival and small search engines. After Bing and Microsoft reached an agreement with Google to terminate all litigation involving the parties, the complainants dropped the case in Brazil, and the investigation was proceeded *ex officio* by the DG. To assess the alleged anticompetitive behaviour of Google, the DG sent several requests for information (RFIs) to clients of Bing, advertising agencies and large companies, such as Coca-Cola, Citigroup, Heineken, Gol Airlines and Volkswagen. From the data gathered from market participants, on 11 May 2018, the DG issued an opinion recommending the dismissal of the investigation, once most of Bing's clients and advertising agencies stated they did not find hardships in dealing with distinct platforms, but rather preferred to use Google owing to the possibility of a wider reach in terms of internet users. The DG also concluded that, with small adjustments, interoperability between platforms may work well.

On 19 June 2019, CADE's Tribunal unanimously dismissed the case, concluding that the absence of multihoming was not related to Google's alleged conduct. First, the Tribunal concluded that AdWords Terms and Conditions were very similar to most licence agreements' and adhesion contracts' and that there was no evidence of anticompetitive practices. Its main

25 Administrative Proceeding No. 08700.005694/2013-19.

distinctive features are justified by Google's operations' global scope and by the copyright protection that is given to computer programs. Based on the answers to RFIs, the Tribunal also concluded that the market agents were able to serve advertisements on more than one platform at the same time and that the choice of the way those platforms would be used also depend on the users' profile. In this sense, the use of other multihoming means has no direct link with Google's T&C but is rather related to its commercial features and the Brazilian digital advertising market's. The Tribunal also found that the T&C provide economic efficiencies to advertisers and that multihoming is allowed and encouraged by search websites.

The third probe, also filed by e-Commerce, involved complaints of illegal copy and content scraping (users' reviews), by Google Shopping, from rival price comparison websites.²⁶ Through this practice, Google allegedly removed recommendations and positive feedback of competitors posted by clients from its search engine, and 'stole' such recommendations and positive feedback, including them in Google Shopping pages. The DG recommended the case to be dismissed once:

- a no evidence of harm to Brazilian customers was found;
- b there were no other competitors of e-Commerce or Google reporting the same practice of content scraping;
- c the practice was limited to very few situations because of a computer bug; and
- d Google has addressed the bug that caused the problems reported by e-Commerce.

On 19 June 2019, CADE's Tribunal decided to dismiss the administrative proceeding due to lack of evidence. Since no other website reported scraping by Google, the Tribunal concluded it was a single incident, in which a very limited number of reviews collected by Buscapé were included on Google Shopping's website. In this sense, there was no systematic conduct of collecting and misuse, which reinforces Google's allegation of malfunction. In addition, the content was removed from Google's website and the reviews were only published on the foreign version of Google Shopping, which indicates a lack of intention of harming the Brazilian market. Therefore, CADE decided that, although Google holds a dominant position in the relevant markets affected by this investigation, such a single incident is not enough to determine that an anticompetitive conduct has occurred.

CADE's Tribunal also ordered that the DG initiate a fifth probe against Google to assess competition levels and alleged abuses of dominance in the general search market and the news market. A preliminary inquiry was opened by CADE on 9 July, 2019.²⁷ The investigated practice refers to a potential scraping of journalistic content published on websites of media and news companies. According to the allegations, Google would be abusing its dominant position to leverage the number of accesses to websites it maintains, such as Google Shopping and Google News. So far, the DG has sent many RFIs to market players and associations.

The fifth investigation originated from a complaint brought by Yelp, a search and advertising company, which alleged that, after Google launched a new service called Google Places, Google had abused its dominance in the search engine market to favour its integrated services to the detriment of non-integrated competitors.²⁸ Yelp and Google Places have the main purpose of providing their users with further information on given places (such as public parks, restaurants, hotels, shops and shopping centres), including ratings, reviews and

26 Administrative Proceeding No. 08700.009082/2013-03.

27 Administrative Inquiry No. 08700.003498/2019-03.

28 Administrative Inquiry No. 08700.003211/2016-94.

tips from clients, opening hours, capacity, prices, discounts and promotions. In accordance with the views of Yelp, prior to the establishment of Google Places, Yelp had more data traffic and users because the Google search engine was functioning properly; that is, without the deployment of an algorithm used to sidestep the standard logic of the ranking process of the results of a query entered into the Google search engine. However, after the launch of Google Places, the Google search engine diverted traffic away from rival services, giving unfair prominence to its own services and putting Yelp and other rivals in unattractive positions to avoid access and clicks from users. At the time of writing, the case is still at a preliminary stage.

On 5 June 2019, the DG initiated a sixth investigation against Google, the aim being to assess whether the conduct by Google in *Android* may adversely affect the Brazilian market.²⁹ The scope of this investigation is similar to that of the European Union, which fined Google €4,342 billion for antitrust violations concerning the Android mobile operating system (i.e., imposition the pre-installation of Google Search and Google Chrome on manufacturers as a condition for the licensing of Google's app store (Play Store), making payments to large manufacturers and mobile network operators on condition that they exclusively pre-installed Google Search on their devices, and prohibition on manufacturers from installing and running alternative versions of Android on mobile devices on which Play Store is installed). As at April 2020, the case is still pending a decision.

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. Article 36 further provides that CADE may change the 20 per cent threshold 'for specific sectors of the economy', although the agency has not formally done so to date. The 20 per cent threshold is relatively low compared with that in other jurisdictions, especially the United States and the European Union. 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 mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the small but significant and non-transitory increase in price 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.

29 Preliminary Investigation No. 08700.002940/2019-76.

IV ABUSE

i Overview

Article 36 of the 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’:

- a* a limitation or restraint on, or, in any way, harm to, open competition or free enterprise;
- b* control over a relevant market of a certain good or service;
- c* an increase in profits on a discretionary basis; or
- d* 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 resale price maintenance (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. Authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers.

ii Exclusionary abuses

Exclusionary pricing

Annex I of CADE Resolution No. 20/99 defines predatory pricing as the ‘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 and 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 the 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 recidivism³⁰ – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses. The most recent conviction concerned Unimed in the Missões region, in southern Brazil, where it was also imposing exclusivity arrangements.³¹ In February 2016, CADE also reached a settlement with Unimed Catanduva, which would only accredit companies as its service providers if they were controlled by physicians linked to the Unimed system, closing the investigation.³²

CADE's most important exclusive dealing decision was issued in 2009. The investigation, initiated in 2004, concerned a loyalty programme (Tô Contigo) instituted by AmBev, Brazil's largest beer producer, which accounts for 70 per cent of the beer market in Brazil. The programme 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. 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 CADE³³ through which it agreed to pay 229.1 million reais and terminate the conduct.³⁴

Another interesting case involving exclusive dealing concerns Unilever, owner of Kibon, one of the most famous brands of ice creams in Brazil.³⁵ Following a complaint filed by competitor Della Vita, on 16 October 2019 the Tribunal found that some exclusive arrangements entered into by Unilever and strategic retailers – located in the states of São Paulo and Rio de Janeiro – violated antitrust laws. Initially, CADE opened a probe against Nestlé and Unilever, since there was preliminary evidence of the existence of agreements through which both companies demanded that some distributors and retailers should only purchase ice creams and related products from one supplier (that is, only from Nestlé or from

30 Administrative Proceeding No. 08012.010576/2009-02.

31 Administrative Proceeding No. 08700.009890/2014-43.

32 Administrative Proceeding No. 08700.001743/2014-25; Settlement Proposal No. 08700.010029/2015-17.

33 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.

34 Another alleged exclusionary case involving AmBev concerned 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 retailers 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).

35 Administrative Proceeding No. 08012.007423/2006-27.

Unilever). In addition, the ice cream manufacturers were supposedly imposing minimum volume of sales and exclusivities related to marketing campaigns on their clients. On the one hand, after further evidence was gathered, CADE concluded that Nestlé had no market power and only followed the commercial strategy adopted by the market leader Unilever, which at that time accounted for a market share higher than 50 per cent in certain regions of Brazil. On the other hand, after the DG performed market tests by sending RFIs to market participants (competitors, distributors, strategic clients, etc.), CADE found that, despite the fact Unilever did not insert explicit exclusivity clauses in its contracts, it offered significant discounts and bonuses based on the volume of products purchased from Unilever (a practice similar to that sanctioned by CADE in *Tô Contigo*, against AmBev). This practice resulted in market foreclosure by means of *de facto* exclusivity: five of Unilever's competitors reported to CADE that they had difficulties in selling non-Nestlé and Kibon ice creams to well-placed retailers in São Paulo and Rio de Janeiro. In addition to this, CADE concluded that the strategy adopted by Unilever was quite successful, since 74.2 per cent of Unilever's total turnover in the segment derived from distributors and retailers with exclusive arrangements. Unilever was sanctioned to pay 1 per cent of its gross sales in the relevant market affected by the practice.

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:

- a* dominance in the tying market;
- b* the tying and the tied goods are two distinct products;
- c* the tying practice is likely to have a market-distorting foreclosure effect; and
- d* the tying practice does not generate overriding efficiencies.

In recent years, CADE 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.³⁶ 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.³⁷

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 IP rights. CADE Resolution No. 20/99 considers denial of access

36 Administrative Inquiry No. 08700.007338/2013-30.

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

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 October 2016, CADE dismissed a refusal to deal involving cement makers.³⁸ Although CADE concluded that violations did occur, it also found that all these conducts were part of cartel practices in the cement industry – a case adjudicated by CADE in early 2014 – and that some of the defendants had already been punished for it. The remaining defendants were acquitted owing to lack of evidence.³⁹

Resale price maintenance

Annex I of CADE Resolution No. 20/99 establishes 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.⁴⁰ 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.

38 Administrative Proceeding No. 08012.008855/2003-11.

39 Administrative Proceeding No. 08012.010208/2005-22.

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

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 parcels.⁴¹ The DG recommended the imposition of fines in April 2017, but a final decision is pending.

There is also an ongoing proceeding into an alleged abuse of dominance in the fuel retail market in Brazil's Federal District.⁴² Petrobras Distribuidora is believed to be ensuring favourable contractual terms to petrol stations affiliated with a specific chain. CADE is still collecting evidence on this case.

iv Exploitative abuses

Unfair trading practices 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 has dismissed all of the complaints.

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'⁴³ pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of an investigation. CADE Resolution No. 3/2012 broadly defines 144 'sectors of activity' to be considered for the purposes of calculating the fine under Law No. 12,529/2011. In November 2016, CADE issued Resolution No. 18/2016, under which such 'fields of activities' may be further limited to ensure that a sanction will be proportionate to the specificities of the conduct. 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 a 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

41 Administrative Inquiry No. 08700.009588/2013-04; defendant: Empresa Brasileira de Correios e Telégrafos.

42 Administrative Proceeding No. 08012.005799/2003-54.

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

violation on the part of a company's executives. Historically, while CADE has investigated 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 the development and implementation of the aforementioned Tõ Contigo loyalty programme, created by AmBev, sanctioned by CADE in 2010. The joint settlement fine amounted to 2 million reais.⁴⁴

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

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

ii Behavioural remedies

At any stage of an investigation, CADE may adopt an interim order to preserve market conditions while a final decision on a case is pending.⁴⁵ An interim order may be adopted only if the facts and applicable law establish a *prima facie* likelihood that an infringement will be found (*fumus boni iuris*); and that, 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. The most recent was the interim measure ordered by CADE in April 2015 against the Gemini consortium, which was ordered to disclose the price of gas that it was supplied with.

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 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.

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

45 Article 87 of the Competition Law.

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.

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 a 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 the conducting of 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 ruling 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 it. 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 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, SDE, Brazil's former administrative antitrust investigative agency, 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, Argentina, Canada, Chile, China, Colombia, Ecuador, France, Japan, Korea, Peru, Portugal and Russia, 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. CADE has also entered into cooperation agreements with the World Bank Group and the Inter-American Development Bank, allowing for the exchange of information and for consultations on matters of common interest.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil⁴⁸ 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 and 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 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 have been related to consumers' rights complaints.

In December 2016, CADE put to public consultation a draft resolution on third-party access to documents and information deriving from leniency agreements, settlement

48 A more detailed version of this section was published in *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-new-perspectives-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.

agreements, and search and seizures, as well as its draft proposals (Proposed Legislation) for modifying Article 47 of Law 12,529/11 related to private antitrust litigation. The explanatory note issued by CADE sets forth that its aim is to 'coordinate the antitrust public and private enforcement'. As CADE states: 'on the one hand, rules that over-encourage private enforcement can damage public enforcement. On the other, rules too restrictive could jeopardise compensation of the injured party by the offence to the economic order and limit antitrust enforcement.'

The drafts are generally in line with international best practices, and reflect CADE's efforts to strike a balance between the two goals. However, there is room for improvement regarding some aspects of the draft resolution and of the Proposed Legislation, and in particular on the need for CADE to change the approach adopted in the Proposed Legislation regarding the triggering event for the statute of limitation for damage claims.

VIII FUTURE DEVELOPMENTS

There are two major, and conflicting, trends currently contributing to defining CADE's stance in abuse of dominance cases. The first is the increasing availability of apparatus that enables the competition authority to employ economic analysis and evidence. The use of economics in Brazil has grown dramatically in competition matters over 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 to a second trend that is apparently at odds 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. Guidelines on vertical restraints and recommended commercial practices for dominant firms would ensure legal certainty and allow more predictability for market players when designing their commercial practices.

Note that four out of the six CADE commissioners took office in the second half of 2019. Any speculation on what would be the likely position of the Tribunal in dominance cases to be adjudicated in the near future is, therefore, difficult.

Finally, in the context of the covid-19 outbreak, CADE has already signalled that it will pay attention to price gouging in connection with essential medical items and certain drugs, but will not directly interfere in pricing policies, which is consistent with its previous practice.

BULGARIA

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I INTRODUCTION

Bulgaria is a member of the European Union, and therefore, Article 102 of the Treaty on the Functioning of the European Union (TFEU) is directly applicable.

On a national level, the Competition Protection Act (CPA) contains provisions (in Articles 21 and 37a) prohibiting abuses of certain degrees of market power: dominant position and stronger bargaining position (i.e., relative market power), both applicable to all kinds of undertakings regardless of their ownership or industry sector.

Competition law in Bulgaria is publicly enforced by the Competition Protection Commission (CPC), which has adopted a multitude of secondary acts dealing with various procedural and statutory issues, such as assessment of market position, setting of fines, providing parties with access to files, protection of confidential information and review and approval of commitments offered by undertakings.

The CPA applies to undertakings entrusted by the state to provide services of general public interest, to the extent the performance of their public tasks is not impeded and competition is not affected to a significant degree (Article 2, Paragraph 1, item 3 of the CPA). The Energy Act contains a similar provision addressed to undertakings active in the transportation or distribution of electricity, heat energy or natural gas. These provisions, however, have little practical importance, since we are not aware of a case in which such an undertaking has been relieved of its responsibility for breaching the competition rules on such a ground. On the contrary, such companies have been sanctioned for abusing their dominance in many cases.²

II YEAR IN REVIEW

In 2019, the CPC initiated four new investigations of alleged abuse of dominant position (the number of proceedings commenced in 2018 being the same), as well as seven new investigations of alleged abuse of stronger bargaining position (compared with three proceedings in 2018). All of them started upon client, supplier or competitor complaints.

Energy and media sectors remained hot areas of the antitrust enforcement.

The CPC finally completed its investigation against the National Electricity Company (NEC), started back in 2015 on the complaint of several RES producers and resulted in two

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2 See, for example, CPC Decision No. 1510, 21 December 2017; CPC Decision No. 1475, 14 December 2017; CPC Decision No. 1476, 14 December 2017.

finances in total of 315,612 leva for infringements of Article 21 CPA.³ NEC, being a subsidiary of Bulgarian Energy Holding, is the public supplier, active on the wholesale segment of the regulated market. NEC purchases electricity from various producers, including from renewables, at regulated or preferential price. According to the rules on the balancing market, the energy producers were required to participate in balancing groups, and those that had purchase agreements with NEC were members of NEC's balancing group. Each producer was required to submit a forecast about its hourly production, and if the actual production deviated from the forecast, the producer would pay imbalances (shortage or surplus). It was established that NEC unilaterally changed the forecasts submitted by the producers in its balancing group, thus making them pay for imbalances. Moreover, NEC adopted a methodology on the allocation of costs of imbalances among the members of its balancing group, which allowed NEC to charge the producers from its group costs for imbalances higher than those actually charged on the group as a whole by the transmission system operator. Higher imbalances for the producers resulted in higher revenues for NEC, whose behaviour was qualified by the CPC as exploitative.

In the past year the CPC closed another important investigation. This concerned the marketing policies of Nova Broadcasting Group EOOD (Nova) and Net Info AD regarding the 'cross-media discounts', namely discounts provided to advertisers and advertising agencies for purchasing advertisements in more than one medium (e.g., TV, radio, print, internet).⁴ The case started following the complaint of several providers of digital services, including online advertising, which alleged that cross-media discounts impede competition on the online advertising market by inducing the advertisers to buy both products (TV and online advertising) from one supplier rather than separately. It was claimed that both parties were engaged in a prohibited agreement and, at the same time, abused their dominant positions. The CPC rejected the first claim on the grounds that Nova exercised control over Net Info, which disqualified both companies as independent undertakings.⁵ The claim for abuse of dominance was also rejected but following an analysis of both markets – TV and online advertising, which showed that neither of both companies held a dominant position. Importantly, the decision of the CPC acknowledged the strong presence of global online platforms, such as Google and Facebook, in the Bulgarian online advertising market, and, therefore, a finding of dominance on the part of a local company appears quite unlikely at the current stage. With regard to the TV advertising market, the CPC confirmed its position from previous cases,⁶ namely that it is an oligopolistic market, where the two major players compete intensively against each other, but neither of them dominates the market. Even though the CPC did not analyse the 'cross-media discounts' and their impact on competition on the merits, the CPC decision is important for the whole industry, applying similar forms of discounts.

3 CPC Decision No. 833, 18 July 2019, appealed at the Administrative Court of Sofia – Region under administrative case No.1111/2019.

4 Nova Broadcasting Group AD and Net Info AD were represented in that case by the authors of this review.

5 At the time the CPC decision was issued, Net Info was under the joint control of Nova Broadcasting Group AD (a majority shareholder) and two other independent undertakings. Shortly after, CPC cleared the acquisition of sole control over Net Info by Nova Broadcasting Group EOOD.

6 In 2018 CPC issued a report on its inquiry into the media sector. One of the conclusions in this report was that the TV broadcasting and TV advertising markets had oligopolistic structures and no individually dominant company. CPC Decision No. 717, 28 June 2018.

In terms of judicial review, the importance of economic expertise in complex antitrust cases was confirmed by the much-anticipated decision of Supreme Administrative court on *CEZ Group* appeal against the CPC decision imposing a total fine of 2.19 million leva on two of its Bulgarian companies for obstructing the liberalisation of the Bulgarian energy market.⁷ While the court of first instance entirely upheld the antitrust authority's decision,⁸ the court of cassation took the view that the establishing of all the relevant facts and circumstances of the case required an expert opinion to be heard and, therefore, returned the case back to the minor court for a new review on the merits.⁹ In performance of these mandatory instructions, the court on the merits appointed an expert who was, in fact, invited to replace the economic analysis of the CPC by answering questions related to, inter alia, market definition, market shares and barriers to entry.¹⁰ It is yet to be seen whether the opinion of the independent expert will lead the court to legal conclusions different from those in the appealed decision.¹¹

Information about pending cases and imposed fines in 2019 is summarised below.

Investigations of abuse of dominance pending at the CPC

Sector	Investigating authority	Conduct	Case opened
Aviation/Aircrafts	CPC	Abuse of dominance unspecified	November 2019
Machinery	CPC	Abuse of dominance, unspecified	December 2019
Medical devices (hearing aids)	CPC	Abuse of dominance, unspecified	September 2019
Heating energy	CPC	Abuse of dominance, unspecified	April 2019
Energy	CPC	Refusal to provide access to the distribution grid/refusal to supply electricity. SO issued	March 2016 ¹²

CPC decisions in the past year with imposed fines for abuse of dominance

Sector	Investigating authority	Conduct	Imposed fine
Energy	CPC	<ul style="list-style-type: none"> • Unilateral amendment of the hourly forecasts for energy production, leading to unjustified additional costs for imbalances • Imposing unfair trading conditions, leading to unjustified costs for imbalances 	315, 612 leva

7 This case was also discussed in the previous edition of this Review.

8 Decision No. 15629, 13 December 2018 and Decision No. 13130, 29 October 2018, of the Supreme Administrative Court's three-member panel.

9 Decision No. 7729, 22 May 2019 under administrative case No.1320/2019 of the Supreme Administrative Court's five-member panel (chaired by the Chair of the Supreme Administrative Court).

10 The admissibility of this expertise was strongly objected to by the CPC.

11 During the preparation of this edition, the court issued decision No.423 dated 30 April 2020, which was entirely in favour of CEZ Group.

12 The investigation was resumed after the CPC decision was cancelled by the Supreme Administrative Court.

III MARKET DEFINITION AND MARKET POWER

In terms of market definition, the CPC follows its methodology on assessment of the market position, and defines the product and geographical market by analysing the interchangeability on the supply and demand sides. In *bTV v. Nova*,¹³ the main tool used for this purpose was questionnaires addressed to clients of the investigated undertaking. The CPC also acknowledges the small but significant non-transitory increase in prices test, and in *BACCO v. Electricity Distribution Networks Operators*,¹⁴ the division of two services into separate markets was justified by the difference in the price (in addition to other factors).

Language-related markets (such as media) are traditionally considered as national. In the energy sector, market definition often follows the scope of the licence. Useful guidance may also be found in the market analysis, which the CPC issued following its sector inquiries. However, the market definition accepted by the CPC in one case is not legally binding in subsequent cases dealing with the same service or product.¹⁵

To the extent the market definition is a matter of economic analysis, it is quite difficult to be challenged in court, and even when a court is prepared to reverse a CPC decision, it tends to do it for reasons not related to market definition.

Article 20 of the CPA lists the factors considered by the CPC in the assessment of whether a company holds a dominant position as follows:

- a* market share;
- b* financial resources; and
- c* the ability to access the market, technological development and commercial relations with other undertakings.

A company is dominant if, owing to any or all of these factors, it is independent from its competitors, suppliers and clients and therefore able to impede competition in the market.

Market share is a primary indicator, even though there is no statutory threshold for dominance. According to the CPC's practice, such finding is unlikely if the market share is below 40 per cent. Market shares are assessed in the light of the particulars of the relevant market. For this purpose, the CPC explores the market structure and the degree and effectiveness of competitive pressure exercised on the undertaking by its competitors, suppliers and clients. The importance of the market share is higher in markets with significant barriers to entry. However, in *bTV v. Nova*, even a market share of above 60 per cent was not considered as enough evidence for dominance in an oligopolistic market with high entry barriers because of the strong competitive pressure exerted between the two main market players.¹⁶ On the contrary, in *Techem*,¹⁷ Techem was found dominant in the individual

13 Case No. CPC/712/2011.

14 Cases Nos. CPC/449/2013, CPC/450/2013 and CPC/451/2013.

15 CPC Decision No. 313, 7 March 2019, containing a market analysis of the fuels markets adopted following a sector inquiry is the most recent example of its inconsistent approach to market definition. In this analysis, the CPC defines the retail markets of different types of fuel as regional within the boundaries of a 10-minute drive within city areas and a minimum of a 20-minute drive in rural areas, while, in a commitments decision adopted in 2017 following a cartel investigation, the same markets were defined as national. See CPC Decision No. 318, 28 March 2017, Section IV.1.2. The CPC's view on the geographic dimensions of the retail markets were objected to by the investigated undertakings.

16 CPC Decision No. 842/2013, 11 July 2013, under case No. CPC/712/2011.

17 CPC Decision No. 870, 4 November 2015, under case No. CPC/626/2014.

measurement and allocation of heating energy market even with a market share of less than 50 per cent because of its market share combined with vertical integration, economies of scope and the incompatibility of its installed measurement devices with competitors. In *Swissport v. Sofia Airport*,¹⁸ the court disagreed with the CPC that Sofia Airport was not dominant in the market of ground-handling services, considering its high market share (above 50 per cent) and the ability to cross-subsidise the ground-handling operations from other sources of revenues owing to its monopoly position of an airport operator.

In *Fast Pay v. CEZ group*,¹⁹ the CPC analysed additional factors such as alternative sources of supply, barriers to entry and expansion, network effects and incentives for exercising market power.

The CPA explicitly states that the dominant position may be occupied by more than one undertaking; however, the concept of 'joint' or 'collective' dominance has not yet been developed in practice.

The majority of cases of established abuses of dominance concern companies in a monopolistic or almost monopolistic position owing to exclusive licences for providing certain services in a given area (e.g., in the energy sector) or operating essential facilities (such as the majority of utilities,²⁰ including ownership of a bus station) or natural monopolies (e.g., collective management organisations). This trend can be explained by the difficulties encountered in proving a dominant position in a market where some competition still exists, which can only be overcome by a high-profile economic analysis. It must be noted that the dominant position on a certain market does not automatically make the company dominant 'per se' on each and every market and in each and every capacity it might participate.²¹

For the purpose of establishing a stronger bargaining position, the CPC explores the structure of the relevant market and the particular commercial relationship:

- a* the degree of dependency between the parties thereto;
- b* the nature and the difference in scale of their business; and
- c* the existence of alternative trading partners, sources of supply, distribution channels and clients.

The concept of relative market power is relatively new²² and is particularly important for companies operating in oligopolistic markets with few strong competitors, where none is

18 Decision No. 3304, 23 March 2016, under administrative case No. 1906/2016, of the Supreme Administrative Court's five-member panel.

19 Case No. CPC/869/2017.

20 For example, the water and sewage supply company within a certain area. See CPC Decision No.1314, 5 December 2019.

21 Even though CEZ Electro was dominant in its capacity of electricity supplier within its licence territory, CPC rejected the same company being dominant in its capacity of client in the market of cash payment services. CPC Decision No.508, 18 April 2019.

22 Introduced through supplements to the CPA in 2015.

individually dominant, but each can exert some market power towards clients or suppliers.²³ Therefore, the prohibition of abuse of stronger bargaining position is more relevant for vertical relationships than for horizontal relationships.²⁴

In A1,²⁵ the CPC found the leading mobile telecommunications operator in Bulgaria (one of three) to be in a stronger position than Handy Bulgaria, an independent distributor of its services. In *Cable Operators v. bTV and Nova*,²⁶ Nova and bTV²⁷ were both found to be in stronger positions towards four regional cable operators distributing their TV channels.²⁸ However, in *Piero 97*,²⁹ this position was rejected for bTV towards its client and major advertising agency, *Piero 97*. In another case, the company operating the *Kaufland*³⁰ chain of hypermarkets was found relatively dominant towards one of its suppliers.³¹

23 In *bTV v. Nova*, the CPC found that the relevant market was highly competitive, regardless of its oligopolistic nature (close to duopoly). Owing to the strong competition between the market players with the highest market share, individual dominance was denied and therefore the concept of abuse of stronger bargaining position appears to be a more appropriate approach in challenging the behaviour of these companies. In *Fast Pay v. CEZ group*, the complainant Fast Pay used this concept to bypass the requirement to prove dominance. Shortly after the CPC rejected its claim based on Article 21 CPA (Decision No. 508, 18 April 2019), Fast Pay filed a new complaint, this time based on Article 37a CPA – case No.1033/2019. Even the world giant Apple Inc was alleged to have abused its stronger bargaining position towards its client – the Bulgarian telecommunication incumbent and one of the three mobile operator bTC. bTC, however, withdrew the complaint shortly after filing, and the case was closed (case No. 604/2019).

24 Originally this prohibition aimed to regulate the relations between the large chains of supermarkets such as Metro, Billa and Kaufland, and their suppliers.

25 Case No. CPC/653/2018.

26 Case No. CPC/610/2016.

27 bTV Media Group and Nova Broadcasting Group are leading media groups in Bulgaria with the most-viewed TV channels and a joint market share exceeding 90 per cent in some markets.

28 The CPC decision has been partially reversed by the first-instance court upon appeal because the CPC's assessment of the TV operators' market positions was based on irrelevant data (the audience share and ratings of the TV channels' advertising market, rather than of their content distribution market, were used as performance indicators). Further, the CPC failed to consider the strong competition between the TV operators, with each being an alternative source of supply to the other towards the cable operators. See Decision No. 3810, 15 March 2019 of the Supreme Administrative Court's three-member panel, upheld by Decision No. 15672, 19 November 2019, under administrative case No. 8224/2019 of the Supreme Administrative Court's five-member panel.

29 Case No. CPC/126/2017.

30 Case No. CPC/378/2016.

31 The CPC decision has been reversed by the court upon appeal owing to procedural defects, including deficiencies in the economic analysis used to demonstrate the stronger bargaining position and failure of the CPC to prove the alleged difficulties for the supplier to switch to alternative trading partners among Kaufland's competitors. See Court Decision No. 4572, 27 March 2019 of the Supreme Administrative Court's three-member panel, upheld by Decision No. 16044, 26 November 2019 under administrative case No. 6379/2019 of the Supreme Administrative Court's five-member panel. The CPC resumed the review of the case in line with the mandatory instructions of the court. Case No.CPC/1032/2019.

IV ABUSE

i Overview

The CPC and Bulgarian courts have acknowledged that it is the abuse and not the dominant position itself that is prohibited.³²

Abuse of dominance is defined as unilateral behaviour of a dominant undertaking that may prevent, restrict or impede competition in a relevant market, as well as affect consumer interest. In order to establish abuse, the CPC is required to prove the existence of:

- a* an undertaking;
- b* the dominant position of such undertaking in a relevant market;
- c* unilateral behaviour; and
- d* actual or potential anticompetitive effect of the behaviour also affecting consumer interest.

Article 21 of the CPA mirrors Article 102 of the TFEU to a great extent, by listing the most common forms of abuse, which is non-exhaustive:³³

- a* the direct or indirect imposition of purchase or selling prices or other unfair trading conditions;
- b* the limitation of the production, trade or technical development to the detriment of consumers;
- c* the application of different conditions to certain clients for equivalent transactions, thereby placing them at a competitive disadvantage;
- d* concluding contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts that, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance; and
- e* the unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity.

The CPC's understanding of 'unilateral' behaviour is somewhat flexible. In *Bulgartransgaz*,³⁴ the CPC took the view that the contracts for gas transportation and supply were not unilaterally imposed by the dominant company because the draft contracts were published on its website and the clients were provided with the opportunity to provide comments on them. This was sufficient for the CPC to reject the allegations against *Bulgartransgaz*, regardless of the fact that not all proposals for changes were accepted and included in the individual contracts. The CPC justified the refusal of the dominant company to accept some of the proposals with the need for the dominant company to ensure equal treatment of all clients, restricting its ability to include different terms and conditions in the contracts with different clients. In previous cases, the CPC qualified contracts in a unified form (often as

32 Decision No. 6985, 5 June 2017, under administrative case No. 2659/2017 of the Supreme Administrative Court's five-member panel.

33 Decision No. 15629, 13 December 2018, under administrative case No. 1262/2018 of the Supreme Administrative Court's three-member panel; Decision No. 1082, 29 January 2015, under administrative case No. 4734/2014 of the Supreme Administrative Court's three-member panel.

34 Case No. CPC/1082/2017.

general terms and conditions), drafted by the dominant party, as unilaterally imposed. In CEZ group,³⁵ the CPC qualified the behaviour of the exchange of information between companies within the same economic group as unilateral.

Even if the behaviour meets all the criteria for abuse, it cannot be prohibited if the dominant company provides 'objective justification'.

The CPC often refers to the classic definition for abuse as the objective concept developed by the Court of Justice of the European Union in *Hoffmann La Roche*.³⁶ However, the CPC and courts do not have a consistent understanding of the meaning of this notion. The CPC relies on the objective concept in order to reject the relevance of the subjective intentions behind the behaviour,³⁷ while the court refers to it³⁸ in the context of the requirement for a link between the behaviour of the dominant undertaking and the negative impact on competition and consumers to exist.³⁹

The CPC does not make a clear difference between a restriction of competition by object and an effects-based approach in its practice, and has applied the as-efficient-competitor test (AEC test) only once – in a case relating to fidelity rebates⁴⁰ and, in general, tends to follow a stricter form-based approach without a developed coherent theory of harm and with less economic evidence.

In order to qualify certain behaviour as abusive, the CPC is not required to prove an actual negative effect on competition; rather, it is sufficient to establish a potential for competition to be distorted.⁴¹

Abuse of a stronger bargaining position is defined as acting in bad faith (i.e., without objective economic justification) to the detriment of the interests of the weaker party and consumers. The CPA⁴² gives examples closely resembling some of the forms of abuse of dominance:

- a* an unjustified refusal to supply;
- b* the imposition of unreasonably burdensome or discriminatory conditions; and
- c* an unjustified termination of business relations.

ii Exclusionary abuses

The CPC defines exclusionary abuse as unilateral behaviour aimed at distorting effective market competition by executing competitive foreclosure, creating barriers to entry in order to limit potential competition or to limit competitors' expansion, or imposing competitive constraint on the dominant company.⁴³

35 Case No. CPC/305/554/2013.

36 CPC Decision No. 641, 14 May 2014.

37 CPC Decision No. 399, 12 May 2015; CPC Decision No. 1576, 20 November 2013; CPC Decision No. 506, 8 May 2013.

38 Judgment of the Court, 13 February 1979.

39 Decision No. 6985, 5 June 2017, under administrative case No. 2659/2017 of the Supreme Administrative Court's five-member panel; Decision No. 10524, 12 October 2015, under administrative case No. 9059/2015 of the Supreme Administrative Court's five-member panel.

40 Case No. CPC/712/2011.

41 CPC Decision No. 1133, 22 December 2016; CPC Decision No. 1475, 14 December 2017.

42 Article 37a, Paragraph 1 of the CPA.

43 CPC Decision No. 425, 19 May 2015.

The CPC has little practice in predatory pricing, which can be attributed to the existence of a similar prohibition in Chapter VII of the CPA on unfair competition, which is applicable to all undertakings, regardless of the degree of their market power. Under Bulgarian law, selling below cost can be a violation of the prohibition of abuse of dominance and a special form of unfair competition, at the same time. In investigating unfair competition, the CPC is not required to prove a dominant position and therefore it is used by competitors as a shortcut to making a complaint.⁴⁴

One of the very few cases in this area is regarding the alleged predatory pricing of the ground-handling services of Sofia Airport EAD,⁴⁵ which started in 2012 following a complaint by the company's competitor, Swissport Bulgaria. The case was subject of judicial review twice.⁴⁶ During the last review before the court of first instance, the appellant Swissport Bulgaria surprisingly withdrew its appeal, and as a result the CPC decision, declaring no infringement, entered into force.

Despite the lack of recent precedents, the CPC acknowledges 'margin squeeze' as one of the possible forms of pricing abuse through the imposition of high prices.⁴⁷ However, the CPC generally tends to address the issue of high prices as exploitative excessive pricing rather than as an exclusionary abuse.

In the past decade, the CPC faced fidelity rebates in two cases without finding infringements. In *bTV v. Nova*,⁴⁸ the CPC sent an SO to bTV, a leading national free-to-air TV operator, for applying retroactive rebates to its TV advertising clients in consideration for a guarantee of a 100 per cent share of their TV advertising budget (a form of exclusive dealing). In this case, the CPC applied the AEC test for the first time, in order to prove that bTV's behaviour could foreclose a competitor as efficient as the dominant company. Eventually, the CPC changed its view on bTV's market position because of the oligopolistic structure of the market, and therefore found no abuse.

Liberalisation of the energy markets at retail level was the focus of a landmark antitrust case initiated in 2013 and completed in 2017.⁴⁹ The CPC sanctioned the local companies of the CEZ and EVN groups for applying a strategy aimed at leveraging their market position as incumbents of the regulated market to the competitive retail market, which has freely negotiated pricing. The on-going liberalisation of the energy markets allows clients to switch

44 In 2018, the CPC imposed two fines for unfair competition on companies selling below cost.

45 Case No. CPC/1074/2012 (first review), case No. CPC/145/2016 (second review).

46 In the first appeal, the court disagreed with the CPC on the lack of dominance and referred the case back to the CPC with mandatory instructions. The CPC conducted a second investigation and arrived at the same conclusion. The complainant, Swissport Bulgaria, appealed the second decision of the CPC. The three-member panel of the Supreme Administrative Court, acting as a first instance, ruled that the CPC failed to comply with the mandatory instructions of the court given in the first review of the case. The CPC was bound to accept that Sofia Airport was dominant and was not entitled to reassess its market position. See Decision No. 15884/2017, 19 December 2018, under administrative case No. 7087/2017 of the Supreme Administrative Court's three-member panel, reversed by Decision No. 8191, June 2019 under Administrative Court's five-member panel. The five-member panel took the opposite view: the antitrust authority had the exclusive power to establish an infringement of Article 21 CPA, and, therefore, the court was not entitled to give mandatory instructions regarding the contents of its decision (including in relation to the market position of the investigated undertaking).

47 CPC Decision No. 450, 27 May 2015.

48 See footnote 13.

49 Case No. CPC/305/554/2013. The CPC decisions towards CEZ group and EVN group are still pending at court.

from the regulated to the free market by replacing their public supplier with a trader. Once the client enters the free market, it can choose its supplier from almost 90 licensed retailers. Both CEZ and EVN were present in the regulated and free electricity markets. According to the CPC, both groups discriminated traders outside the group by refusing them access to historical data about clients' hourly consumption, which the groups had collected during their operations on the regulated market, and which was at the disposal of the traders within the group. Further, it was alleged that the groups also applied various practices aimed at preventing clients from switching to the free market or at least delaying such a process. The CPC did not apply the doctrine of the single economic entity,⁵⁰ and, owing to the difference in the geographic dimensions of the markets (the free market was national, while the regulated market was limited to the licensed area), failed to prove dominance of the groups' traders operating in the broader market. Therefore, it sanctioned only the incumbents – the network operators, CEZ Razpredelenie Bulgaria AD (CEZ group) and EVN Bulgaria Elektrorazpredelenie EAD (EVN group), and the companies supplying electricity at a regulated price, CEZ Electro Bulgaria AD (CEZ group) and EVN Bulgaria Electrosnabdyavane EAD (EVN group), which were found liable for an abuse benefiting related traders⁵¹ and, therefore, reaffirming the understanding that the abuse may take place in a market different from the market in which competition is affected. However, the theory of harm in this case was not completely consistent: the companies were sanctioned for applying a strategy aimed at keeping their clients in the regulated market, and, at the same time, benefiting the traders within the group operating in the free market (the two aims excluding each other).

Against the background of the pending investigation, in 2016, the CPC began another investigation⁵² into the same companies on the basis of similar allegations but related to a later period of time. Both investigations run in parallel and finished with contradictory decisions.⁵³

iii Discrimination

The provision of Article 21(c) of the CPA explicitly lists discrimination (i.e., applying dissimilar terms to equivalent transactions) as a possible form of abuse of dominance. Similarly, Article 37a, Paragraph 1 of the CPA provides that imposition of discriminatory conditions on the weaker party can be an abuse of stronger bargaining position. The practice shows that the CPC tends to apply this rule too broadly, encompassing not only transactions with companies that are competitors, placing some of them at a competitive disadvantage, but also contracts with end consumers,⁵⁴ as well as various forms of factual behaviour.⁵⁵

50 According to this doctrine, all companies that belong to the same economic group can be considered as a single 'undertaking' for purposes of the application of Article 102 TFEU.

51 Each investigated group included companies operating on different markets: operation of the distribution network at low and medium voltage, supply of electricity at regulated prices and supply of electricity at freely negotiated prices.

52 Case No. CPC/319/2016.

53 Several months after the CPC issued its infringement decisions for the period covered by its first investigation (namely, CPC Decisions Nos. 1475 and 1476, 21 December 2017), the second investigation was closed without finding an abuse (CPC Decision No. 1299, 15 November 2018).

54 CPC Decision No. 870, 4 November 2015. The CPC sanctioned Techem for applying different terms of service and rates of its fees to customers residing in different cities within the territory of Bulgaria.

55 By CPC Decision No. 399, 12 May 2015 (reversed by the court upon appeal), the CPC sanctioned the Bulgarian telecommunication incumbent BTC for discriminatory treatment of a client by taking factual

iv Exploitative abuses

In *RES producers v. NEC*⁵⁶ the CPC referred to the exploitative abuse as a type of abuse that allows the undertaking to benefit from its behaviour in a way it would not be able if there was effective competition.

Exploitative abuses remain the most common type of abuse in the practice of the CPC, even though sometimes the difference between exclusionary and exploitative abuse is not obvious. In *ViK Dobrich v. Energo-Pro*,⁵⁷ the CPC sanctioned the electricity supplier Energo-Pro Sales for termination of supplies to one of its business customers – a water-supply and sewage company, ViK Dobrich.⁵⁸ Regardless of the fact the case appeared as a classic example of ‘refusal to supply’ conduct, the CPC analysed the behaviour of the dominant company within the framework of an exploitative abuse given the absence of competition in the downstream market (water supply within a given territory) that might be affected (ViK Dobrich was a monopolist in that market).

In another case, the CPC sanctioned an electricity distribution network operator (being an essential facility) for delaying a client’s access to its network and consequently to the downstream market, delaying the production of energy from renewables. The CPC mostly qualified the behaviour of the dominant company (i.e., impeding the accession to the network) as an imposition of unfair trading conditions (a kind of exploitative abuse) rather than as constructive refusal to supply. According to the CPC, the network operator exploited its monopoly in order to achieve non-justified financial benefits by transferring expenses, which they would normally bear, to the clients. The CPC went further by stating that this behaviour may also prevent potential competitors from entering the market as an indirect result and, therefore, may also have exclusionary effects.⁵⁹

Recently, the CPC approved commitments offered by the local heating company Toplofikatziya Sofia to address allegations of imposing unfair trading conditions regarding the connection of clients to its heating network.⁶⁰ The contractual clauses alleged to be unfair required the clients to construct the facilities necessary to connect to the network at their own cost and thereafter to allow the heating company to use such facilities for free for the purpose of providing its service. Once the ownership of the connection facilities was transferred to the heating company, the latter compensated the clients for by delivering heating energy of the same value to them. Such set-off mechanism was not acceptable to the construction companies, which were not able to benefit from the free heating energy delivered to the inhabitants of the completed buildings.

measures for resolving a dispute (i.e., termination of a contract), which have not been applied to clients in similar positions in previous disputes. By CPC Decisions Nos. 1475 and 1476, 21 December 2017, the energy incumbents from CEZ and EVN groups were sanctioned for discriminating independent traders outside the group by refusing to provide them access to certain data that were at the disposal of traders within the groups. See Section IV.i.

56 Case No. CPC/121/2015.

57 CPC Decision No. 506, 8 May 2013.

58 See M Marinova and K Yaneva-Ivanova, ‘Exploitative Abuse of a Dominant Position in the Bulgarian Energy Markets’ *Yearbook of Antitrust and Regulatory Studies*, 2017, Vol. 10(16).

59 CPC Decision No. 1510, 21 December 2017.

60 CPC Decision No. 158, 31 January 2019.

In the past five years, the CPC has sanctioned several companies for excessive pricing:

- a* cemetery's sole provider of funeral services;⁶¹
- b* the owner and exclusive operator of a bus station;⁶² and
- c* three operators of electricity distribution networks.⁶³

Aurubis Bulgaria, a local subsidiary of the world leader in copper recycling, was also investigated for excessive pricing in the production and wholesale of sulphuric acid market; however, after considering the objections against the SO, the CPC expanded the geographic market and could not, therefore, prove a dominant position.⁶⁴

The approach of the CPC depends on the particular product or service in question. Investigating bus station services, the CPC analysed whether the pricing factors applied by the owner of the bus station (transport scheme and time of service) were relevant for the costs of the service. With regards to the rental price of energy distribution network pylons, the CPC investigated whether the costs for maintenance and service of the pylons were fully accounted as costs for the regulated service and, as such, were covered by network charges or appropriately allocated between various activities (regulated and non-regulated services). In all cases concerning excessive pricing, the accounting of the investigated undertaking is of great importance because this is necessary in proving the particular costs included in the price of a product or service and the relevance of those costs. The lack of objective pricing methodology or using irrelevant pricing factors by themselves may lead to a finding of infringement.

Relying on the common understanding that the competition authorities should not act as price regulators, the CPC often orders undertakings to terminate the infringement without specific remedies or further guidelines on how to comply. This creates significant uncertainty and difficulty in achieving post-decisional compliance. Sanctioned companies asked for clarification of the reasons underlying such CPC decisions, but these were not provided. While the sanctioned companies were waiting for the CPC to provide the requested clarifications, the court reversed the infringement decisions.

V REMEDIES AND SANCTIONS

The CPC is entitled to impose sanctions, as well as behavioural and structural remedies. The undertakings can also offer commitments, at an earlier stage (within the deadline for submission of response to the allegations in the SO). As a general rule, sanctions are imposed on the undertakings that committed the abuse and, in exceptional cases, on individuals.

i Sanctions

The CPC has adopted a methodology on setting fines, which categorises infringements by gravity, into three groups: light, medium and heavy, taking into account factors such as type (exploitative or exclusionary), coverage (national, regional or local) and effect (capable to foreclose the market or exclude competitors, or both).

61 CPC Decision No. 1511, 21 December 2017.

62 CPC Decision No. 1133, 22 December 2016.

63 CPC Decisions Nos. 449, 450 and 451, all 27 May 2015, reversed by the court upon appeal. See also footnote 48.

64 CPC Decision No. 443, 8 June 2016.

The base amount of the fine is calculated as a percentage of net revenue from sales of the affected products or services generated during the last year of participation in the infringement, in the following range.

Gravity of infringement	Abuse of dominance	Abuse of stronger position
Light	Up to 5 per cent	Up to 2 per cent
Medium	Up to 8 per cent	Up to 5 per cent
Heavy	Up to 10 per cent	Up to 10 per cent

In abuse of dominance cases, the base amount is multiplied by the number of the years of duration of the infringement. The fine can be further increased or decreased by 10 per cent in the case of aggravating or mitigating circumstances and increased by another 25 per cent if the infringement is under Article 102 of the TFEU. In any event, the fine cannot exceed 10 per cent of the annual turnover of the undertaking for the preceding financial year (including all products and services).

Sanctions for abuse of stronger bargaining position are calculated on the basis of the total revenue from the sales of the relevant product or service instead of on the revenue from the particular client on whom the abuse has been committed.⁶⁵

ii Behavioural and structural remedies

Remedies and interim measures are more a theoretical option in Bulgaria. In practice, the sole remedy regularly applied by the CPC is ordering the undertaking to end the infringement.

VI PROCEDURE

The CPC can initiate investigations on its own initiative; however, the majority of cases are triggered by complaints by clients or competitors. Investigations are not limited in time. Most cases are completed within two to three years; however, some cases have been of longer duration.⁶⁶ The CPC follows different procedures depending on whether it is investigating abuse of dominance or abuse of stronger bargaining position.

i Common features of both procedures

The CPC has the power to conduct dawn raids in business premises and of motor vehicles, during which it can take all kinds of evidence, such as documents, emails, databases, including those that are not directly related to the subject of investigation.⁶⁷ Legal privilege is not respected for in-house lawyers.

During the investigation, the CPC sends requests for information and evidence to the relevant authorities (sector regulators) or companies (e.g., clients and competitors), including the undertaking being investigated and the complainant (as the case may be). Any addressee is obliged to respond because the failure to cooperate (including by providing incorrect,

65 This rule operates in a particularly confusing way when the abuse has been committed towards a supplier but the fine is calculated on the basis of the revenues from clients.

66 Case No. CPC/305/554/2013; case No. CPC/121/2015.

67 Dawn raids are subject to the prior approval of the administrative court.

incomplete or misleading information) may entail a fine of up to 1 per cent of their total annual turnover for the preceding financial year. Persons providing information to the CPC have the right to protect their business secrets.

The CPC does not tend to exercise its powers to impose interim measures, but is entitled to impose daily fines in order to stimulate undertakings' compliance. These fines vary depending on the case, and may reach 5 per cent of the preceding year's average daily turnover.

Decisions in most cases are issued shortly after the hearing and can be appealed by the affected parties before the administrative courts in two instances. Following changes in the Administrative Procedural Code, effective since 1 January 2019, appeals against CPC decisions are reviewed by a court of first instance with no previous experience of competition cases.

ii Specifics of the investigation for abuse of dominance

Before imposing a sanction, the CPC is required to issue an SO expressing its preliminary findings and to provide the undertaking with an opportunity to defend. Investigated undertakings are entitled to respond in a time period, set by CPC, which cannot be less than 30 days, and can also opt for a hearing at an open session. An SO does not prejudice the proceedings and the CPC can decide that the company was not dominant or that abuse was not committed. Parties have access to the file during the whole period of response to the SO. During the same period, undertakings can offer commitments, save for heavy infringements, and such proposal does not prejudice the right to object to the SO.

The CPC may approve the commitments through a decision, which is silent on the issue of whether there was an infringement. The proposed commitments are consulted within the parties to the proceedings only (and not publicly). Once approved, commitments become binding on the undertakings, which must comply under the threat of a sanction. Noncompliance, reported by a third party or established *ex officio*, may also result in resuming the investigation.

Unlike other jurisdictions, in Bulgaria, closing investigations with commitments is still more an exception than a rule.⁶⁸

iii Specifics of the investigation for abuse of stronger position

In investigations into abuse of stronger position, no SO is issued and the investigated company receives a copy of the complaint (if any). Parties have access to the file after being summoned for the hearing, which is a mandatory step that usually takes place one week in advance of the hearing.

68 Between 2010 and 2019, the CPC approved commitments in eight cases, while 36 investigations finished with sanctions.

VII PRIVATE ENFORCEMENT

Private enforcement in Bulgaria is still an underdeveloped area regardless of the implementation of the EU Damages Directive⁶⁹ through amendments to the CPA,⁷⁰ effective since the beginning of 2018. Even before the amendments, parties were entitled to claim damages in follow-on cases; however, the relevant court practice is very limited⁷¹ and mainly includes discontinued cases owing to the lack of the CPC's final decision on the abuse.⁷²

Under Bulgarian law, any person affected by a competition infringement is entitled to full compensation encompassing the actual damages suffered and loss of profit plus statutory default interest calculated from the date the harm occurred. Bulgarian law does not allow claims for punitive damages, neither does it take possible fines imposed by competition authorities into account.

Article 105(4) of the CPA provides that the CPC's decisions regarding infringement are binding on the courts and the infringer, and thus facilitates follow-on claims where claimants only need to prove damages. The court may consult the CPC regarding the calculation of damages and is entitled to award compensation even if the precise amount of the damages is not established.⁷³

69 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

70 A new Chapter 15 has been included in the CPA. For more detailed analysis on the implementation of the EU Damages Directive in Bulgaria, see Petrov, Anton, Implementation of the EU Damages Directive in Bulgaria (30 January 2018). Available at SSRN: <https://ssrn.com/abstract=3126799>.

71 Public sources advise of one successful claim, brought against the operator of the electricity distribution network in north-east Bulgaria, Electrodistribution North, which refused to supply electricity to a factory because of unpaid network charges and electricity price by the previous owner. The CPC sanctioned the network operator for abuse of dominance in the form of unjustified refusal to supply. On the basis of this decision, the claimant was awarded with compensation for loss of profit resulting from the impossibility of concluding a lease agreement for the factory and generating revenues. It was proved that the owner of the factory was in negotiations with a third party, and signing of the agreement was obstructed by the lack of electricity. See Court Decision No. 156, 23 October 2015 of the Varna Court of Appeal.

72 In one of these cases, an energy producer claimed damages (loss of profit) resulting from alleged abuse of dominance in the form of undue restrictions on its production imposed by Electrodistribution North. The court of first instance upheld the claim, while the court of appeal reversed its decision and discontinued the proceedings on the ground that, at that time the CPC's decision establishing the abuse was being appealed at the Supreme Administrative Court, and thus was not final. This was consistent practice of the courts based on the mandatory interpretation of the Supreme Court of Cassation that the CPC is the sole authority entitled to establish infringements of competition law. After the implementation of the EU Damages Directive, this practice shall no longer be deemed relevant. This understanding of the authors is confirmed by judgment no. 8220, 3 December 2019 of the Sofia City Court, which, acting as a court of appeal, reviewed on the merits a stand-alone claim for compensation based on infringement of Article 21 CPA.

73 According to Article 162 of the Civil Procedural Code, if the ground of the claim is proved, but the value is not, the court is entitled to set the amount to be awarded at its own discretion or by hearing an expert opinion.

Special rules regarding access to evidence, pass-on defence and joint and several liability apply to claims based on abuse of dominance. Obstructing other parties' access to evidence may entail fines⁷⁴ that are significantly higher than those applicable in the ordinary civil litigation.

Claims for compensation are reviewed by the civil courts, while decisions of the CPA are appealed before the administrative courts. This is another obstacle in stand-alone claims: civil judges have no experience in establishing competition law infringement.

VIII FUTURE DEVELOPMENTS

The health and economic crisis surrounding the covid-19 outbreak will inevitably have an impact on antitrust enforcement in 2020. The CPC already joined the common position of the European Commission and the European Competition Network⁷⁵ and stated it would closely monitor the markets of foods, pharmaceuticals and sanitary products, such as masks and sanitisers, for any anticompetitive practices, including excessive pricing. While the CPC seems to be prepared to take a more lenient approach to certain forms of cooperation, it would not hesitate to enforce competition law rigidly against any abuse of market power.

Against the background of economic recession, it could be expected that Article 37a CPA would be employed even more intensively as an important tool for dealing with the issues of misused economic dependence.

The fuel markets will also remain in focus, especially considering the significant fluctuations in the petrol prices on the international stock exchanges during the pandemic.⁷⁶

The final outcomes of some major antitrust cases in the energy sector are still expected,⁷⁷ and it is yet to be seen whether any of them will contribute to such long-awaited development of the private enforcement of competition law in Bulgaria. The admissibility of stand-alone claims after the implementation of the EU Damages Directive appears to be an unsettled issue, which invites clarifications from the Supreme Court of Cassation.

In terms of legislative changes, Bulgaria would need to take the necessary steps for the implementation of the ECN Directive.⁷⁸ Considering the past experience and the lack of official information on whether this process has been started, implementation is likely to be delayed.⁷⁹

74 Fines vary from 500 leva to 50,000 leva (for individuals) and from 5,000 leva to 500,000 leva (for companies).

75 Available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf.

76 This expectation was confirmed on 16 April 2020, when the CPC opened a prohibited agreements/abuse of dominance investigation regarding the settling of prices at all levels of trade – production, wholesale and retail: case No. CPC-255/2020. This is the sixth investigation into the pricing in the sector for the past 10 years.

77 *CEZ group v. CPC* Decision No.1475/2017, currently being reviewed by the Administrative Court of Sofia – Region under administrative case No. 797/2019; *EVN Group v. CPC* Decision No.1476/2017, currently being reviewed by the Supreme Administrative court under administrative case No.1152/2018; *NEC v. CPC* Decision No.833/2019, currently being reviewed by the Administrative Court of Sofia – Region under administrative case No. 1111/2019.

78 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

79 The deadline for implementation is 4 February 2021.

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 (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).³ 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.

To provide guidance in this area, the Bureau has issued Enforcement Guidelines (the Guidelines)⁴ describing its approach to the interpretation of the statutory provisions in light of case law. The Guidelines were last updated in March 2019, and explicitly supersede policy statements and several earlier guidelines, including the prior 2001 and 2012 versions of

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

3 These were recently imposed in the water heater rental industry. *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, CT-2012-002: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=355; *The Commissioner of Competition v. Direct Energy Marketing Limited*, CT-2012-003: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=356.

4 Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (7 March 2019): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04420.html.

the Guidelines, as well as detailed enforcement guidelines on predatory pricing,⁵ guidelines specific to the telecommunications and grocery sectors, and draft guidelines specific to the airline industry.⁶

The Guidelines do not have the force of law and are not binding on the Tribunal, Canadian courts or even the Bureau.⁷ The Guidelines also emphasise that the Bureau's enforcement approach will 'depend on the particular circumstances of the matter in question', and on the discretion of the Tribunal and Canadian courts in contested cases.⁸ 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

Key recent developments indicate that, increasingly, the Bureau and Canadian courts have considered possible abuses of dominance by firms that do not compete directly in the relevant market. In August 2018, the Supreme Court of Canada dismissed a leave application by the Toronto Real Estate Board (TREB), effectively confirming that the abuse of dominance provisions can apply on the basis that TREB controls (even if it does not compete in) the market for residential real estate services in the Toronto metropolitan area. In another high-profile case initiated in 2016, the Tribunal dismissed the Commissioner's application seeking to stop the Vancouver Airport Authority (VAA) from restricting access at Vancouver International Airport to additional in-flight catering companies. In its decision, the Tribunal determined that VAA was dominant in the relevant market at Vancouver International Airport and also had a 'plausible competitive interest' in adversely affecting competition in that market. Ultimately, however, the Tribunal concluded that while VAA's conduct was exclusionary, its overall character was not anticompetitive, nor did it have the effect of substantially preventing or lessening competition. In its decision, the Tribunal confirmed the importance of considering legitimate business justifications when determining if acts are anticompetitive in nature.

The latest version of the Bureau's Guidelines, released in March 2019, picks up on the implications of these cases, and also introduces a number of other significant updates to the previous version. In the same month, the Bureau released a revised version of its guidance on the interface of intellectual property (IP) and competition law, which reflects, inter alia, another outcome of *TREB* (see Section II.iv).

5 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.

6 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).

7 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.

8 Guidelines, Preface.

Active enforcement has continued in a range of other cases. These include an ongoing investigation into a national airline's low-cost carrier division, in which the Bureau has alleged that certain below-cost fares amounted to predatory pricing. In April 2020, the Bureau discontinued its investigation (the second into similar conduct in recent years) into potential anticompetitive conduct by a pharmaceutical company that allegedly aimed to prevent or delay the entry of competing generic drugs by restricting a generic drug manufacturer's access to samples of the branded drug.

Other recent investigations focused on:

- a* a case with a software development company regarding certain restrictive business practices in markets relating to the supply of 'all-inclusive travel packages';
- b* a large grocery retailer's dealings with its suppliers;
- c* online search and search advertising practices;
- d* smartphone manufacturer's agreements with Canadian wireless carriers;
- e* restrictive clauses in contracts between TMX Group Limited and investment dealers;
- f* brand-name drug manufacturers' attempts to restrict access to samples needed to prove bioequivalency of generic products; and
- g* the possible implications of a biologic drug manufacturer's relationships with hospitals, insurers, infusion clinics and patients on biosimilar firms' ability to compete.

A theme underlying several recent developments is the increasing relevance of innovative markets, including, notably, in the pharmaceutical sector and the digital economy. Not only does recent enforcement suggest that abuse cases in innovative industries are becoming increasingly common, but the Bureau has flagged its interest in these areas in its updated Guidelines and other commentaries and statements. For example, in addition to the revised IP Enforcement Guidelines (IPEGs) and a number of statements focused on competition in the pharmaceuticals sector, the Bureau highlighted the digital economy and innovative markets in the release of its policy report titled 'Big data and innovation: key themes for competition policy in Canada' in 2018.⁹ Even in closing recent investigations, the Bureau has commented that it will continue to actively monitor these areas. This was the case, for example, following its inquiry into online search and advertising, and recent cases involving the competitive relationships between manufacturers of branded and generic drugs as well as biologic and biosimilar drugs.¹⁰

9 (19 February 2018) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html. See also the Bureau's 2017–2018 Annual Plan, the focus of which is 'Competition is key – Creating the conditions for innovation' (18 May 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04241.html. In its position statement regarding the recent investigation into online search and advertising practices (see the table under Section II.v), the Bureau also flagged that the digital economy, 'including the increasing competitive significance of data, will continue to play a crucial role for Canadian businesses and consumers. Robust competition policy and enforcement in this sector will nurture a competitive and innovative Canadian marketplace.'

10 In the online search and advertising case, the Bureau stated that it will be 'closely following' the subject's conduct and 'actively monitoring' the digital marketplace. See Section II.iv for further background on the pharmaceutical investigations and Section II.v for a full summary of recent cases.

i TREB decision

On 23 August 2018, the Supreme Court of Canada rejected TREB's application for leave to appeal a Federal Court of Appeal decision of 1 December 2017, bringing an end to a long-running case involving the Canadian real estate industry.¹¹

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.¹² In an unusually short decision in April 2013, the Tribunal initially determined that the Bureau's application did not meet the requirements of Section 79(1)(b) of the Act,¹³ on the basis that TREB does not compete with its members. However, on appeal, the Federal Court of Appeal in 2014 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 despite not technically competing in that market, and referred the matter back to the Tribunal for reconsideration.

Following the rehearing, the Tribunal followed the Court of Appeal's 2014 decision and ruled in April 2016 that an abuse of dominance was established, and the Federal Court of Appeal upheld that ruling in its decision in December 2017. More specifically, in its ruling upon reconsideration, the Tribunal found that TREB substantially or completely controlled 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.¹⁴ 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.

11 *Toronto Real Estate Board v. Commissioner of Competition*, 23 August 2018, case 37932, dismissing application for leave to appeal 2017 FCA 236. 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: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=325).

12 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.

13 CT-2011-003: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347. 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.

14 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.

The result in the *TREB* case provides a significant clarification to the application of Section 79(1)(b), which, as discussed in Section IV, requires that a dominant firm or firms have engaged in ‘a practice of anticompetitive acts’. In the leading case interpreting this requirement, *Canada Pipe*,¹⁵ the Court of Appeal had appeared to hold that the dominant firm must be a competitor of the firm or firms targeted by the practice, and the Tribunal in its original decision in 2013 followed this line of reasoning.¹⁶ Considering the Court of Appeal’s explicit rejection of that interpretation, and the ultimate outcome of the case, *TREB* arguably can be regarded as a landmark in Canadian abuse of dominance analysis. Its influence is already apparent in the subsequent *VAA* case, as well as in the latest version of the Guidelines.

ii VAA

On 17 October 2019, the Tribunal dismissed the Commissioner’s application against the VAA, which is responsible for the management and operation of Vancouver International Airport, including granting physical access to the airport.¹⁷ On 20 November 2019, the Bureau announced that it would not be pursuing an appeal thus bringing an end to this case.

The case involved restrictions imposed by the VAA that, according to the Bureau, decrease competition at the airport among in-flight catering companies that prepare meals for flight passengers and crew, and also provide related galley-handling services. Specifically, the Bureau alleged that while airlines that operate at the airport want greater choice of suppliers and that there are new suppliers willing to meet this demand, the VAA denied new suppliers access to the airport. According to the Bureau, the VAA abused its dominant position ‘by excluding and denying the benefits of competition’ to the in-flight catering marketplace at the airport and has ‘no legitimate explanation to justify the substantial prevention or lessening of competition that has resulted in higher prices, dampened innovation and lower service quality’.¹⁸

Similar to *TREB*, the case against the VAA involved alleged abuse of dominance in a market in which the VAA technically is not a direct competitor. In a lengthy decision dismissing the Commissioner’s application, the Tribunal determined that: (1) the VAA substantially or completely controlled the market for galley-handling services at the Vancouver International Airport;¹⁹ (2) the VAA had not engaged in anticompetitive acts; and (3) the VAA’s conduct did not prevent or lessen competition substantially, and was not likely do so because it had

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.

17 *The Commissioner of Competition v. Vancouver Airport Authority*, Notice of Application, CT-2016-015: https://www.ct-tc.gc.ca/CMFiles/CT-2016-015_Reasons%20for%20Order%20and%20Order_429_67_10-17-2019_9649.pdf.

18 *The Commissioner of Competition v. Vancouver Airport Authority*, Notice of Application, CT-2016-015: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=404.

19 The Commissioner also argued that there was a separate airside access market. While the Tribunal agreed, it ultimately concluded that nothing turned on it. The Tribunal determined that VAA controlled the galley handling services market by virtue of its control over a critical input to that market (airside access).

not reduced the degree of price or non-price competition in the supply of galley-handling services at the airport, relative to the degree that would likely have existed in the absence of this conduct.

The Tribunal's decision confirms and clarifies the 'plausible competitive interest' (PCI) screen used to limit the scope of cases alleging abuse of dominance against 'gatekeepers' (i.e., firms that do not compete in the market they are alleged to control, e.g., VAA and TREB). The Tribunal concluded that VAA had a PCI in the relevant market because of its 'participation in the upside' of overall revenues (through its interest in concession fees), together with its ability to exclude additional suppliers from the relevant market, which distinguished VAA from a typical upstream supplier that would suffer from a less competitive downstream market.

The decision also provided clarity on the application of the regulated conduct doctrine (RCD) and that, as a matter of law, it does not apply as a defence in Section 79 cases because, inter alia, Section 79 does not contain the 'leeway' language required to allow the RCD to be invoked and there was no statute, regulation or other subordinate legislative instrument that required, directed, mandated or authorised VAA, expressly or by necessary implication, to engage in the conduct. The Tribunal did, however, indicate that compliance with a statutory or regulatory requirement may nonetheless constitute a legitimate business justification for conduct that is potentially anticompetitive.

In this case, the Tribunal accepted that in excluding new entrants VAA could reduce the risk of finding itself in a position where it could lose one of its two full-service catering firms, thus preserving competition, choice and reliability for airlines. The Tribunal also accepted that VAA believed that its exclusionary conduct protected the airport's reputation because by maintaining two full-service catering firms, it reduced the risk of airlines experiencing significant adverse consequences because of the entry or exit of a caterer. The Tribunal held that to the extent reputational concern affected the airport's ability to compete with other airports for new routes, it constitutes a legitimate pro-competitive rationale unrelated to an anticompetitive purpose. Finally, the Tribunal also accepted that VAA's concern that introducing new entrants could result in aeroplanes departing without sufficient or high-quality meals, was a legitimate pro-competitive rationale.

iii Updated Guidelines

In March 2019, the Bureau issued a new version of its Guidelines, which is significantly more detailed than the previous version and includes several important updates.

In general, the Guidelines also carve out considerable discretion for the Bureau to assess elements of abuse of dominance, including in its definition of the relevant market or markets, as well as its determination of what constitutes substantial market power and an ability to 'control' a market.

First, in keeping with the *TREB* outcome, the Guidelines now specifically address the possibility that firms may 'substantially or completely control' markets in which they do not necessarily compete. Second, with respect to market power, the Guidelines now omit an informal safe harbour market share threshold of 35 per cent, which had been included in prior versions, retaining only a 50 per cent market share benchmark as a guideline for determining whether or not a firm's conduct will 'generally' prompt further examination. At the same time, the Guidelines contain additional commentary on the relevance of 'the ability to exclude' in assessing market power. Finally, the Guidelines expand upon the range of ways in which the relevant market may be defined. In particular, they emphasise the possibility

that the Bureau may identify more than one product or geographic market. Further, they now specifically contemplate that either or both sides of a ‘multi-sided platform’ may comprise the relevant product market or markets, and also how the ‘hypothetical monopolist test’ may apply in cases involving the provision of free services (as may be the case in circumstances involving such platforms).

These developments are further discussed in Sections III and IV.

iv Updated IPEGs and ongoing focus on pharmaceuticals

In the same month that the updated Guidelines were released, the Bureau released its updated IPEGs.²⁰ The revised guidance reflects another outcome of the *TREB* case, namely the Tribunal’s rejection of TREB’s argument that the information of which the use and dissemination it sought to restrict was protected by copyright and therefore subject to an exemption under the abuse of dominance provisions.²¹ Additionally, the 2019 version reflects updates to the Canadian Patented Medicines (Notice of Compliance) regulations.

More generally, the IPEGs reflect the Bureau’s ongoing 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. Other enforcement and policy developments in the pharmaceutical sector include the closure of an investigation into alleged product switching by a supplier of certain pharmaceutical drugs in May 2014.²² Later that year, 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.²³ More recent public statements reiterate the Bureau’s interest in the intersection between IP and competition law.²⁴

Finally, the Bureau has conducted several investigations in the pharmaceutical sector, including most recently two inquiries that closed in early 2019 and 2020 respectively. The first involved the possible predatory or exclusionary impact of a biologic drug manufacturer’s alleged conduct with regards to biosimilar firms. Here again, in its public statement regarding the closure of the investigation, the Bureau indicated that it maintains an active interest in this area, specifically commenting that it ‘will continue to monitor the evolving biologic and biosimilar industry’. The second involved an alleged attempt by a brand name pharmaceutical manufacturer to restrict access and samples of a brand drug required by the generic drug manufacturer to secure market approvals. The investigation was discontinued after the branded drug samples were provided. In its press release, the Bureau expressed concerns that ‘this sort of conduct has persisted despite its previous investigation and guidance to the pharmaceutical industry’ and warned branded drug manufacturers that it will ‘treat any explanation for a failure to supply [Canadian Reference Products] in a timely manner with an

20 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04421.html.

21 Specifically, Act, Subsection 79(5).

22 See the summary table in Section II.v.

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

24 See for example ‘Intellectual property & competition law: innovation in the 4th industrial revolution’ (Remarks by John Pecman, Commissioner of Competition, 10 June 2016): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04103.html.

extremely high degree of skepticism'.²⁵ This investigation comes after Health Canada warned drug manufacturers in July 2019 that elements of risk management plans required by Health Canada cannot be used to delay comparative drug testing or hinder a generic manufacturer's ability to enter the market.²⁶

v Summary of recent developments

The following table summarises significant recent decisions and developments.

Sector	Investigating authority	Conduct	Case opened	Status
Real estate services	Bureau	Restriction by TREB of members' access to multiple listing service information (sales inventory, selling price, broker compensation, etc.)	Initial application filed with the Tribunal in May 2011	Rehearing held in 2015. The Tribunal's April 2016 ruling that abuse of dominance was established (followed by issuance of an order in June) upheld by the Federal Court of Appeal on 1 December 2017; application for leave to appeal dismissed by the Supreme Court of Canada in August 2018
Pharmaceuticals	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 in November 2012	Closure of investigation announced in May 2014 following cessation of the alleged conduct
Residential water heaters	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 Comfort Limited Partnership registered November 2014, including C\$5 million penalty and C\$500,000 investigation costs Consent agreement with Direct Energy Marketing Limited registered October 2015, including a C\$1 million penalty and commitment to implement a corporate compliance programme in the event of re-entry into the market Commitments by EnerCare Inc not to continue Direct Energy's alleged anticompetitive policies and practices obtained by the Bureau in November 2014 following the acquisition of Direct Energy by EnerCare

25 Competition Bureau, 'Competition Bureau warns pharmaceutical industry that any further obstruction to the manufacture of generic alternatives will not be tolerated', 2 April 2020: <https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-warns-pharmaceutical-industry-that-any-further-obstruction-to-the-manufacture-of-generic-alternatives-will-not-be-tolerated.html>.

26 Health Canada, 'Notice of clarification to drug manufacturers and sponsors – Risk Management Plans', 4 July 2019: <https://www.canada.ca/en/health-canada/services/drugs-health-products/medeffect-canada/notice-clarification-drug-manufacturers-sponsors-risk-management-plans.html>.

Sector	Investigating authority	Conduct	Case opened	Status
Insulin pumps for diabetic patients	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 the acquisition by Medtronic Holdings Limited of Covidien plc, which was subject to a consent agreement registered on 26 November 2014	Agreement with Bureau to revise warranty terms announced March 2015
Digital economy – online search and search advertising ²⁷	Bureau	Alleged conduct by an online search engine and advertiser intended to exclude or disadvantage competitors, including through imposition of conditions and demands on customers preventing rivals from competing	Investigation commenced in 2013	Discontinuation of investigation announced in April 2016 owing to insufficient evidence, subject to ongoing monitoring of the subject of the investigation and the digital economy more generally according to the Bureau's Position Statement
Grocery retail ²⁸	Bureau	Investigation into pricing strategies and programmes of Canada's largest grocery retailer in the context of its relationship with its suppliers, reflecting the Bureau's focus on vertical agreements and arrangements that reference competitors, such as 'meet-or-release' and 'most-favoured nation' clauses	Investigation commenced March 2014	Discontinuation of investigation announced in November 2017 on the basis that the retailer no longer enforced certain policies and that there was insufficient evidence to conclude that the policies had lessened or prevented competition substantially
Smartphones ²⁹	Bureau	Imposition of potentially anticompetitive obligations and restrictions regarding the sale and marketing of smartphones in agreements with Canadian wireless carriers	Investigation commenced after Bureau's receipt of information on the matter in 2014	Discontinuation of investigation announced in January 2017 owing to insufficient evidence
Data aggregation – provision of indicative market data ³⁰	Bureau	Imposition of contractual clauses in TMX Group's standard form market data agreement with investment dealers, restricting the latter from sharing private market data with third parties; according to a complaint to the Bureau this hindered a potential competitor's ability to develop an alternative consolidated data market product; the Bureau considered possible 'prevention' of competition under the third part of the abuse of dominance test	Investigation commenced after the Bureau's receipt of a complaint in 2015	Discontinuation of investigation announced in November 2016 following the Bureau's conclusion that it was unlikely that the complainant could have obtained sufficient volumes of private market data from investment dealers to develop a competitive product even absent the contractual arrangements

27 Competition Bureau, Position Statement (19 April 2016): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html.

28 Competition Bureau, Position Statement (21 November 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04310.html.

29 Competition Bureau, Position Statement (6 January 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04182.html.

30 Competition Bureau, Position Statement (21 November 2016): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04157.html.

Sector	Investigating authority	Conduct	Case opened	Status
Galley handling at airports and airport access for the supply of galley handling	Bureau	Conduct by the VAA alleged to decrease competition among in-flight catering companies at Vancouver International Airport	Initial application filed with the Tribunal in September 2016	Tribunal dismissed the Commissioner's application in October 2019; the Bureau announced that it does not intend to appeal the decision in November 2019
Software geared towards the travel industry ³¹	Bureau	Restrictive practices by Softvoyage Inc in markets related to the supply of 'all-inclusive travel packages', specifically through the use of exclusivity clauses in contracts (including contracts with tour operators), giving rise to allegations of foreclosure of the relevant markets or otherwise making access difficult ³²	Date investigation commenced not publicly disclosed	Consent agreement with Softvoyage registered in January 2018, including commitments to cease restrictive practices so as to address the Bureau's concerns over possible barriers to entry
Pharmaceuticals ³³	Bureau	Imposition of restrictions by brand name manufacturers on generic manufacturers' access to samples of brand name drugs (required to prove bioequivalency of generic products)	Inquiry commenced in November 2016 following generics' allegations of having been impeded access to branded drug samples through pharmaceutical wholesalers acting as intermediaries between manufacturers and downstream purchasers	Discontinuation of investigation announced in December 2018 owing to insufficient evidence
Pharmaceuticals ³⁴	Bureau	Alleged conduct by a biologic drug manufacturer included supplying many hospitals with its biologic drug for 1 cent per vial; providing the biologic drug free to patients not eligible to receive reimbursement under an insurance plan; contractually requiring hospitals and private insurers to favour its biologic drug over biosimilars; and entering into exclusive contracts prohibiting third-party infusion clinics from using biosimilars to its drug	Inquiry commenced in 2018 according to Bureau Position Statement	Discontinuation of investigation announced in February 2019 owing to insufficient evidence; biologic and biosimilar industry subject to ongoing 'monitoring'

31 Competition Bureau, Position Statement (17 January 2018): <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04331.html>.

32 According to the Bureau, the company is dominant in both the market for 'content management' and the market for 'online distribution' software. Specifically, it was alleged that after a majority of tour operators adopted Softvoyage's content management software, the company used exclusivity clauses in its contracts requiring those tour operators to only use Softvoyage's distribution software. According to the Bureau's position statement, Softvoyage also prohibited tour operators from 'extracting or using their own data managed in Softvoyage's content management software'.

33 Competition Bureau, Position Statement (20 December 2018): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04407.html.

34 Competition Bureau, Position Statement (20 February 2019): <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04418.html>.

Sector	Investigating authority	Conduct	Case opened	Status
Airlines ³⁵	Bureau	Alleged predatory pricing (low-cost fares designed to force rivals out of the market) by a national airline's low-cost carrier division	Late 2018; date investigation commenced not publicly disclosed	Ongoing
Pharmaceuticals ³⁶	Bureau	Alleged conduct by a drug manufacturer intended to prevent or delay the entry of competing generic drugs by refusing to supply a generic drug manufacturer with samples of a branded drug	Inquiry commenced in early 2020 according to the Bureau Position Statement	Discontinuation of investigation announced in April 2020 after the pharmaceutical company provided the drug samples to the generic manufacturer thus resolving the Bureau's concerns

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.³⁷ 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.³⁸

35 As reported in the media; for example, CBC News, 'Competition Bureau checks WestJet's discount airline Swoop for predatory pricing' (12 December 2018), online: www.cbc.ca/news/business/westjet-swoop-competition-bureau-1.4942490. In previous investigations relating to air passenger and cargo services in Northern Canada, the Bureau similarly considered, inter alia, possible predatory pricing practices under the abuse of dominance provisions. See Competition Bureau, Position Statement (22 August 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04295.html.

36 Competition Bureau, Position Statement (02 April 2020): <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04524.html>.

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

38 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 anticompetitive 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.

This is generally consistent with the approach taken by the Bureau in defining markets for purposes of merger analysis.³⁹ 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.⁴⁰

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 the product and geographic market definition, including:

- a* consumer behaviour;
- b* past product or location substitution;
- c* product functional interchangeability;
- d* unique product characteristics;
- e* transportation costs and shipping patterns;
- f* switching costs;
- g* the role of distant sellers and foreign competition; and
- h* past price correlation among substitute products.⁴¹

The 2019 Guidelines specifically contemplate how to apply the hypothetical monopolist test to ‘multi-sided’ platforms, where demand for one side depends on use of another, and indicate that the Bureau may define the product market either as one side of the platform or as including multiple sides, depending on the case. The updated Guidelines also consider the challenges that may arise in the application of this test where services are offered at a ‘zero-monetary price’ (e.g., to attract users to a multi-sided platform), and indicate that in these cases, the Bureau may focus on ‘qualitative indicators of substitutability’ rather than seeking to analyse whether a hypothetical monopolist would find it profit-maximising to decrease a relevant non-price dimension of competition by a small but substantial amount for a non-transitory period of time.

More generally, the updated Guidelines retain ample flexibility for the Bureau to define one or more product markets. For instance, the Bureau ‘may consider it appropriate to define markets in reference to particular types of purchasers in certain circumstances, such as where sellers engage in price discrimination between different sets of buyers’, or by referring to ‘a particular level of the supply chain’. Moreover, the Bureau ‘may consider it appropriate to analyse several different (or potentially different) product markets together for the purposes of market definition’. This appears to reflect recent case law, such as *Softvoyage*, in which more than one relevant market was identified. Additionally, the Guidelines specifically contemplate the possibility of analysing several geographic markets together.

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

40 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 ‘cellophane fallacy’). See Guidelines, Section 2.1.

41 Guidelines, Sections 1A and 1B.

ii Market power

The words ‘substantially or completely control’ in the context of the abuse of dominance provisions have been held by the Tribunal in *TREB* to contemplate a substantial degree of market power. Such market power confers ‘considerable latitude to determine or influence price or non-price dimensions of competition’ in a market, and may be reflected in the power to exclude.⁴² The Guidelines, as updated in 2019, take this approach, indicating that market power (the assessment of which takes into account both pre-existing market power and the market power derived from allegedly anticompetitive practices) may be reflected in the power to exclude; that is, an ability to restrict the output of other existing or potential market participants and ‘thereby profitably influence price’. Here again, the updated Guidelines reserve discretion for the Bureau, indicating that the assessment of whether a firm holds a substantial degree of market power may depend on ‘the body of relevant information and/or documents on the whole’ and noting that the ‘exact nature of the Bureau’s analysis and the weight accorded to any particular piece of information or document will depend on the circumstances of the case’.⁴³

The Guidelines note that, while market power can be measured through direct factors such as high profit margins or ‘supracompetitive profitability or 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 owing to existing competition or likely competitive entry. Indirect indicia considered by the Bureau include the ‘structural characteristics’ of a market (such as market shares and barriers to entry) and the effects of anticompetitive acts and countervailing power from customers or suppliers.

Notably, in a clear nod to the outcome of the *TREB* case, the updated Guidelines expressly contemplate that a firm ‘that does not compete in a market may nonetheless substantially or completely control that market’. In such cases, the power to exclude competitors will often feature prominently in the Bureau’s analysis, whereas market shares or supracompetitive profits may not be as central. This update to the Bureau’s approach presumably is the reason for which the 2019 version of the Guidelines also de-emphasises a market share safe harbour, as discussed below.

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’⁴⁴ 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 current and future competitive significance of competitors’.⁴⁵ 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.

42 *TREB*, Tribunal’s decision upon reconsideration (2016) at 173-175. See also *NutraSweet*, indicating that to substantially or completely control is synonymous with holding market power.

43 Guidelines, Section 1C.

44 Guidelines, Section 1C.

45 Guidelines, Section 1C.

Although the Bureau has historically taken the position that a single firm market share below 35 per cent will be considered unlikely to give rise to a finding of market power, the 2019 Guidelines state only that a market share below 50 per cent will ‘generally only prompt further examination’ if it is believed that the anticompetitive conduct is likely to result in increased market share in a reasonable period.⁴⁶ On the other hand, 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* 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.⁴⁷ 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:

- a* sunk investments (e.g., in equipment, infrastructure or research and development);
- b* regulatory barriers;
- c* whether the market is mature or depends on economies of scale or scope;
- d* network effects; and
- e* availability of scarce resources or inputs.

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 prior (2001) Abuse of Dominance Enforcement Guidelines, which also described factors that could be used to infer joint action in the civil context. The 2019 Guidelines simply state that ‘[s]imilar

⁴⁶ Despite the removal of the 35 per cent threshold in the updated Guidelines, the 50 per cent threshold nonetheless remains generally 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. *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289.

⁴⁷ *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.

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.⁴⁸

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.⁴⁹

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 anticompetitive 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 2019 Guidelines, moreover, no longer refer to the possibility that the Bureau may investigate the conduct of a firm that is expected to acquire market power as a result of the allegedly anticompetitive conduct ‘within a reasonable period of time’.⁵⁰

Nonetheless, the updated Guidelines suggest that the Bureau may contemplate, if not necessarily ‘attempted’ monopolisation, the possible acquisition of market power where none existed previously. For example, the Guidelines do refer to anticompetitive conduct that permits the exercise of ‘new or increased market power’.⁵¹ More generally, the post-*TREB* updates to the Guidelines (including, in particular, the Bureau’s consideration of dominance by firms that do not compete directly in the relevant market or markets, and of the ability to exclude, as well as the de-emphasising of market shares) suggest that the Bureau may apply a nuanced and potentially broad interpretation of monopolisation.

48 *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. 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.

49 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 VI, the responsibilities of the ‘Monopolistic Practices Directorate’ cover both abuse of dominance and certain types of anticompetitive agreements or arrangements.

50 This was expressly contemplated in the prior (2012) version of the Guidelines, Section 2.3.

51 Guidelines, Section 3 (describing conduct that ‘lessens’ competition). Elsewhere, the Guidelines refer to impugned practices causing ‘a materially greater degree of market power to exist than in the absence of the practice’, without specifying whether this would necessarily exclude an acquisition of new market power.

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 or disciplinary’.⁵² 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.⁵³

Further to the ultimate result in the *TREB* case, the Guidelines, as updated in 2019, take the position that ‘certain acts not specifically directed at competitors could still be considered to have a predatory, exclusionary, disciplinary or some other anticompetitive purpose’.⁵⁴ This interpretation would encompass ‘facilitating practices’ that do not themselves harm a competitor but permit coordination. It is broader than the interpretation that appeared to have been applied in the earlier *Canada Pipe* case, in which the requirement that an anticompetitive act be intended to harm a competitor was essential. The Tribunal’s initial decision in *TREB* also arguably foreclosed the broader interpretation. However, as discussed above, the Tribunal’s ruling upon reconsideration, as upheld by the Court of Appeal, leave open the possibility that a range of acts not specifically directed at one’s competitor may constitute ‘anticompetitive acts’.

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’.⁵⁵ 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’.⁵⁶

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.⁵⁷ A practice may also consist of different forms of anticompetitive

52 *Canada Pipe* at 66.

53 *NutraSweet*.

54 Guidelines, Section 2B.

55 *Canada Pipe* at 73.

56 Guidelines, Section 2B(iv).

57 Guidelines, Section 2A.

conduct,⁵⁸ 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. In principle, this test concerns competition rather than individual competitors.⁵⁹

The prevailing test was formulated in *Canada Pipe*, and recently affirmed in *TREB*, as well as in the context of the evaluation of mergers under the Act.⁶⁰ 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.

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.⁶¹ The Guidelines indicate that the Bureau will also consider factors such as whether, but for the practice, monetary prices would be lower, product quality, service, innovation or choice would be greater, or switching between products or suppliers would be more frequent.⁶² The prior (2012) version of the Guidelines listed similar factors but qualified them by describing the ‘but for’ scenarios as ‘substantially’ different, which may suggest that the 2019 Guidelines broaden the potential situations in which the Bureau may look into any given practice.⁶³

ii Exclusionary abuses

The Act enumerates several practices in Section 78 that relate to the exclusion of a competitor, including:

- a* margin squeezing by a vertically integrated supplier;
- b* acquisition by a supplier of a customer;
- c* pre-emption of scarce facilities or resources;
- d* adoption of non-compatible product specifications; and
- e* exclusive dealing.⁶⁴

58 *NutraSweet*.

59 The Act does, however, require 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 (Section 79(4)).

60 *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.

61 Guidelines, Section 3. See also the Court of Appeal’s 2017 decision in *TREB* at 66.

62 Guidelines, Section 3.

63 Guidelines (2012 version), Section 4, indicating that the Bureau may consider ‘whether, in the absence of the practice of anticompetitive acts, consumer prices might be substantially lower; product quality, innovation, or choice might be substantially greater; or consumer switching between products or suppliers might be substantially more frequent’.

64 Act, Section 78(a), (b), (c), (j) and (h).

The Guidelines specify that the list above is non-exhaustive and also reference tying and bundling and activities that increase customer switching costs. Moreover, the 2019 Guidelines refer more generally to other activities that ‘increase a rival’s costs’, as was the case in the prior version, and add to this activities that may ‘reduce their revenues’.⁶⁵

The Tribunal and Canadian courts have also recognised numerous other exclusivity abuses in case law, including:

- a* meet-or-release and most-favoured nation clauses;⁶⁶
- b* rights of first refusal;⁶⁷
- c* automatic price increases;⁶⁸
- d* long-term contracts;⁶⁹
- e* negative option automatic renewal provisions;⁷⁰
- f* costs or penalties, such as liquidated damages or excessive fees to switch suppliers, return goods or otherwise terminate contracts early;⁷¹
- g* the acquisition of competitors and inclusion of non-compete clauses in the acquisition agreements;⁷²
- h* various kinds of loyalty or fidelity rebates,⁷³ including discounts and allowances in exchange for the use of the supplier’s logo and name;⁷⁴
- i* exclusive networks;⁷⁵
- j* market allocation;⁷⁶
- k* in the real estate services cases, the use of a database in a way that could be exclusionary;⁷⁷ and
- l* in the airport case, denying new catering suppliers access to an airport.⁷⁸

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.⁷⁹

The Act enumerates several examples of discriminatory or predatory conduct, including freight equalisation, introducing fighting brands selectively and temporarily, buying up

65 Guidelines, Section 3.2.1.

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

67 *Laidlaw*.

68 id.

69 *D&B*.

70 *Laidlaw*.

71 *Direct Energy and Reliance*; *Laidlaw*; *D&B*; *Waste Services*.

72 *Canada Pipe*; *Laidlaw*.

73 *Canada Pipe*; *NutraSweet*.

74 *NutraSweet*.

75 *Bank of Montreal*.

76 *AGT* regarding allocation of national advertisers.

77 *CREA*; *TREB*.

78 *VAA*.

79 For example, see Competition Policy Review Panel, *Compete to Win* (27 June 2008) at 58: www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.

product to prevent price erosion, and selling articles below acquisition cost.⁸⁰ Prior cases have also considered the intimidation of competitors and customers through spurious or threatened litigation,⁸¹ cross-subsidisation⁸² and predatory pricing generally.⁸³

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.⁸⁴

iv Exploitative abuses

As discussed above, the 2019 Guidelines appear to take a broad and flexible approach to the interpretation of anticompetitive acts. In particular, they do not explicitly exclude excessive pricing or similar exploitative abuses. Nonetheless, in principle, the Act does not prohibit such practices, except to the extent that they have an exclusionary, disciplinary or predatory purpose and likely effect.

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’.⁸⁵

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’.⁸⁶ 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,⁸⁷ 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.⁸⁸ To date, the water heater rental industry cases (*Reliance* and *Direct Energy*) are the only ones in which AMPs have been sought by the Bureau and ultimately imposed.⁸⁹

80 Act, Section 78(c), (d), (f) and (i).

81 *Laidlaw*.

82 *NutraSweet; Télé-Direct*.

83 *Commissioner of Competition v. Air Canada*, 2003 Comp Trib 13; *Télé-Direct*.

84 Guidelines, Section 2B.

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

86 Act, Section 79(3.2).

87 Act, Section 79(3.3).

88 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): <http://canlii.ca/t/jg04cv>.

89 *Reliance* was not a fully contested case. The C\$5 million penalty obtained by the Bureau was the result of a consent agreement.

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.⁹⁰ Both consent agreements and prohibition orders can theoretically be imposed for an indefinite period.⁹¹

An interim order may be issued, on application by the Bureau on an *ex parte* basis, where the Tribunal finds that injury to competition cannot be adequately remedied by a later order, or in certain other specific circumstances, is likely to occur in the absence of the order.⁹²

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.

VI PROCEDURE

The Monopolistic Practices Directorate of the Bureau's Mergers and Monopolistic Practices Branch 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.⁹³

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.⁹⁴ 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.⁹⁵ 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

90 Act, Section 79(2).

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

92 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.

93 Following the 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. The Mergers Directorate and Monopolistic Practices Directorate were formerly known as the Mergers Branch and Civil Matters Branch respectively. Separately, the Cartels and Deceptive Marketing Practices Branch is focused on cartels and deceptive business practices. Competition Bureau, 'Competition Bureau restructures to maximise its contribution to a more effective marketplace' (Announcement, 25 March 2015): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03897.html.

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

95 Competition Tribunal Rules, SOR/2008-141: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2008-141>.

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.⁹⁶ Firms that volunteer to make changes in their business practices are generally required to formalise these commitments in a consent agreement.⁹⁷

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’.⁹⁸

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. 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. The Bureau has increasingly made use of this tool to compel production in recent enforcement activity, such as the inquiries involving Loblaw, the smartphone industry, the VAA and online search and advertising, and in several recent cases it has highlighted its reliance on third parties in particular.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ 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 collaboration or substantive merger provisions.¹⁰² However, the Bureau may, and often does, bring applications under both the abuse of dominance provisions and provisions relating to other vertical trade practices. Moreover, it is not uncommon for an investigation under the abuse provisions to immediately precede or follow the Bureau’s examination of the same firm

96 Act, Section 105.

97 Guidelines, Section 1.

98 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), p. 308.

99 For instance, the online search and advertising matter, which was a complaint-driven inquiry, involved extensive consultations with industry and economic experts, and interviews with a range of market participants. Similarly, in the *Softvoyage* case, the Bureau gathered information from multiple sources, including tour operators, travel agencies, industry associations, past and potential competitors and ‘businesses offering similar products and services in foreign markets’. The Bureau has indicated that in the inquiry involving biologic and biosimilar drugs (discontinuation announced in February 2019), it ‘interviewed key market participants, including pharmaceutical manufacturers, public and private insurers, hospitals, physicians, infusion clinic networks and trade associations, while also gathering relevant records from many of these parties’. In some cases, these communications may be conducted informally and voluntarily, as the Bureau does not always specify whether it relied on its formal powers under Section 11 in engaging third parties.

100 Act, Section 15.

101 Act, Section 79(6).

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

under other provisions. For instance, the Bureau's inquiry into certain practices of the grocery retailer Loblaw, based on potential abuse of dominance concerns, immediately followed its review of Loblaw's acquisition of a large pharmacy retailer (during which, according to the Bureau's statement, it uncovered evidence that certain of the grocery retailer's policies 'may have been implemented for an anticompetitive purpose'). In turn, an investigation into alleged price-fixing of bread products among Loblaw and other retailers appears to have immediately followed the abuse inquiry.¹⁰³

In practice, the Bureau also frequently collaborates with its international counterparts. For instance, it consulted with the US Federal Trade Commission and the European Commission in the course of its investigation into online search and advertising practices, and indicated that it would continue to closely follow international investigations into similar alleged conduct. The Bureau has similarly referenced communications with foreign counterparts in the recent smartphones inquiry.

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 it is costly to bring an action, private litigants could in theory use Section 103.1 to prohibit certain

103 These allegations are outlined in court documents relating to the inquiry concerning alleged activities of Canada Bread Company, Limited; Weston Foods (Canada) Incorporated; Loblaw Companies Limited; Wal-Mart Canada Corporation; Sobeys Incorporated; Metro Incorporated; Giant Tiger Stores Limited and other persons. The case has also been reported in the media. See, for example, CBC, 'Bakers, grocers met to reach deals on bread prices, competition watchdog alleges' (1 February 2018): www.cbc.ca/news/business/competition-bureau-bread-price-fixing-1.4512332.

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).

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.

VIII FUTURE DEVELOPMENTS

The following expected developments are likely to be of particular relevance for the law of abuse of dominance in Canada in the coming year:

- a* the outcomes of the Bureau’s inquiry into low-cost airline pricing;
- b* further enforcement and commentary reflecting the outcomes in *TREB* and *VAA*, particularly as they relate to firms that do not compete in markets in which they may be dominant, and further development in particular of the ‘plausible competitive interest’ concept as well as legitimate business justifications;
- c* continued focus on markets within the digital economy and innovative markets generally; and
- d* continued attention on the pharmaceutical industry in particular, following the release of the updated IPEGs and recent investigations.

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*; *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*; and *Swenson Inc v. Trader Corporation*.

CHINA

*Zhan Hao and Song Ying*¹

I INTRODUCTION

Article 17 of the Anti-Monopoly Law (AML) is the primary legal basis for regulating the abuse of market dominance in China. According to Article 17, undertakings with a dominant position in the relevant market are banned from conducting the following 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 deal with their trading counterparties;
- d* without justifiable reasons, requiring trading counterparties to exclusively deal 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 treatments on trading prices and other terms among trading counterparties with equal standing; or
- g* other acts of abuse of dominant market position determined as such by the AML enforcement authorities under the State Council.

In brief, the year 2019, as the first year since institutional reform was completed, has seen recognised development in legislation and enforcement activities.

The legislative update is reflected by the release of several new regulations entering into force from 1 September 2019 and drafts for comments, among which are interim provisions on monopoly agreement, abuse of market dominance and administrative monopoly Acts respectively, providing clearer guidance on China's antitrust enforcement activities.

From the perspective of public enforcement, the State Administration for Market Regulation (SAMR), as the consolidated antitrust enforcement agency, kept a more rigorous enforcement attitude towards anticompetitive conduct. In 2019, SAMR published 19 decisions on alleged monopoly agreements and abuse of market dominance in aggregate.

¹ Zhan Hao is the managing partner and Song Ying is the partner at AnJie Law Firm.

II YEAR IN REVIEW

i Public enforcement

Investigation cases published by the SAMR

In 2019, the SAMR and its local branches initiated 103 investigations into anticompetitive conduct, among which 15 investigations are about abuse of market dominance, and closed 44 of them. In 2019 SAMR's website published five market dominance cases with two suspended cases and three cases resulting in punishment.

Investigation into Phenobarbital API by the Jiangsu AMR (suspended)²

On 20 February 2019, the Jiangsu AMR issued the decision of suspending the investigation into Nantong Jinghua Pharmaceutical Co, Ltd. The company was suspected of engaging in unjustifiable refusal to deal by abusing its dominant market position in the phenobarbital active pharmaceutical ingredient (API) market. Except for being sold continuously to sporadic pharmaceutical production and distribution companies such as Shangqiu Xinxianfeng Pharmaceutical Co, Ltd and Henan Wanlong Pharmaceutical Co, Ltd and sold one time to two pharmaceutical production companies in Shanxi, the API of phenobarbital produced by the party has never been sold to any other domestic pharmaceutical production companies. In addition, some of the regular customers of the party and many domestic pharmaceutical production companies have all been refused by the party when they offered to buy the API. Pursuant to Article 45 of the AML, Nantong Jinghua Pharmaceutical Co, Ltd proposed commitments to the Jiangsu AMR on 16 November 2017 and apply for the investigation suspension, and Jiangsu AMR ultimately suspended the investigation on 20 February 2019.

Investigation into gas supply by Jiangsu AMR (suspended)³

On 20 February 2019, the Jiangsu AMR issued the decision of suspending investigation into Yancheng ENN Gas Co, Ltd. The company was suspected of engaging in unjustifiably imposing unreasonable trading conditions by abusing its dominant market position in the pipeline gas supply market. In the supporting construction contract of pipeline natural gas facilities concluded between the party and the users when opening an account for gas consumers of industry and commerce groups, it is agreed that 'the dividing point of property right for gas supply and usage facilities shall be the property line of Party A (note: the user), i.e., gas facilities outside the property line belong to Party B (note: the party) while those inside the property line belong to Party A' and 'upon gas supply, Party B shall be responsible for maintenance and management of the gas transmission and distribution facilities at the backward direction of the gas flow on the dividing point of property right (included) and provide one year's warranty free of charge for gas facilities (excluding gas facilities and appliances of the use) at the direction of gas flow on the dividing point of property right after they pass the acceptance inspection, and they shall be maintained by Party A itself after the warranty period' where 'backward direction of the gas flow on the dividing point of property right (included)' refers to the area outside property line and 'the direction of gas flow on the dividing point of property right' refers to the area inside property line. Pursuant to

2 www.samr.gov.cn/fldj/tzgg/xzcf/201903/t20190308_291810.html.

3 www.samr.gov.cn/fldj/tzgg/xzcf/201903/t20190325_292290.html.

Article 45 of the AML, Yancheng ENN Gas proposed commitments to the Jiangsu AMR on 24 August 2017 and applied for the investigation suspension, and Jiangsu AMR ultimately suspended the investigation on 20 February 2019.

Investigation into Eastman by Shanghai AMR (completed)⁴

On 16 April 2019, the Shanghai AMR imposed a fine of 24.38 million yuan on Eastman (China) Investment Management Co, Ltd for abuse of market dominance in relation to mainland China's ester alcohol film-forming agent market. The company was accused of limiting the trade parties to only trade with it without any justifiable causes through the following methods: (1) signing and implementing exclusive agreements with relevant domestic coatings companies that included provisions on minimum purchase quantities and take-or-pay clauses; and (2) signing and implementing exclusive agreements with most favoured nation (MFN) clauses subject to the effective conditions of minimum purchase quantity. The fine was equivalent to 5 per cent of Eastman (China) Investment Management Co, Ltd's 2016 sales revenue.

Investigation into water supply by the Tianjin AMR (completed)⁵

On 12 July 2019, the Tianjin MAR imposed a fine of 7,438,622.77 yuan on Tianjin Water Supply Group Co, Ltd for abuse of market dominance in relation to water supply. The company was accused of engaging in unjustifiably imposing the following unreasonable trading conditions: requiring the real estate development enterprises to use, when constructing secondary water supply facilities, the intelligent electric control cabinets and remote monitoring substations produced by Tianjin Huacheng Water Supply Engineering Co, Ltd designated by the Tianjin Water Supply Group. The fine was equivalent to 3 per cent of Tianjin Water Supply Group Co, Ltd's 2016 sales revenue.

Investigation into water supply by the Jiangsu AMR (completed)⁶

On 12 October 2019, Jiangsu MAR imposed a fine of 2.05 million yuan on Suqian Zhengyuan Water Supply Co, Ltd for abuse of market dominance in relation to water supply. The company was accused of engaging in unjustifiably imposing the following unreasonable trading conditions: requiring the real estate development enterprises to engage the company for the construction of the building water installation projects. The fine was equivalent to 4 per cent of Suqian Zhengyuan Water Supply Co, Ltd's 2016 sales revenue.

Summary

In summary, the above cases relate to abuse of market dominance handled by the SAMR. Ones handled by its provincial branches in 2019 are listed below.

4 www.samr.gov.cn/fldj/tzgg/xzcf/201904/t20190429_293241.html.

5 www.samr.gov.cn/fldj/tzgg/xzcf/201907/t20190712_303427.html.

6 www.samr.gov.cn/fldj/tzgg/xzcf/201911/t20191126_308830.html.

Investigated party	Industry	Investigating authority	Monopoly conduct	Case initiated	Status
Nantong Jinghua Pharmaceutical Co, Ltd	Pharmaceutical	Jiangsu AMR	Unjustifiable refusal to trade	2016	Suspended on 20 February 2019
Yancheng ENN Gas Co, Ltd	Gas supply	Jiangsu AMR	Unjustifiably imposing unreasonable trading conditions	–	Suspended on 20 February 2019
Eastman (China) Investment Management Co, Ltd	Chemical	Shanghai AMR	Unjustifiably limiting the trade parties to only trade with it	2017	Completed by issue of penalty
Tianjin Water Supply Group Co, Ltd	Water supply	Tianjin AMR	Unjustifiably imposing unreasonable trading conditions	2016	Completed by issue of penalty
Suqian Zhengyuan Water Supply Co, Ltd	Water supply	Jiangsu AMR	Unjustifiably imposing unreasonable trading conditions	2017	Completed by issue of penalty

ii Private enforcement

*Hytera v. Motorola*⁷

On 14 September 2017, the plaintiff, Hytera Communications Corporation Limited (Hytera) brought a lawsuit to Beijing Intellectual Property Court, alleging that the defendants Motorola Systems (China) Investment Co, Ltd, Motorola Systems (China) Co, Ltd, Motorola Systems (China) Co, Ltd, Beijing Branch (together Motorola) had abused market position in the communication market of specific cities' metro private network. The plaintiff petitioned the court for Motorola to stop its monopolistic behaviour and compensate the loss of 49.266 million yuan and reasonable expenses of 1.056 million yuan. After almost 20 court investigations and hearings since 2017, on 31 December 2019, the court issued the first instance judgement, which found that Motorola, while dominant in some of the relevant markets claimed by the plaintiff, did not conduct abuse of dominance and dismissed all the claims of the plaintiff.

The parties' debate focused on the definition of relevant market and whether Motorola had abused its market domination. Hytera alleged that Motorola has a dominant position in the wireless communication market of Chengdu Metro private network. Motorola announced that if the user had used Motorola's product previously, the subsequent product would have better connectivity performance when continuing to use Motorola's product. Hytera alleged that this action restricted the Chengdu Metro to dealing with Motorola, excluding Hytera from entering the bid and that the defendant's refusal to open the API for connectivity also constituted refusal to deal, with these behaviours cause material damage to Hytera.

The defendant argued that the relevant market of this case should be the China wireless communication equipment market for urban rail transit. Even in the 'Chengdu market' claimed by Hytera, Motorola should not be deemed to have a dominant market position. The API is not necessary for connectivity, and Motorola's refusal to open the API is a legitimate exercise of intellectual property rights, which is a reasonable reason. Motorola itself does not have the ability to limit the transaction, and there is no objective fact that the transaction is limited by Motorola. Furthermore, there is no evidence showed that Hytera had suffered any damage as a result of any of Motorola's actions. The claims of Hytera have neither factual basis nor legal basis.

⁷ https://www.thepaper.cn/newsDetail_forward_5568294.

Beijing Intellectual Property Court heard this case in chamber at the end of 2019. The court held the opinion that, in the bidding market, the requirements of bidding documents determine the scope of operators to participate in the competition. Since each bidding event will have corresponding bidding requirements, each single bidding event constitutes a separate relevant market. In the plaintiff's claim of Chengdu Metro line 2, 3, 4 in the tender documents, the new line switches interconnected with each line is mandatory, because of the switch between interconnected applies only to the same manufacturer of the equipment, and Motorola won the previous bids. Consequently, Motorola has a dominant market position.

However, market dominance is not illegal per se. The AML only prohibits abuse of market dominance, for instance, designating specific trading counterparty without reasonable ground. Thus, in this case, if Motorola's restriction could be deemed as unreasonable conduct, it would have been liable for Hytera's loss. More specifically, one of the preconditions for judging whether it constituted a restricted transaction was whether Motorola had the intention to require the Chengdu Metro party to trade only with it. But none of the limited trading behaviour claimed by the plaintiff can be deemed as Motorola intending to restrict trading between the Chengdu Metro and Motorola. Therefore, the defendant's behaviour does not constitute limited trading behaviour.

*Huang Wende v. DiDi*⁸

On 4 May 2018, a natural person Huang Wende (Huang) was temporarily charged 6 yuan by DiDi. Huang argued that DiDi's temporary price violated the 'unfairly high price' in Article 17 of the AML and filed a lawsuit to Zhengzhou Intermediate Court. Huang had lost in first instance trial in Zhengzhou and appealed to a higher court. On 24 September 2019, the IP Tribunal of the Supreme Court as the appeal court heard this case publicly, and the final judgment is still pending.

One controversial issue is whether cruise taxis are part of the relevant market. Huang claimed that cruise taxis are not part of the market. First, cruise taxis and ride-hailing are subject to different laws and regulations and legal permissions. Second, the two types of cars are different in terms of convenience, safety and market demand. Third, the online ride-hailing cars use online payment, but cruise cars usually use offline payment.

Didi argued that cruise cars and ride-hailing constitute a close alternative relationship and should be included in one relevant market. Ride-hailing and cruise cars belong to the same industry category, with the same nature and functions, and both provide convenient and personalised services for the majority of passengers. And the difference between cruise taxis and ride-hailing is getting smaller, and they are becoming integrated with each other.

As regards the issue of whether DiDi has a dominant market position, Huang pointed out that the official website of DiDi claimed that it had a '99% market share', therefore, it could be presumed to have a dominant market position. DiDi argued that, the statistical calibre of online ride-hailing service industries has changed from 2015 to 2018; the evidence of 99 per cent of the market came from a third party company's data in 2015. This data cannot be construed as actual market situation in 2018. Furthermore, Zhengzhou has 46 taxi companies and 18 online ride-hailing companies, and DiDi is facing fierce competition in

8 (2019) Zui Gao Fa Zhi Min Zhong No. 207, https://www.sohu.com/a/342351749_742371.

the local market. In addition, the taxi market is always under dynamic competition, and, due to the low market entry threshold, DiDi has been subject to strong competition constraints and does not have a dominant market position.

As regards the issue whether the temporary price increase of DiDi could be deemed as the abuse of market dominance by charging higher price, Didi argued that the temporary price increase was for the purpose of regulating supply and demand, and it has economically reasonable and does not constitute a monopolistic high price. This action also complied with local government regulations. Moreover, the fees are paid to drivers, and DiDi has no intention of earning monopoly profits.

The Ministry of Transportation (MOC) mentioned that it had held several interviews with relevant online ride-hailing companies and requested them to conduct rectification to the dynamic pricing mechanism. On 12 July 2019, the MOC released the Opinions on Deepening Reform of Road Transport Prices (draft for comments), which states that online ride-hailing companies should disclose the pricing mechanism and dynamic pricing mechanism at least seven days in advance to the public. This draft has not come into force so far. The Supreme People's Court's judgment on this case is expected to be released in this year. That will notably bring demonstration effects to the online ride-hailing market.

2019 is a milestone for the China private antitrust enforcement, because the IP Tribunal of the Supreme Court was set up in this year. The IP Tribunal hears antitrust civil and administrative appeals, and that means it could unify the ruling standards and improve the quality of private litigations. The IP Tribunal has made a series of rulings on hot issues, such as arbitrability of monopoly disputes and regional jurisdiction of anti-monopoly cases in *Huili v. Shell* and *JD.com v. Tmall*. It has accepted *Huang Wende v. DiDi*, and has started the trial.

In addition, the competition concerns raised in Internet industry had drawn great attention of the whole society. Private litigations against internet companies are on the rise; for instance, JD.com, Tencent, Tmall and DiDi gained wide attention and heated discussion in the market. As these cases enter the substantive trial stage, it is expected they will be great precedents in maintaining the order of market competition and protecting the impetus of innovation.

Summary

In summary, the most high-profile private enforcement actions on abuse of market dominance between 2018 and 2019 (both completed and pending cases) are listed below.

Plaintiff	Defendant	Sector	Courts	Conduct	Case opened	Status of proceedings
Tiyu Culture Co Ltd (OSports Media)	China Super League Co Ltd and Shanghai Yingmai Culture Co Ltd (Imagine China)	Media	Shanghai Higher Court, Shanghai IP Court,	Abuse of dominance	2018	Pending
Huang Wende (an individual)	DiDi Chuxing Co Ltd	Transportation/ Internet	Supreme People's Court	Abuse of dominance by charging unfairly high prices	2018	Pending

Plaintiff	Defendant	Sector	Courts	Conduct	Case opened	Status of proceedings
Song Xin (an individual)	China State Railway Group Co Ltd	Transportation	Changsha Intermediate Court, Hunan Higher Court	Refusal to deal and designating specific trading counterparty	2016	Plaintiff lost in first and second-instance trials
JD.com	Tmall	Internet	Beijing Higher Court	Abuse of dominance	2018	Pending
Wu Zongli (an individual)	Yongfu County Water Supply Company	Public service	Nanning Intermediate Court	Tying	2018	Plaintiff win the first instance trial
Hytera	Motorola	Telecommunications	Beijing IP Court	Refusal to deal and designating specific trading counterparty	2017	Plaintiff lost in first instance trial and Pending
Zhang Zhengxin (an individual)	Tencent	Internet	Beijing IP Court	Abuse of dominance	2019	Pending
GalanZ	Tmall	Internet	Guangzhou IP Court	Abuse of dominance	2019	Pending
Luckin Coffee	Starbucks	Coffee	Shenzhen Intermediate Court	Abuse of dominance	2018	Plaintiff withdrew the claims

III MARKET DEFINITION AND MARKET POWER

The approaches for defining the 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 principles related to abuse of market dominance in the AML are similar to those of 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 Guidelines on the Definition of Relevant Market (Guidelines). In accordance with the Guidelines, the basic approaches for defining the relevant market are analysis of demand-side substitutability and supply-side substitutability.

Article 8 of the Guidelines provides that the following factors may be considered when defining the relevant market.

Factors from the demand-side:

- a* evidence of demanders switching to other products when the price or other factors of the product concerned are changed;
- b* the appearance, characteristics, quality, technical features and functionality of the product;
- c* price variance between products;
- d* the distribution channel; and
- e* other factors.

Factors from the supply-side:

- a* evidence that other undertakings respond to the change of price or other competitive factors; and

- b* other undertakings' manufacturing process and techniques, their difficulties, time to be consumed, extra costs and risks in changing the line of production, the competitiveness and marketing channels of the products provided after changing the line of production, etc.

Article 9 of the Guidelines provides the following factors to be considered when defining the relevant geographical market:

Factors from the demand-side:

- a* evidence of demanders turning to other regional products when the price or other factors of the product concerned are changed;
- b* the cost and characteristics of transportation;
- c* the region in which the majority of customers purchase the product in practice, and the regional distribution of major business operators' products;
- d* trade barriers, such as tariffs, regulations and environmental and technical factors; and
- e* other factors.

Factors from the supply-side:

- a* evidence that undertakings in other geographic areas respond to the change of price or other competitive factors; and
- b* instantaneity and feasibility of the supply from other geographic areas, for example, the cost for costumers to turn to undertakings in other geographic areas.

The Guidelines also mention the 'small but significant and non-transitory increase in price' method, a tool frequently used by both EU and US antitrust regulators.

ii Market dominance

Market dominance under the Chinese antitrust regime is defined in Article 18 of the AML and further elaborated by Article 5 of the Interim Provisions on Prohibition of Abuse of Market Dominance (The Abuse of Dominance Provisions).⁹ It refers to a position held by one or more undertakings that enables the undertakings to:

- a* control the price, volume or other trading terms¹⁰ 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.

Article 18 of AML further elaborates the following factors by which market dominance should be assessed:

- a* market share in the relevant market;
- b* the competition situation in the relevant market;
- c* the ability to control sales markets or raw material purchasing markets;
- d* the financial status and technical conditions of undertakings;
- e* the degree of dependence on the undertakings of other undertakings;

9 This new regulation was released by SAMR on 26 June 2019 and entered into force on 1 September 2019.

10 According to Article 5 of the Interim Provisions on Prohibition of Abuse of Market Dominance, 'other trading terms' include the factors that can have substantial impact on a market, such as grade of commodity, payment terms, method of delivery, after-sales service, trading options or technical constraints.

- f* entry into the relevant market by other undertakings; and
g other factors.

Article 11 of the Abuse of Dominance Provisions elaborates the following factors should be assessed additionally when the relevant market relates to the new economic-form area, such as the internet sector:

- a* competitive characteristic of related industries;
b business model, number of users, network effects, lock-in effects, technical characteristics, market innovation, ability to control and process relevant data;
c market power of undertakings in connected markets.

Article 12 of the Abuse of Dominance Provisions also elaborates the following factors should be assessed additionally when the relevant market relates to intellectual property:

- a* the substitution of its intellectual property;
b the dependence of the downstream market on the commodities provided by the use of intellectual property;
c the counterbalance ability of the counterparties to the undertakings.

iii Market dominance 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 market share in the relevant market
One	One-half
Two	Two-thirds
Three	Three-quarters

However, the preliminary evidence of market dominance can be rebutted by showing lack of sufficient market power despite high market share.¹¹

Also, it is important to point out that according to Article 13 of the Abuse of Dominance Provisions, market structure, related market transparency, related commodity homogeneity degree and consistency of undertaking's behaviour are the factors that should be considered when identifying two or more undertakings as having a dominant market position together. But under the preliminary evidence, if one of the undertaking in the aforementioned two or three undertakings has a market share of less than 10 per cent, this undertaking shall not be deemed to have a dominant position.¹²

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:

- a* excessive pricing or selling at an unfairly low price;

¹¹ See Article 19 of the AML.

¹² *ibid.*

- b* selling below cost;
- c* refusal to deal;
- d* requiring a party to trade exclusively with the undertaking or other designated undertakings;
- e* tie-ins or the imposition of other unreasonable trading terms;
- f* price discrimination or the imposition of other discriminatory trading terms; and
- g* other behaviours defined as abuse of dominance by the antitrust regulators.

Practices including refusal to deal, exclusive dealing and imposing unreasonable trading terms have frequently come under antitrust scrutiny in 2019. Particularly, the enforcement agencies continue to monitor the pharmaceutical and other public utility sectors.

ii Exclusionary abuses

In China, according to the AML, abuse of dominance is not segmented into exclusionary abuse, discrimination and exploitative abuses. 'Exclusionary abuses' generally includes the dominant undertaking abuses its market dominance by excluding its competitors; for example, by exclusive dealing, refusing to deal, or tying or bundling.

The Abuse of Dominance Provisions, promulgated by the SAMR and effective on 1 September 2019, further elaborate on exclusive dealing, refusing to deal, or tying or bundling.

For refusing to deal, Article 16 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from refusing to deal with the trading partners through the following methods:

- a* substantially reducing the existing number of transactions with their trading partners;
- b* delaying or interrupting existing transactions with their trading partners;
- c* refusing to engage in new transactions with their trading partners;
- d* setting restrictive conditions, making it difficult for their trading partners to trade with them; and
- e* refusing to let their trading partners in the production and business activities to use their necessary facilities with reasonable conditions.

For exclusive dealing, Article 17 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from carrying out the following acts to limit transaction:

- a* limiting their trading partners to engage in transactions only with them;
- b* limiting their trading partners to engage in transactions with business operators specified thereby; and
- c* forbidding their trading partners from transacting with specified business operators.

The aforesaid restrictive transaction behaviours may take the form of direct restrictions or indirect restrictions through setting transaction conditions.

On 16 April 2019, the Shanghai AMR imposed a fine on Eastman (China) Investment Management Co, Ltd for abuse of market dominance in relation to the mainland China ester alcohol film-forming agent Market. The company was accused of limiting the trade parties to exclusively trade with it without any justifiable causes through the following methods: (1) signing and implementing exclusive agreements with relevant domestic coatings

companies that include provisions on minimum purchase quantities and take-or-pay clause; and (2) signing and implementing exclusive agreements with MFN clause subject to the effective conditions of minimum purchase quantity.

For tying or bundling, or imposing unreasonable transaction conditions, Article 18 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from bundling their products or adding other unreasonable transaction conditions for their transactions as follows:

- a* breaching trading practices or consumption habits or disregarding the functions of commodities, and mandatory bundling different products or combine sales;
- b* adding unreasonable restrictions on contract duration, payment mode, transport and delivery of goods or the methods of service provision;
- c* adding unreasonable restrictions on sales regions, sales targets, after-sale service and others;
- d* adding unreasonable expenses in addition to the price; and
- e* adding transaction conditions unrelated to the subject of the transactions.

iii Discrimination

There is no precedent penalty regarding the type of discrimination (such as discriminatory pricing) under the abuse of market dominance in 2019 in China.

Article 19 of the Abuse of Dominance Provisions provides that without legitimate reasons, business operators with market dominance are prohibited from implementing the following preferential treatment regarding the transaction conditions for trading partners with identical conditions:

- a* different number of transactions, variety and quality grades;
- b* varying quantity discounts and other preferential terms;
- c* different payment conditions and delivery methods; and
- d* different contents and durations of the warranty, contents and timing of maintenance, technical assistance and other after-sale service conditions.

‘Identical conditions’ shall mean that there is no difference between the trading partners, which will have a substantial impact on aspects such as transaction security, transaction costs, scale and capabilities, creditworthiness status, transaction phase and duration of trading relationship.

iv Exploitative abuses

There is no precedent penalty regarding the type of exploitative practice (such as excessive pricing) under the abuse of market dominance in 2019 in China.

Article 14 of the Abuse of Dominance Provisions provides that business operators with market dominance are prohibited from selling goods at unfairly high prices or buying goods at unfairly low prices.

For determination of ‘unfairly high prices’ or ‘unfairly low prices’, the following factors may be considered:

- a* whether the selling price or purchase price is evidently highly or evidently lower than the price paid by other business operators for sale or purchase of the same type of goods or comparable goods under identical or similar market conditions;

- b* whether the selling price or purchase price is evidently higher or evidently lower than the price paid by the same business operator for sale or purchase of goods in other regions with identical or similar market conditions;
- c* subject to basically stable costs, whether the selling price is raised beyond normal range or the purchase price is reduced beyond the normal range; and
- d* whether the price increase for sale of goods is evidently higher than the cost increase range, or if the price drop range for purchase of goods is evidently higher than the cost reduction range of the trading partner; and
- e* other relevant factors to be considered.

For determination of identical or similar market conditions, the factors such as sales channel, sales model, supply and demand situation, regulatory environment, transaction phases, cost structure and transaction situation shall be considered.

Article 15 regulates that without legitimate reasons, business operators with market dominance are prohibited from selling goods at a price below cost.

For determination of selling goods at a price below cost, it should be considered whether the price is lower than the average variable cost. Average variable cost shall mean each unit cost that varies in accordance with the changes in the quantity of goods produced. Where a free of charge model in new economic forms, such as the internet is involved, the circumstances such as, inter alia, the free goods provided by the business operator and the relevant chargeable goods shall be considered in a holistic manner.

V REMEDIES AND SANCTIONS

i Sanctions

In accordance with Article 47 of the AML, an undertaking that has abused its dominant position may be fined between 1 and 10 per cent of its turnover in the preceding year. Notably, since the establishment of SAMR, the authority adopted the overall turnover of a company in the preceding year as denominator for imposing fines on abuse of market dominance, rather than turnover of relevant products involved in the antitrust investigation. Additionally, the regulator may confiscate the illegal gains. Article 49 of the AML further states that when calculating the amount of the fine, the regulator shall consider factors such as the nature, gravity and duration of the illegal conduct. Effective in September 2019, SAMR released the Interim Rules of Prohibition on Abuse of Market Dominance, which further explain the key points regarding imposing fines and confiscation of illegal gains.

ii Behavioural remedies

Along with sanctions, Article 47 of the AML provides that the regulator may impose cease-and-desist orders to stop illegal abusive conduct, although there is no explicit legal basis regarding whether and how the regulator may impose such interim measures for abusive conduct. Previous cases provide little clarification in this regard, owing to their lack of transparency.

iii Structural remedies

To date, there are no effective antitrust-related laws, regulations or rules in China explicitly authorising the SAMR to impose structural remedies on undertakings for violation of Article 17 of the AML. Accordingly, all previous cases suggest that the regulators do not adopt structural remedies for abuse of dominance.

However, 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.

VI PROCEDURE

As mentioned above, on 1 September 2019, the Abuse of Dominance Provisions promulgated by the SAMR went into force and replaced previous regulations of the former SAIC and NDRC with regards to dominance.

The Abuse of Dominance Provisions relating to substantive provisions, such as how to define the market dominance power and the behaviours of abuse, are mainly integrated with provisions of the SAIC's Rules on the Prohibition of the Abuse of Market Dominance, the SAIC Regulation on Prohibition of Abuses of Intellectual Property Rights, the SAIC Provisions and Procedures on Investigation of Monopoly Agreements and Abuse of Dominant Market Position and the NDRC Regulations on Anti-Price Monopolies.

A notable procedural change is that the Abuse of Dominance Provisions provide a blanket authorisation for provincial AMRs to investigate and penalise abusive conduct within their respective administrative regions. Previously, investigations by provincial agencies into price-related abuses were authorised on a blanket scale by the NDRC, while investigations into non-price-related abuses were authorized on a case-by-case basis by the SAIC. The new Abuse of Dominance Provisions ended the fragmented regime of authorisation and will likely increase the efficiency in handling abuse of dominance cases.

Meanwhile, the Interim Provisions on Administrative Penalty Procedures for Market Administration (the Penalty Procedural Provisions) came into effect on 1 April 2019, and these cover the common procedural provisions regarding administrative penalties issued by the SAMR. By contrast, the Abuse of Dominance Provisions provide special provisions on investigating abuse of market dominance.

Considering these two sets of regulations, the stages of SAMR investigations are as follows:

- a* An antitrust investigation can be triggered largely from four possible sources:
 - *ex officio* discovery;
 - reports by undertakings;
 - case transfer from other government agencies; and
 - case assignment from higher-level agencies.
- b* The Abuse of Dominance Provisions provide that the SAMR shall be responsible for, or authorise the relevant provincial market regulatory authorities to be responsible for, investigation and punishment of the following monopoly acts:
 - that have occurred across provinces, autonomous regions and centrally administered municipalities;
 - that are complicated or have a significant impact nationwide; and
 - that are deemed by the SAMR to be under its own jurisdiction. The provincial branches shall be responsible for enforcement against cases that have occurred within their administrative region. Further, commissioned by the SAMR, the provincial branches can conduct investigations in the name of the SAMR.
- c* It falls within the regulators' discretion to determine whether to open a formal investigation after receiving a lead.
- d* Investigative measures include:

- conducting an inspection by entering business premises or another relevant place;
 - interviewing business operators under investigation, interested parties or other relevant entities or individuals;
 - checking and duplicating, inter alia, relevant documents, agreements, account books, business correspondence and electronic data for the business operators under investigation, interested parties or other relevant entities or individuals;
 - registering the evidence for preservation in advance where there is a likelihood that the evidence may be destroyed or lost, or difficult to obtain later;
 - seizing and detaining relevant evidence; and
 - checking the bank accounts of the business operators under investigation.
- e* Undertakings under investigation can offer commitments at any stage of an investigation. The regulators are entitled to decide whether to accept the commitments. If the antitrust agency determines that the conduct at issue is likely to constitute an abuse of market dominance, the regulator will not accept commitments offered by the undertaking but will issue an administrative decision.
- f* The authorities may issue punishment decisions when they consider that the undertaking concerned has violated Article 17 of the AML. The regulators should publish the decisions.
- g* If unsatisfied with a decision, the undertakings under investigation may apply for an administrative review or file an administrative lawsuit with a court for judicial review.

The Abuse of Dominance Provisions do not specify the statutory deadlines of investigation; therefore, some procedures may last either for a relatively long time or short timeframe, depending on specific situations in individual cases.

VII PRIVATE ENFORCEMENT

The AML creates a private right of action against monopolistic conduct under Article 50, which provides that '[w]here the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law'. The Supreme People's Court further clarifies that '[w]here a plaintiff directly files a civil lawsuit with the people's court or files a civil lawsuit with the people's court after a decision of the anti-monopoly law enforcement authority affirming the existence of monopolistic conduct comes into force, if the lawsuit satisfies other conditions for lawsuit acceptance as prescribed by law, the people's court shall accept the lawsuit'.

Among private actions, collective actions are available in China in the form of representative actions under Articles 53 and 54 of the Civil Procedure Law, which are similar to class actions in the United States. However, collective actions are not common either in antitrust disputes or in other causes of action. This is because the law has not provided clear guidance as to some key issues in representative action, such as the elements of representative action, the type of applicable cases, the division of damages awarded and the appeals mechanism. Hence, no antitrust collective action has been brought in China yet.

In contrast, private actions brought by putative individual victims are commonly seen, although the prevailing rate for antitrust plaintiffs is still low relative to other types of civil actions. The reasons are either because the plaintiffs are not in a position to carry the burden

of proof or because the real issue in dispute is not an antitrust claim and does not cause any antitrust injury, but rather is a regular contract or tort dispute that is outside the scope of antitrust law.

VIII FUTURE DEVELOPMENTS

As China enters the 12th year of AML implementation, it is expected to step up legislative and enforcement efforts against abuse of market dominance.

On 2 January 2020, the SAMR initiated the process for revising the AML for the first time in 12 years by unveiling a draft amendment for public comment. The draft amendment added a specific provision for assessing market dominance of internet companies, which echoed the analytical framework already adopted in the Abuse of Dominance Provisions (see Section III for more details). These provisions signal an emphasis on the fast-growing internet economy and potential increased enforcement in the coming years. However, since China has not issued an administrative decision against abuses in the internet sector yet, how the provisions are to be interpreted in practice will be closely watched.

Aside from the internet sector, industries that concern daily livelihood will continue to be top enforcement priorities. As discussed in Section II, the five administrative decisions issued in 2019 all concerned daily livelihood (three in public utilities, one in pharmaceutical and one in construction materials). Companies in these sectors are reminded to assess their market positions and scrutinise potential abuses on a regular basis.

Enforcement efficiency is also expected to increase as provincial AMRs have been given blanket authorisation for investigation. In fact, all the five abuse decisions in 2019 were issued by provincial AMRs (three by Jiangsu AML, one by Shanghai AMR and one by Tianjin AMR). More familiar with local firms and market conditions, the provincial AMRs will play a more active role in antitrust enforcement and ease the burden on the SAMR so that the latter can focus on more significant and complicated cases.

Private enforcement is also expected to step up in the coming year. Starting in 2019, the Supreme People's Court began to hear all appeals from first-instance judgments and rulings from local courts. While having issued a few important decisions to resolve procedural issues, the Supreme Court has yet to make substantive rulings that may have lasting and precedential value for China's antitrust enforcement going forward.

CZECH REPUBLIC

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I INTRODUCTION

Generally, Czech competition laws follow EU law in all substantive matters, while also setting out national procedures for enforcement. There are several layers of provisions, each carrying differing levels of force. At the base is constitutional law, followed by EU laws and international treaties, and finally domestic legislation. The Office for Protection of Competition (the Competition Authority) has issued several guidelines, known as ‘soft law’, on the application, procedures and enforcement of competition law. This chapter focuses on domestic law, with the influence of international law being highlighted where relevant.

Constitutional layer

Article 26, Paragraph 1 of the Czech Charter of Fundamental Rights and Freedoms² establishes the right to engage in enterprise and pursue other economic activity, whereas Paragraph 2 of the same Article specifies that the exercise of certain professions or activities may be subject to special conditions or restricted by law. This Article is interpreted by the Czech Constitutional Court as an implicit obligation on the state to create and maintain the conditions for fair competition and a fair business environment.³ This Article is also the basis for the right of both individuals and legal entities to conduct business, although these activities may be restricted by law in certain cases. Competition law is considered to be one such way of restricting dominant businesses in pursuing their economic activities.⁴ These restrictions and their application must be proportionate and rational and must have a legitimate goal, otherwise they will be deemed unconstitutional.

Domestic legislation

The fundamental law establishing the rules governing dominant market position and the abuse of that position is the Act on the Protection of Competition,⁵ which protects competition in the products and services (goods) market. This Act is modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union.

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2 Constitutional Act No. 2/1993 Coll.

3 Decision of the Constitutional Court No. IV ÚS 27/09.

4 Decision of the Constitutional Court No. III ÚS 3472/15.

5 Act No. 143/2001 Coll.

Since 2016, Article 19a of the Act on the Protection of Competition prohibits public authorities from disrupting competition (unless the disruption is permitted or required by special laws). It can mainly be used in the case of discriminatory regulations or other measures adopted by municipal or regional authorities.⁶

The Act on Compensation of Competition Law Damage⁷ incorporates the relevant EU Directive into domestic law.⁸ This Act sets out the applicable procedures for private enforcement (see below).

The Act on Significant Market Power in the Sale of Agricultural and Food Products and its Abuse⁹ (the Act on Significant Market Power) targets certain kinds of abuses of market power in contractual relationships¹⁰ in place with the overseeing Competition Authority. While the main purpose of the Act on the Protection of Competition is to deter conduct consisting in undue distortion of competition, the Act on Significant Market Power aims to regulate certain specific aspects of supplier–purchaser relations in connection with sales of agricultural and food products.¹¹ In particular, it aims to protect the weaker contractual party (individual suppliers, or small or medium-sized enterprises) from systemic abuse by a retail market player with significant market purchasing power.

Soft law

The Competition Authority has published several Guidelines. The relevant Guidelines that remain applicable to date are as follows:

- a* Notice on alternative solution of certain competition issues;
- b* Guidelines on determining fines for breaching the Act on Protection of Competition;
- c* Guidelines on applying the leniency programme in accordance with Article 22ba of the Act on the Protection of Competition; and
- d* Guidelines on applying the accelerated procedure in accordance with Article 22ba of the Act on the Protection of Competition.

Where possible, these guidelines follow the model set up by the European Commission.

6 The Competition Authority has already ruled on certain cases in this matter. The most recent decision is No. ÚOHS-S0478/2018/VS-11518/2019/830/VVo, in which the city council of Krupka was found guilty of having removed competition in the lottery market and was fined 280,000 Czech crowns.

7 Act No. 262/2017 Coll.

8 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

9 Act No. 395/2009 Coll.

10 For example, negotiation or enforcement of contractual terms that create a significant imbalance in the rights and obligations of the parties, as stipulated in Article 4, Paragraph 2(a).

11 Decision of the Head of the Competition Authority No. ÚOHS-R0001/2018/TS-31480/2018/310.

II YEAR IN REVIEW

On average, the Competition Authority only opens one case on abuse of dominant position and two to three cases on abuses of significant market power per year.¹² Significant decisions issued in 2019 are shown in the table below.¹³

Company	Authority	Type of case	Conduct	Fine or resolution
Volvo Group Czech Republic, s.r.o.	Competition Authority	Abuse of dominant position	Discriminatory pricing	Settlement reached
České dráhy, a.s.	Head of the Competition Authority	Abuse of dominant position	Predatory pricing	274.8 million Czech crowns
MAKRO Cash & Carry ČR, s.r.o.	Competition Authority	Abuse of significant market power	Disproportionate contractual terms	46.56 million Czech crowns
Globus ČR, v.o.s.	Competition Authority	Abuse of significant market power	Enforcement of services not included in the contract	Settlement reached
Albert Česká republika, s.r.o.	Competition Authority	Abuse of significant market power	Disproportionate contractual terms	Settlement reached
Rewe Buying Group, BILLA, Penny Market	Competition Authority	Abuse of significant market power	Enforcement of services not included in the contract	164.37 million Czech crowns

The small number of cases concerning the abuse of dominant position or significant market power is caused by the fact that the Competition Authority pays more attention to cartels and other types of breaches of competition law.¹⁴

The decision in the *Globus* case was issued in the proceedings that followed the annulment of the original decision issued by the Head of the Competition Authority (the appellate body) based on an appeal filed by Globus ČR, v.o.s. Although the Head of the Competition Authority annulled the original decision due to a failure of the Competition Authority to properly ascertain the facts of the case, Globus, in its appeal, argued (among other things) that the reasoning contained in the decision in the *Kaufland* case from 2018 should be followed and that the option of settlement should be taken into account. The unlawful conduct assessed by the Competition Authority was substantially similar to the one in the *Kaufland* case: a system connected to the advertising company Markant, in which the suppliers were forced to take part and to pay a fee for the system's use. Finally, in the new proceedings following the annulment, Globus reached a settlement based on its commitment to restore competition and to provide adequate consideration to the damaged suppliers (instead of the original fine of 183.19 million Czech crowns).

Another important decision was issued in the *České dráhy* case concerning the predatory pricing policy employed by České dráhy, a.s., whereby the undertaking prevented other competitors from accessing long-distance passenger rail transport. In 2017, the

12 The number of cases in 2019 is comparatively similar to the annual numbers in the period 2015–2018; see Annual Report of the Competition Authority for the Year 2018 (www.uohs.cz/cs/informacni-centrum/vyrocní-zpravy.html).

13 One more decision concerning the abuse of dominant position by O2 Czech Republic, a.s. was issued in 2019, but no breach was found.

14 Approximately 12 decisions concerning cartels were issued in 2019 and 15 decisions in 2018 (see Annual Report of the Competition Authority for the Year 2018 (www.uohs.cz/cs/informacni-centrum/vyrocní-zpravy.html)).

Competition Authority imposed a 367,81 million Czech crowns fine. Although the Head of the Competition Authority reduced the imposed fine to 274,8 million Czech crowns on appeal by České dráhy, the remaining part of the decision has been upheld.

The most recent decision, although not yet final (the appeal proceedings are currently pending), was issued in January 2020. The Competition Authority imposed a 10.67 million Czech crowns fine on OSA.¹⁵ The unlawful conduct consisted in OSA imposing unfair business terms and conditions upon accommodation facilities providers. When entering into copyright licence agreements for audio and audiovisual devices located in the accommodation facilities (hotel rooms), the conditions imposed by OSA failed to take into account the actual occupancy rates of the hotel rooms.

The administrative courts did not decide any cases relating to abuses of dominance or significant market power in 2019. However, the Supreme Court addressed a matter relating to an abuse of dominant position in connection with intellectual property rights. In this decision,¹⁶ the Supreme Court referred to the case law of the European Court of Justice¹⁷ and stressed that a competitor can acquire a dominant position in the relevant market on the basis of its ownership of intellectual property rights (e.g., a trademark). Nevertheless, the connection between the dominant position and ownership of such rights is not automatic and must be proven on a case-by-case basis. The Supreme Court annulled the lower court's judgment on the grounds that it had failed to address possible abuses of dominant position by the claimant.

III MARKET DEFINITION AND MARKET POWER

i Market definition

The definition of relevant market under the Act on the Protection of Competition is identical to that of EU law. In practice, the Competition Authority and courts follow the soft law of the EU Commission and EU case law.¹⁸ To determine the relevant market, the Competition Authority uses similar econometric and other markers as are used by the European Commission (e.g., small but significant and non-transitory increase in price, price elasticity and correlation tests); however, it tends to do so on a smaller scale and with a lower degree of expertise.

ii Market power

Market power is defined in Article 10 of the Act on the Protection of Competition, wherein dominant market position occurs where the market power of one or more competitors acting in concert enables them to behave to an appreciable extent independently of its customers and consumers.

15 Copyright Protection Association for Rights to Musical Works (in *Czech*: Ochranný svaz autorský pro práva k dílům hudebním, z. s.).

16 Decision of the Supreme Court No. 23 Cdo 5955/2017-II.

17 E.g. Decisions of the European Court of Justice Nos. C-24/67; C-78-70; C-102/77; C-40/70; C-51, 85, 96/75.

18 Decisions of the Competition Authority usually refer to the Commission Notice on the definition of relevant market for the purposes of Community competition law.

This market power is assessed based on the value of the volume supplied or purchased in the (relevant) goods market (market share) during the period under examination, as well as on other markets, including competitors' economic and financial power, legal and other barriers to market entry, vertical integration, market structure and respective market shares.

Market share in the relevant market is the starting point for assessing market power. Once the market has been defined, the Competition Authority compares statistical data on the relevant competitors and may request internal data from them to assess the market structure and market share of the competitor or competitors in question. However, even where the market share of a competitor is above 75 per cent, the Competition Authority also usually analyses and evaluates other markers in order to provide the grounds for its final decision.¹⁹

Relative dominance in the food industry

The Act on Significant Market Power was enacted in 2009 and amended in 2017. Any entity engaged in purchasing food products for their subsequent resale and that has significant market power is prohibited from abusing this power.

Unlike the Act on the Protection of Competition, the Act on Significant Market Power does not address the concept of relevant market at all and does, therefore, not require the Competition Authority to define the relevant market in order to assess a breach of competition in its decisions under this Act.²⁰

Significant market power is defined by law as a position from which the purchaser²¹ can unjustifiably extract advantages from suppliers in relation to the purchase of food or in relation to the provision or receipt of services related to the sale and purchase of food. The main criteria for assessing this power are market structure, market-entry barriers and the financial power of the purchaser. Any purchaser acting on behalf of another purchaser is regarded as though they were a single purchaser.

Significant market power can be assumed to exist when the criteria set forth in the Act are met. Any purchaser or purchasing alliance whose annual turnover from the resale of food and the provision of related services in the Czech Republic is higher than approximately US\$230 million is regarded as being a purchaser with significant market power.

The initial consequences of this were originally significant, as a purchaser could be considered to be in abuse of significant market power even where the suppliers in question

19 Such as legal barriers to market entry or positions of competitors. It is not unusual for the Competition Authority to ask a competitor for statements on the market structure and their positions, including when they are not party to the proceedings, or to conduct market research via questionnaires. This can also be seen in the landmark decision of the Competition Authority on the abuse of dominant position in which the Competition Authority used thorough analyses to define the market and assess the market share; No. ÚOHS-S162/2008/DP-4490/2010/820/DBr; similarly, as with Decision No. ÚOHS-S0220/2006/DP-18887/2018/830/DKl in which the Competition Authority also took note of the vertical integration of the competitor even though the market share of the competitor was above 90 per cent. However, in most cases, the Competition Authority states that when the market power is greater than 75 per cent, it is not necessary for additional criteria to be evaluated.

20 Decision of the Head of the Competition Authority No. ÚOHS-R0001/2018/TS-31480/2018/310.

21 Article 2 of the Act on Significant Market Power defines the purchaser as an 'entrepreneur or purchasing alliance if they purchase food for resale or receive or provide services relating to the purchase of food'. A person acting on behalf of another purchaser is also considered to be a purchaser.

had significantly higher market power (absolute conception).²² However, the Act was later amended in light of criticism, with significant market power and the abuse of that power now being assessed by the Competition Authority on the basis of the absolute conception of market power, with a corrective mechanism in place to ensure that a purchaser is not considered as having significant market power where the supplier has greater market power.²³

IV ABUSE

Abuse of a dominant position is defined in Article 1, Paragraph 1(b) and Articles 10 and 11 of the Act on the Protection of Competition.

Abuse of a dominant position can be committed by one competitor or by several competitors acting in concert. Dominant position is defined as a market power that enables any competitor to behave to an appreciable extent independently of its customers and consumers. Dominant position must be proved and is presumed that, until proven otherwise, market share below 40 per cent rules out dominant position.

i Overview

Abuse of dominant position falls under two distinct legislative instruments.

The first one is the Act on Significant Market Power, which is applied in the food industry in a slightly different way. Since 2017, the legal framework and practice of the Competition Authority have provided for the absolute conception together with a corrective mechanism. Where a purchaser is assumed to have significant market power (see above) and the Competition Authority initiates proceedings against it, the purchaser can raise the objection in the proceedings that it cannot be considered to have significant market power with respect to other suppliers because, for instance, it is the weaker party in its relationship with them. The Competition Authority might then find that the purchaser holds and has abused significant market power in its relationship with some suppliers and not with others.

The types of conduct that constitute abuses of significant market power can be grouped into:

- a* disproportionate contractual terms and conditions between the supplier and the purchaser, primarily with regard to pricing;²⁴
- b* the enforcement of pricing, provision of services or any other consideration not included in the contract between the parties;²⁵

22 Until 2017, this concept was disputed, with the Competition Authority upholding the absolute conception of significant market power. When the purchaser did have significant market power, it was banned from the actions stipulated in law notwithstanding its supplier's market position.

23 This view was upheld by the Head of the Competition Authority in Decision No. ÚOHS-R0001/2018/TS-31480/2018/310, in which it explained the move to the updated conception. However, the Competition Authority will only apply this corrective measure upon the objection of the purchaser and the purchaser must provide sufficient proof (base) for the objection.

24 For example, in its Decision No. ÚOHS-S0161/2017-22390/2017/461/MNo, the Competition Authority ordered the COOP group to refrain from demanding a 2 per cent price reduction from its suppliers backed by the threat of reducing the amount of its purchased products by 30 per cent (leaked internal letter requesting this action). The COOP group has close to an 11 per cent market share.

25 For example, in the proceedings with Globus ČR, v.o.s. the company demanded that its supplier purchase marketing services from Globus' subsidiary (see Decision of the Competition Authority No. ÚOHS-S0138/2017/TS-25800/2019/461/MPř).

- c discrimination between suppliers for comparable goods without fair reason;
- d auditing or control of the supplier; or
- e disregard of the outcomes of inspections carried out by public authorities.

Moreover, contracts between the purchaser and suppliers must meet special requirements relating to form, content and term, as stipulated in Article 3a of the Act on Significant Market Power.²⁶

The second one is the Act on the Protection of Competition, which targets behaviour that has disrupted or could disrupt competition, regardless of whether this is engaged in collectively or individually.

The Act on the Protection of Competition follows the EU's definition of abuse of dominant position, providing a general clause and six typical types of abuse.²⁷

The Competition Authority relies heavily on the guidelines and case law of the European Union and cites them in most of its decisions, in which it also applies EU principles. While a per se approach may have been more common several years ago, today, the Competition Authority claims to embrace this effects-based approach.

ii Exclusionary abuses

Exclusionary pricing

With the exception of the recent *České dráhy* case, cited above, and the landmark case *Student Agency v. Asiana*,²⁸ few cases have been initiated in relation to predatory pricing. In short, the Competition Authority takes a more holistic and effects-based approach to this behaviour and tries to assess its impact. In this respect, where a sales price is below the cost price, this alone is not sufficient to disrupt competition, rather the impact of the entire period in which these prices are maintained would also have to be measured. Predatory pricing can, therefore, be a legitimate tool in competition.

Czech case law on margin squeezes is still immature. However, a few investigations have been conducted by the Competition Authority in the field of telecommunications²⁹ and energy.³⁰ In these cases, the Competition Authority has cited the guidelines and case law of the European Union.

26 The Competition Authority has recently fined MAKRO Cash & Carry ČR s.r.o. for failing to adhere to the requirements under Article 3a of the Act on Significant Market Power (see Decision of the Competition Authority No. ÚOHS-S0356/2018/TS-28761/2019/461/MNo).

27 The Act specifically mentions: leveraging, tying and bundling of services, discriminatory terms and conditions, refusal to deal, predatory pricing and denial of access to an essential facility.

28 Decision on the anticompetitive behaviour of a Czech train transporter consisting of predatory pricing proven to have been set in order to inhibit competition; No. ÚOHS-R 155/2008/01-5485/2009/310/MVr.

29 See, for example, Decision of the Supreme Administrative Court No. 2 As 357/2017-37.

30 Decision of the Head of the Competition Authority No. ÚOHS-R63/2011/HS-8361/2012/320, in which a coal company was found not guilty of having abused a dominant position, including through pricing. This decision was later upheld by the Decision of Supreme Administrative Court No. 6 As 89/2015-51.

Exclusive dealing

In line with EU law, Czech domestic law deems that exclusive dealing and rebates may be anticompetitive where enforced by a dominant competitor. Anticompetitive exclusive dealing is rare. The most thorough decision can be found in relation to *Telefonica Czech Republic*.³¹ In this decision from 2004, which was finally confirmed by the Supreme Administrative Court in 2012, the Competition Authority provides clarification on the subject of rebates, and attempts to draw a distinction between permitted forms of quantity discounts as compared with unlawful rebates, in which it cites EU case law. The biggest issue encountered by the Competition Authority in relation to this case was that exclusive discounts were tied to the length of the contract and the length of the consumers' future undertaking, whereas the actual volume of the services used by the consumer was disregarded. In this case, termination of the contract before a certain date was made particularly difficult.

Refusal to deal

The Competition Authority has ruled on several cases where a dominant competitor has refused to deal with a consumer or suddenly terminated a contract to gain an advantage in a limited market. No rules have been established to regulate this issue, and these cases are decided on a case-by-case basis. However, certain conclusions can be drawn. First, as has been confirmed by the courts,³² the Competition Authority must take into account both sides of the contract, primarily to assess their dependence on one another more thoroughly. Market power is used as a marker in these cases only sparingly. Similarly, when a transportation company that provides 100 per cent of the public transport in a city decides to terminate a contract owing to the city council having grossly breached its contract, it may do so, but must do so in a way that does not cause harm to the city or to consumers.³³

Another, quite distinct, issue is the essential facilities doctrine. The basic requirement for these cases was set in a 2001 decision of the High Court.³⁴ Where this doctrine is invoked, the Competition Authority must prove that an essential facility exists. If it is proven to exist, then abuse of dominant position may occur both by refusing access to the facility or by setting burdensome barriers to its access. Moreover, the essential facilities doctrine may be invoked even if the facility is not a prerequisite for the existence and activity of the competitor, but where refusal of access to the facility makes it difficult for it to compete with a vertically integrated competitor.³⁵

iii Discrimination

Discrimination is a broad area characterised by different forms of behaviour that often overlap with the abuses described above. Unlike the practice of the EU, where discrimination in competition alone is not deemed to constitute an abuse of dominant position, the

31 Telefonica was found to be in abuse of its dominant position by imposing rebates; Decision of the Competition Authority No. 1/03-3250/03-ORP.

32 Decision of the Supreme Administrative Court No. 5 Afs 46/2012-69.

33 In particular, it must do so with sufficient advanced notice, as confirmed by a decision of the Regional Court of Brno; No. 62 Ca 42/2007-337.

34 Decision of the High Court in Olomouc No. 2 A 10/2000-58.

35 For example, when a transportation company operates both buses and bus stations, as confirmed by the Supreme Administrative Court in Decision No. 8 Afs 48/2007-235.

Competition Authority has tended to adopt a *per se* approach in its early cases,³⁶ stating that, if a dominant competitor enforces discriminatory conditions that would be lawful if they were applied by a non-dominant competitor, but if this conduct causes harm to another competitor, then the conduct constitutes an abuse of dominant position.

If a competitor has a dominant position in a vertically integrated market, an abuse of dominant position may also exist where different conditions are placed on other competitors as compared with those placed on its own subsidiary.³⁷ Similarly, in its decision made in the case involving RWE Supply & Trading CZ, a.s.,³⁸ the Competition Authority ruled that different contractual terms and conditions may be applied for a dominant competitor, provided that the differences do not bar consumers from competing with the dominant competitor's concern in a downstream market.

Also of interest is the above-mentioned case involving České dráhy, a.s., which highlights the shift from a *per se* approach to assessing abuses of dominant position, as per the standard set in the *AKZO* decision,³⁹ to a more holistic method whereby the Competition Authority employs an effects-based approach to the assessment of these cases, and explains why – in the case in question – the prices below cost were exclusionary for competitors and how they disrupted competition, which serve to exemplify this shift in approach.

iv Exploitative abuses

The most important decision in this regard is the decision reached in the case involving Intergram,⁴⁰ in which the Competition Authority elaborated on the issue of excessive pricing and how it should be assessed, in which it cited EU case law. Where it is not possible to compare the price against the consideration (the monopolist performs operations that are delegated to it by the state), then the Competition Authority shall compare similar pricing in other jurisdictions, assuming that the regulatory frameworks and practice of these jurisdictions are similar.

V REMEDIES AND SANCTIONS

Breach of competition legislation may trigger both administrative and criminal liability. However, abuse of dominant position and abuse of significant market power are administrative offences only.

If a legal entity proves that it has made every effort that could be reasonably required of it to prevent any breach of the law, then it will not be held liable for such an offence.

36 Decision of the Head of the Competition Authority No. R034/2002.

37 Decision of the Head of the Competition Authority No. R002/2004.

38 Decision of the Head of the Competition Authority No. ÚOHS-R15/2015/HS-24337/2015/310. This case is also interesting as the Regional Administrative Court and then the Supreme Administrative Court confirmed that the intra-enterprise doctrine cannot be used if a controlling competitor in the concern has contractually bound its subsidiaries to apply certain additional conditions while contracting distributors outside of the concern.

39 Decision of the European Court of Justice No. C-62/86.

40 The proceedings were discontinued after Intergram appealed and the case was rescinded by the Head of the Competition Authority in Decision No. R003/2005. Intergram is a collective administrator of rights of performers and producers of audio and visual recordings.

i Sanctions

Each offence is described in the legislation referred to above. Generally, for disruption of competition, perpetrators are subject to fines of up to US\$40,000 or 10 per cent of their net annual turnover, whereas for obstructing an investigation or proceedings, fines of up to US\$15,000 or 1 per cent of net annual turnover can be handed down. The Competition Authority may mitigate or aggravate the fine, or may use any of the other instruments provided for in the Act on Liability for Administrative Offences⁴¹ or in the Guidelines on Determining Fines. Usually, the Competition Authority takes into account the annual turnover of the perpetrator in the relevant market, the duration of the abuse, the seriousness of the abuse and the behaviour of the perpetrator, and also checks whether the fine will be destructive for the perpetrator.

The Competition Authority is often criticised for handing down lenient fines and for not enforcing them sufficiently. The biggest fine issued to a cartel in the construction industry was US\$70 million, although this was later rescinded by the courts. The highest fines range between US\$4 million and US\$14 million, and the average fine is close to US\$1.5 million.

ii Behavioural remedies

Both the Act on the Protection of Competition and the Act on Significant Market Power provide the option for unlawful situations to be redressed outside of proceedings.

Both acts give the Competition Authority the power to impose measures of redress with the purpose of reinstating effective competition and to set a time limit for doing so. Contrary to Article 7, paragraph 1 of Council Regulation No. 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, the Acts do not distinguish between behavioural and structural remedies. Neither Act explains these measures in detail, and the slight difference between the behavioural remedies and commitments imposed in the settlement procedure (see below) is criticised.⁴²

Behavioural remedies are rarely employed by the Competition Authority.⁴³ Failure to comply with such a measure of redress would constitute an offence.

VI PROCEDURE

Generally, both the Act on the Protection of Competition and the Act on Significant Market Power contain a set of mainly specific substantive rules. Few of their provisions, however, contain specific procedural steps or instruments. Thus, they are not standalone legislative acts and the Code of Administrative Procedure must therefore be applied with certain modifications.

The Competition Authority actively oversees competition and initiates investigations where necessary. Investigations and other proceedings can only be initiated at its sole

41 This Act is fully applicable to these proceedings with slight modifications; Act No. 183/2017 Coll.

42 The Competition Authority tried to shed some light on the matter in its Notice on alternative solution of certain competition issues, stressing the key difference which lies in the fact that behavioural remedies are imposed when a competitor is found guilty of a breach of competition law rules, whereas a competitor is not found guilty if a decision imposing commitments is issued.

43 e.g. regarding concentration of undertakings, the Competition Authority imposed behavioural remedies in the *Karlovarské minerální vody* case (No. ÚOHS-S 224/03-1271/04), which consisted of the obligation to transfer shares of Poděbradka to a shareholder independent of Karlovarské minerální vody.

discretion. As a government office, it is also required to receive, analyse and report the findings of third-party concerns; however, proceedings concerning abuses of dominant position and significant market power can only be brought *ex officio*.⁴⁴ Nevertheless, the Competition Authority is empowered to prioritise cases, which means it cannot initiate proceedings in cases where no public interest is involved or where the perpetrator commits to restoring competition and such commitment is deemed sufficient.

The Competition Authority has the authority to conduct investigations (including both dawn raids and requests for documents)⁴⁵ before or after initiating proceedings. The only limitation placed on the Competition Authority in this respect is that any investigation conducted prior to initiating proceedings must be proportionate to the purpose of that investigation.⁴⁶ The person under investigation can refuse to cooperate if the investigation extends beyond its stated scope and purpose,⁴⁷ whereas after initiating proceedings, the Competition Authority can expand the investigation as regards the evidence gathered.⁴⁸ Investigations may also be conducted on premises other than business premises after consent has been granted by the relevant court. A detailed record must be taken of all investigations conducted on premises.

A defence may be filed against investigations on business premises in the form of a suit against public authority interference.⁴⁹ Following criteria set out by case law, the Competition Authority issued its Information Paper summarising the procedure for dawn raids.⁵⁰

Interim measures may be imposed where there is a concern that proper enforcement may be in jeopardy. However, such measures may only be imposed during official proceedings.⁵¹

There are no strict time limits applicable to the Competition Authority, and the general time limits set forth in the Code of Administrative Procedure apply. However, these can be extended subject to the complexity of the case in question and are not binding on the Competition Authority. Nevertheless, any unnecessary prolongation of these time limits is unlawful and can lead to compensation claims for damage arising from such extensions. On average, cases are decided in one to two years, while the longest cases can take up to 12 years when all legal remedies are employed.⁵²

A settlement procedure is in place for both reducing fines and dropping proceedings. The Competition Authority will issue a statement of objection informing the perpetrator

44 The initiation of proceedings means that the Competition Authority serves notice on a person in accordance with law, usually in writing.

45 Investigations include requesting documents, investigating the business premises of the person under investigation and investigating non-business premises.

46 Based on the decision of the European Court of Human Rights in the *Delta Pekárny, a.s. v. Czech Republic* case, No. 97/11, the Competition Authority was required to have reasonably specific evidence and reasons for conducting an investigation in the form of a dawn raid, as confirmed by case law; see, for instance, the decision of the Regional Administrative Court in Brno, No. 29 A 165/2016, highlighted by the Supreme Administrative Court.

47 Official request for information or notification of an *in situ* investigation.

48 In the Supreme Administrative Court Decision No. 5 Aps 4/2011-326, the Court stated that it is not the purpose of the preliminary investigation (before the initiation of proceedings) to gather information and evidence for a final decision on the matter.

49 Decision of the Supreme Administrative Court No. 5 Afs 7/2011. This possibility also exists following the revision of the Act on the Protection of Competition.

50 Available in *Czech* at www.uohs.cz/download/Informacni_listy/2017/uohs_informacni-listy3_net.pdf.

51 Interim measures may be imposed upon serving notice of the initiation of proceedings.

52 e.g. Decision of the Competition Authority No. ÚOHS-S0220/2006/DP-18887/2018/830/DKI.

of the offence committed, the possible consequences of the offence, the probable amount of the fine and the main evidence. The perpetrator can then accept liability for the offence and assume commitments to restoring competition. If the Competition Authority finds the proposed commitments sufficient to restore competition, it may drop the proceedings while also imposing these commitments on the perpetrator in its decision. The perpetrator can also reach settlement with the Competition Authority following a ruling on the offence. The fine can be reduced if the Competition Authority decides, upon the request of the perpetrator, that a lower fine would be sufficient for the offence committed. In all cases, the perpetrator must admit to having committed the offence.

Procedures are most often conducted in writing. Oral hearings can be arranged if they are necessary for the perpetrator to properly exercise its rights.

The decisions of the Competition Authority are subject to appeal. However, the second instance for these decisions is the Head of the Competition Authority. The decisions of the Head of Competition Authority can be appealed with the administrative courts, with the decisions of the administrative court subsequently subject to appeal with the Supreme Administrative Court, which is the court of final instance. Where a decision may have infringed constitutional rights (in particular, when an *in situ* investigation has been conducted unlawfully), a constitutional appeal can be filed with the constitutional court. Finally, where basic rights may have been breached unlawfully, the European Court of Human Rights may decide that the breach should be redressed.⁵³ Generally, the prospect of successful appeal against a decision of the Competition Authority is relatively high.

VII PRIVATE ENFORCEMENT

In 2017, the Act on Compensation of Damage in the Area of Economic Competition integrated EU Directive 2014/104 on antitrust damages actions into domestic law.

The goal of the Act is to facilitate both follow-on and stand-alone actions for private enforcement of competition law, in the event of both a breach of EU law and the antitrust laws of Member States.

Decisions of the Competition Authority handing down convictions serve as evidence in civil proceedings, with the conclusion of guilt held as indisputable. Damage must be proven by evidence. The Act entitles the plaintiff to demand access to the documentation of both the defendant and the Competition Authority. Both of these possibilities are limited, however, as the Competition Authority may refuse to provide documents if it deems that doing so would jeopardise the effective enforcement of competition law where these documents contain sensitive information or business secrets or where access would not be proportionate to the scope of the plaintiff's application.⁵⁴

The biggest novelty of the Act is the introduction of a type of discovery in Czech procedural law. To acquire documents from the defendant, the plaintiff must file an application demanding access to documentation. This application must provide sufficient facts and evidence from which to attest to the credibility of the plaintiff's claim and right to damages. The court may then order the defendant to provide these documents or classes of documents that are necessary and proportionate to the claim. The respect of such an

⁵³ This occurred in 2014 in the landmark case of *Delta Pékárny, a.s. v. Czech Republic*, No. 97/11.

⁵⁴ Both the Act on Compensation of Damage in the Area of Economic Competition and the Act on the Protection of Competition regulate this process and the provision of documents in detail.

injunction is secured by high fines that can go up to 1 per cent of the turnover or approximately US\$500,000. However, the plaintiff remains liable for any damage that may be incurred by these documents being handed over. The effectiveness and usability of these instruments is yet to be tested in the Czech Republic.

Furthermore, limitation rules have significantly changed under the Act. In particular, the limitation period is longer and does not have an absolute limit, and the commencement date and suspension rules are also addressed differently. The changes go hand in hand with the uncertainty as to whether to apply the new limitation rules or the old ones in each case, as the answer is not sufficiently stipulated in the Act or in the available case law. There are no any official statistics yet on the number of cases introduced under the new Act. Based on informal information, however, this is estimated to be about a dozen, mostly following on from EC decisions.

Collective actions cannot yet be brought in the Czech Republic.

VIII FUTURE DEVELOPMENTS

The expected development is that private enforcement will be combined with collective actions. At present, Czech law does not regulate collective actions; however, a government Bill containing opt-out class actions is currently going through the legislative process. Although the enactment of legislation on collective actions has long been called for in the Czech Republic, the proposed Bill has been constantly revised following critical comments, and its proposed scope of application has been reduced to consumer disputes only. Despite sizeable opposition to the Bill, it is finally expected to pass this year.

EUROPEAN UNION

*Thomas Graf and Henry Mostyn*¹

I INTRODUCTION

The statutory provision that governs abuses of dominance in the European Union is Article 102 of the Treaty of the Functioning of the European Union (TFEU).² The regulatory body with the power to investigate and sanction abuses is the Competition Directorate-General of the European Commission. National competition authorities of individual Member States are competent to apply Article 102 TFEU as long as the Commission has not opened a formal investigation into the same matter.

The procedure for the Commission's enforcement and application of abuse of dominance 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 Article 102 TFEU is the Article 102 Guidance Paper.⁴

In broad terms, four conditions must be met for Article 102 TFEU to apply:

- a* the entity engaged in the relevant conduct constitutes 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 restrict competition; and
- d* the conduct must affect trade between Member States.

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2 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty became Articles 101 and 102 TFEU. The two sets of provisions are, in substance, identical, and references in this paper to Article 102 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, 4 January 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.

5 The concept of 'undertaking' has been interpreted widely by the European courts. See case C-41/90, *Höfner and Elser v. Macroton GmbH*, judgment of 23 April 1991, EU:C:1991:161, 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.'

II YEAR IN REVIEW

2019 and the first half of 2020 was a relatively quiet period for abuse of dominance in Europe. The Commission reached three infringement decisions (*Qualcomm*, *Google AdSense*, and *AB InBev*)⁶ and closed one investigation via commitments (concerning exports of natural gas from Romania to neighbouring Member States).⁷ Two other notable developments include the Commission opening a formal investigation concerning Amazon's use of data from independent retailers,⁸ and the Commission, for the first time in 20 years, adopting interim measures in an abuse of dominance case in *Broadcom*.⁹ We discuss these cases in more detail below.

In *Qualcomm* (predation), the Commission fined Qualcomm €242 million for abusing its dominance in 3G baseband chipsets by selling them below cost, with the aim of forcing its competitor Icera out of the market. The Commission concluded that Qualcomm engaged in predatory pricing by, apparently relying on a price-cost test for each of the chipsets concerned and a 'broad range' of qualitative evidence (at the time of writing, the decision has not been publicly released). This was the Commission's first predatory pricing decision in over 15 years.

In *Google AdSense*, the Commission fined Google €1.49 billion for imposing quasi-exclusive clauses in contracts with third-party websites that allegedly prevented rivals placing search ads on covered partner websites. Google has appealed the Commission decision to the General Court and the appeal is pending.

In *AB InBev*, the Commission fined AB InBev €200 million for restricting cross-border sales of beer, after reducing AB InBev's fine to take account of its cooperation during the investigation. The Commission found that AB InBev abused its dominance on the Belgian beer market by hindering cheaper imports of its Jupiler beer from the Netherlands. AB InBev employed four different methods to achieve its strategy of restricting parallel trade, including altering the packaging to remove French language, limiting supply of Jupiler beer to wholesalers in the Netherlands, and conditioning sales to Belgian retailers on agreements to limit their imports.

In *Romanian Gas Interconnectors*, Transgaz offered commitments to make available firm capacities of natural gas exports at interconnection points for the increase of natural gas exports from Romania to neighbouring Member States, in particular Hungary and Bulgaria. The Commission had concerns that Transgaz had restricted natural gas exports from Romania and created barriers to cross-border natural gas flows, which was contrary to the aim of a competitive Energy Union.

In *Amazon Marketplace*, the Commission has initiated an in-depth investigation into Amazon's collection and use of sensitive data from third-party sellers that trade on its marketplace. As part of its investigation, the Commission will examine the standard

6 Case AT. 40411, *Google Search (AdSense)*, Commission decision of 20 March 2019; case AT. 40134, *AB InBev Beer Trade Restrictions*, Commission decision of 13 May 2019; and case AT. 39711, *Qualcomm* (predation), Commission decision of 18 July 2019 (*Qualcomm*).

7 Case AT. 40335, *Romanian Gas Interconnectors*, Commission decision of 6 March 2020 (*Romanian Gas Interconnectors*), not yet published.

8 European Commission, 'Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon', 17 July 2019.

9 European Commission, 'Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets', 16 October 2019.

agreements between Amazon and independent retailers that provide Amazon with access to commercially sensitive data, and analyse Amazon's use of this data in its selection of winners of its 'Buy Box' featured on its product page.

In *Broadcom*, the Commission ordered Broadcom, on an interim basis, to cease to apply exclusivity provisions in its agreements with six manufacturers of TV set-top boxes and modems. The Commission claims that Broadcom's exclusivity agreements harmed competition by strengthening its dominant position in the markets for TV set-top boxes, fibre modems, and xDSL modems, and by leveraging its dominance in those three markets into the market for cable modems chipsets, where it was not yet dominant. The Commission concluded that Broadcom's exclusivity agreements were prima facie evidence of an infringement that, if allowed to continue, would likely affect a number of tenders launched in the future and lead to the exit or marginalisation of other chipset suppliers. The Commission reasoned that this risk of serious and irreparable damage to competition warranted urgent intervention in the form of interim measures. The measures will be in place for the earlier of three years or the date of adoption of a final decision on the merits of the case or the closure of the investigation. Broadcom has appealed the Commission's decision to the General Court. It argues that the Commission has made errors of law and fact in its application of the interim measures conditions, and in its assessment of proportionality, by failing to consider whether an expedited investigation would have been more proportionate. On 1 April 2020, Broadcom offered commitments to address the Commission's concerns. At the time of writing, the Commission is consulting on these commitments.

At the court level, 2019/20 was notable for the Court of Justice's judgment in *Generics (UK) and Others*.¹⁰ The Court ruled that a strategy consisting of the conclusion of reverse payment patent settlement agreements initiated by a dominant manufacturer with the effect of temporarily excluding potential competitors from entering the market may constitute an abuse. This is the case even if one of the settlement agreements would not be penalised under national competition law, provided the overall strategy has the capacity to restrict competition and has exclusionary effects beyond the specific effects of the individual agreements.

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 companies under investigation.¹¹ 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 TFEU.¹² The relevant product market comprises all those products or services 'which are regarded as

10 Case C-307/18, *Generics (UK) and Others*, judgment of 30 January 2020, EU:C:2020:52.

11 Commission Notice on the definition of the relevant market for the purposes of community competition law (Market Definition Notice), OJ 1997 C 372/5, Paragraph 2.

12 The Commission is consulting this year on a new market definition notice with a focus on digitalisation and the globalisation of the economy. See European Commission, 'EU competition law – market definition notice (evaluation)'.

interchangeable or substitutable by the consumer, by virtue of the products' characteristics, their prices and their intended use.¹³ This definition draws on the principles established by the Court of Justice in *Michelin*, holding that:¹⁴

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.

To define relevant markets, it is not sufficient to point to differences in characteristics or intended use.¹⁵ Rather, the task for Commission is to determine whether products are demand-side or supply-side substitutes, and in the presence of either demand or supply substitutability, markets should be widened.

Substitutability is assessed by the hypothetical monopolist (SSNIP)¹⁶ test. This 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.¹⁷ Because market definition is about determining whether one set of products or services exercises a competitive constraint on another set, it is a one-way exercise: substitutability may be asymmetric.¹⁸

A number of EU court judgments have discussed basic principles of market definition in the context of Article 102 TFEU cases.¹⁹ Some of these cases are relatively old and remain quite general.²⁰ The Commission's decisional practice and court case law in other areas of EU competition law, including merger control, provide additional insight that is also relevant for Article 102 TFEU cases.²¹

13 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 a 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).

14 Case 322/81, *Michelin*, judgment of 9 November 1983, EU:C:1983:313 (*Michelin*), Paragraph 37.

15 Market Definition Notice, Paragraph 36.

16 Small but significant non-transitory increase in price.

17 Market Definition Notice, Paragraph 17.

18 Case T-340/03, *France Télécom*, judgment of 30 January 2007, EU:T:2007:22, Paragraphs 88-91; and case T-321/05 *AstraZeneca*, judgment of 1 July 2010, EU:T:2010:266, Paragraph 97.

19 For example, case 6/72, *Continental Can*, judgment of 21 February 1973, EU:C:1973:22 (*Continental Can*); and case 85/76, *Hoffmann-La Roche*, judgment of 13 February 1979, EU:C:1979:36 (*Hoffmann-La Roche*).

20 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*, judgment of 1 July 2010, EU:T:2010:266; confirmed in case C-457/10 P, *AstraZeneca*, judgment of 6 December 2012, EU:C:2012:770 (*AstraZeneca*).

21 See N Levy, *European Merger Control Law: A Guide to the Merger Regulation* (New York: Matthew Bender & Co, 2019), Chapter 8, for a discussion of market definition in EU merger control.

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 Court of Justice 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’.²²

This test, however, provides 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 behave²³ or when the threshold of ‘appreciable extent’ is crossed.²⁴ What is clear is that no single factor is determinative in assessing a company’s dominance.²⁵ Nor does dominance require that there is no competition on the relevant market.²⁶

The Guidance Paper equates the concept of competitive independence with the ability to profitably raise prices above the competitive level.²⁷ 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 the Commission to show that the company could raise prices beyond the level that it currently charges (this is known as the ‘cellophane fallacy’).²⁸ If the company has market power, it will already charge above the competitive level at the profit maximising 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, case law has developed indicators for the existence of dominance. The Guidance Paper classifies these broadly into criteria relating to: constraints imposed by competitors (i.e., an assessment of market structure and market shares); constraints imposed by the threat of expansion and entry; and constraints imposed by the bargaining strength of customers.²⁹

22 Case C-27/76, *United Brands*, judgment of 14 February 1978, EU:C:1978:22 (*United Brands*), Paragraph 65; and *Hoffmann-La Roche*, Paragraph 38. The Commission’s Guidance Paper relies on the same definition: Guidance Paper, Paragraph 10.

23 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.

24 See B Vesterdorf, ‘Article 102 of the TFEU and sanctions: appropriate when?’, *ECLR* 2011, 32(11), pp. 573–579.

25 *United Brands*, Paragraph 66.

26 *ibid.*, Paragraph 113.

27 Guidance Paper, Paragraph 10.

28 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).

29 Guidance Paper, Paragraph 12.

Market shares

In the *Akzo* judgment, the Court of Justice established a (rebuttable) market share presumption for dominance under which a company is assumed to be dominant if it holds a market share of 50 per cent or more in the relevant market.³⁰ The rationale 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’.³¹ The Guidance Paper notes that dominance is ‘not likely if the undertaking’s market share is below 40 per cent.’³²

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 characterised by a limited number of large orders, temporary high shares do not indicate market power.³³ Similarly, in markets subject to a high degree of innovation or where services are offered for free, market shares are not a proxy for market power, either.³⁴

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.³⁵ In other words, lack of barriers to entry and expansion can prevent a dominant position if a company faces no current competitive constraints, but the existence of barriers will not create a dominant position if a company already faces competitive constraints. As recognised in the Guidance Paper, ‘an undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient’.³⁶ In assessing this likelihood, the Commission considers barriers that prevent timely entry

30 Case C-62/86, *Akzo Chemie*, judgment of 3 July 1991, EU:C:1991:286 (*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.’

31 Case C-62/86, *Akzo Chemie*, Opinion of Advocate General Lenz of 19 April 1989, EU:C:1989:154, Paragraphs 111 and 114.

32 Guidance Paper, Paragraph 14.

33 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.

34 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.4747, *IBM/Telelogic*, Commission decision of 5 March 2008, Paragraph 151. See also case T-79/12, *Cisco Systems and Messagenet*, judgment of 11 December 2013, EU:T:2013:635 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 to 90 per cent were not indicative of market power.

35 *Hoffmann-La Roche*, Paragraph 41.

36 Guidance Paper, Paragraph 16.

or expansion. These can take the forms of legal barriers (such as legislation conferring a statutory monopoly,³⁷ or intellectual property rights),³⁸ or barriers such as economies of scale or scope,³⁹ technological advantages⁴⁰ or network effects.⁴¹

Buyer power

Customers with sufficient countervailing bargaining strength can prevent a company from exercising market power. Buyer power, however, may not negate dominance where a strong buyer can protect only itself, but not the entire market.⁴²

Generally, exercising buyer power requires the buyer to have viable competitive alternatives to the dominant company, or the ability to develop such alternatives.⁴³ Even a large buyer will have little or no power if it has no alternative supply options to which it can realistically turn.⁴⁴ That said, in some instances, buyer power may also come from the buyer's ability 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.

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 TFEU if it abuses its dominant position to restrict competition.

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

37 See, for example, case 89/113/EEC, *Decca Navigator Systems*, Commission decision of 21 December 1988.

38 See, for example, case COMP/35.141, *Deutsche Post*, Commission decision of 20 March 2001.

39 *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'.

40 See, for example, *Hoffmann-La Roche*, Paragraph 48.

41 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.

42 Guidance Paper, Paragraph 18.

43 Guidance Paper, Paragraph 18.

44 See, for example, case COMP/37.990, *Intel*, Commission decision of 13 May 2009, Paragraphs 886 and 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.'

*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.*⁴⁵

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 Court of Justice in *Post Danmark I* and *Intel*, where the Court stressed that ‘not every exclusionary effect is necessarily detrimental to competition’ and that ‘it is in no way the purpose of Article 102 TFEU to . . . ensure that competitors less efficient than the undertaking with the dominant position should remain on the market’. To the contrary: ‘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.’⁴⁶ The key task in an abuse analysis is therefore to distinguish between anticompetitive conduct and competition on the merits.

Article 102 TFEU lists a number of abusive practices, but these are not exhaustive: sui generis abuses can be identified in individual cases.⁴⁷ The Guidance Paper 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. New abuses cannot be postulated without limitation: if a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish that abuse need to be satisfied.

The case law qualifies certain categories of conduct as ‘by nature’ abuses (e.g., discounts conditioned on exclusivity, as discussed below). The *Intel* judgment brings important clarity to the treatment of these abuses: by nature, abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This entails, in particular, an assessment of rivals’ efficiency, because competition law does not seek to protect inefficient rivals.⁴⁸

Outside the ‘by nature’ exceptions, a ‘fully fledged analysis of effects has to be performed’.⁴⁹ This fully fledged analysis requires proving at least the following five elements:

a the dominant company’s abusive conduct must hamper or eliminate rivals’ access to supplies or markets;⁵⁰

45 *Hoffmann-La Roche*, Paragraph 121.

46 Case C-209/10, *Post Danmark AIS*, judgment of 27 March 2012, EU:C:2012:172 (*Post Danmark I*), Paragraphs 21 and 22. *Intel*, Paragraphs 133 and 134.

47 See *Continental Can*, Paragraph 26. *AstraZeneca*, with its regulatory-type abuses, represents another example.

48 *Intel*, Paragraph 142.

49 *ibid.*

50 Guidance Paper, Paragraph 19.

- b the abusive conduct must cause the anticompetitive effects.⁵¹ Proving causation requires comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur;⁵²
- c the anticompetitive effects must be reasonably likely.⁵³ If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place;⁵⁴
- d anticompetitive foreclosure must be determined by reference to equally efficient competitors.⁵⁵ Any possible foreclosure of competitors can only conceivably be anticompetitive if it is liable to exclude competitors that are at least as efficient as the dominant company;⁵⁶ and
- e the anticompetitive effects must be sufficiently significant to create or reinforce market power.⁵⁷

Even if a company abuses its dominance, it retains the possibility to justify its conduct – even for ‘by nature’ abuses (referred to as ‘objective justification’). To do so, the company must show that the conduct is either objectively necessary or produces efficiencies that outweigh restrictive effects on consumers.⁵⁸ If a dominant company raises evidence of objective justification, it ‘falls to the Commission . . . to show that . . . the justification put forward cannot be accepted’.⁵⁹

These general principles are discussed in relation to various different types of abuse below.

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 Court of Justice established a two-test rule for the assessment of predatory pricing conduct under

51 Case C-23/14, *Post Danmark II*, judgment of 6 October 2015, EU:C:2015:651, (*Post Danmark II*), Paragraph 47.

52 Guidance Paper, Paragraph 21.

53 Case T-201/04, *Microsoft*, judgment of 17 September 2007, EU:T:2007:289 (*Microsoft*), Paragraph 1089.

54 Case T-70/15, *Trajektma luka Split*, judgment of 30 September 2016, EU:T:2016:592, Paragraph 24.

55 *Post Danmark I*, Paragraphs 21 and 22; and Guidance Paper, Paragraphs 25–27. *Intel*, Paragraphs 133 and 134.

56 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 *Post Danmark II*, the Court of Justice 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 Court 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).

57 Guidance Paper, Paragraphs 11 and 19.

58 *Post Danmark I*, Paragraph 41; Guidance Paper, Paragraph 28.

59 *Microsoft*, Paragraph 688.

Article 102 TFEU:⁶⁰ pricing below average variable cost (AVC) is presumptively abusive;⁶¹ and 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.⁶² 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 a view to strengthening market power).⁶³ 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.⁶⁴

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’.⁶⁵

Margin-squeeze cases were originally viewed as instances of a constructive refusal to supply. The 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 treat margin-squeeze practices as akin to predatory pricing behaviour, particularly as they analyse the margin squeeze under Article 102(a) TFEU. To end the margin squeeze, the dominant company is not required to provide access to its facilities; it only needs to change the level of prices to remove the squeeze.

60 Confirmed in case C-333/94 P, *Tetra Pak*, judgment of 14 November 1996, EU:C:1996:436; and case C-202/07 P, *France Telecom*, judgment of 2 April 2009, EU:C:2009:214.

61 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.’

62 *ibid.*, Paragraph 72: ‘Such prices 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.’

63 See Guidance Paper, Paragraphs 64–66. The Guidance Paper in fact refers to cost benchmarks of average avoidable cost and long-run average incremental cost, but recognises that these are likely to be good proxies for AVC and ATC respectively. See Guidance Paper, Paragraphs 26 and 27.

64 See, for example, *Post Danmark I*, Paragraph 33. The Court of Justice in *Post Danmark I* (at Paragraphs 39 and 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).

65 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 case C-52/09, *TeliaSonera*, judgment of 17 February 2011, EU:C:2011:83, Paragraphs 31–34; and case C-295/12 P, *Telefonica*, judgment of 10 July 2014, ECLI:EU:C:2014:2062, Paragraph 75. 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’).’

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 TFEU⁶⁶ and 102 TFEU can apply to exclusive dealing, although traditionally the approach under Article 101 TFEU has been more economic, while under Article 102 TFEU, exclusive dealing has historically been treated as presumptively unlawful.⁶⁷ The *Intel* judgment clarifies that this presumption remains, but if firms submit evidence that the conduct is not capable of restricting competition, the Commission must then assess all the circumstances to determine whether the conduct is abusive.⁶⁸

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.⁶⁹ 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.⁷⁰

Exclusionary discounts

While the grant of discounts (also known as rebates) is generally pro-competitive, certain forms of discounts may constitute an abuse if applied by a dominant company. The concern is 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.

The case law generally distinguishes between three categories of rebates:

- a* volume-based rebates that pay out based on the volume of a customer’s purchases: reflecting gains in efficiency and economies of scale, volume-based rebates are presumptively lawful;⁷¹
- b* rebates conditioned on exclusivity, which require a customer to obtain all or most of its requirements from the dominant company in order to get the rebate, are presumptively

66 In many cases, the block exemption regulation on vertical agreements will apply to exempt such agreements from Article 101 TFEU, provided that the supplier has a market share of no more than 30 per cent; the exclusive purchasing contract contains no hardcore restrictions; and 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.

67 See, for example, *Hoffmann-La Roche*. This approach was partially questioned in case T-65/98, *Van den Bergh Foods*, judgment of 23 October 2003, EU:T:2003:281 (*Van den Bergh Foods*).

68 *Intel*.

69 See *Van den Bergh Foods*, Paragraph 160.

70 Guidance Paper, Paragraph 36.

71 *Hoffmann-La Roche*, Paragraph 90; and case T-203/01, *Michelin*, Paragraph 58.

unlawful (*Hoffmann-La Roche*, *Michelin*, *British Airways*⁷² and *Tomra*).⁷³ The *Intel* judgment clarifies that while exclusive dealing remains presumptively unlawful, if firms submit evidence that the conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive; and

- c fidelity-building rebates that possess a loyalty-building mechanism without being directly linked to exclusive or quasi-exclusive supply: these require an assessment of all the circumstances to determine whether the rebate is likely to foreclose equally efficient competitors.⁷⁴ The relevant circumstances include:
- whether the rebates are individualised or standardised;
 - the length of the reference period;
 - the conditions of competition prevailing on the relevant market;
 - the proportion of customers covered by the rebate; and
 - whether a rebate is retroactive or incremental.⁷⁵

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.⁷⁶ The Court found that Microsoft's tying of Windows Media Player (a qualitatively inferior product) to Windows, the ubiquitous operating system, degraded the quality of the Windows operation system and foreclosed original equipment manufacturers as a distribution channel for rival media players. Rival means of distribution, notably internet downloads, were not viable because they were slow, difficult and prone to failure. The Commission, upheld by the General Court, identified five conditions for an abusive tying:

- a the tying and tied goods 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;

72 Case C-95/04 P, *British Airways*, judgment of 15 March 2007, EU:C:2007:166.

73 Case C-549/10 P, *Tomra*, judgment of 19 April 2012, EU:C:2012:221, Paragraph 24.

74 *Post Danmark I*, Paragraphs 31 and 32.

75 *Post Danmark II*. *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. The Court held that for determining whether the discount system was abusive, it was necessary to consider 'all the circumstances' of the case. Unsurprisingly, in the circumstances, the Court concluded that *Post Danmark*'s retroactive rebate system infringed Article 102 TFEU.

76 Prohibition decisions have been adopted in a number of other cases involving tying allegations, including case T-30/89, *Hilti*, judgment of 12 December 1991, EU:T:1991:70; and case C-193/83, *Windsurfing*, judgment of 25 February 1986, EU:C:1986:75.

- d the tying forecloses competition; and
- e there is no objective and proportionate justification for the tie.⁷⁷

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’.⁷⁸

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.⁷⁹ 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 that 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).⁸⁰

Refusal to deal

As a general rule, companies, including dominant companies, are free to decide whether to deal with a counterparty. As Advocate General Jacobs confirmed in *Bronner*, it is ‘generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business’.⁸¹ A refusal by a dominant undertaking to supply its products can therefore amount to an abuse under Article 102 TFEU only in exceptional circumstances. According to established case law, the following general conditions must be met for a refusal to supply to be abusive: the requested input must be indispensable to compete viably; the refusal is likely to eliminate all competition in the downstream market; and there is no objective justification for the refusal.⁸²

The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are ‘technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult’ to create alternatives, or to create them within a reasonable time frame.⁸³ If there are ‘less advantageous’ alternatives, that means the input is not indispensable.

77 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 *Microsoft*, Paragraph 859. See also Guidance Paper, Paragraphs 47–74.

78 See *Microsoft*, Paragraph 925.

79 See for example, *Hoffmann-La Roche*, Paragraphs 110 and 111; and case COMP/37.859, *Hays/La Poste Belge & Key Mail*, Commission decision of 5 December 2001.

80 Guidance Paper, Paragraph 60.

81 Case C-7/97, *Bronner*, Opinion of Advocate General Jacobs of 28 May 1998, EU:C:1998:264 (*Bronner Opinion*), Paragraph 57.

82 *Bronner Opinion*, Paragraph 41; case T-374/94, *European Night Services*, judgment of 15 September 1998, EU:T:1998:198; and case T-504/93, *Tiercé Ladbroke*, judgment of 12 June 1997, EU:T:1997:84.

83 Case C-7/97, *Bronner*, judgment of 26 November 1998, EU:C:1998:569, Paragraph 44.

For example, in *Bronner*, access to newspaper distributor Mediaprint's delivery network was not indispensable because Bronner could have used kiosks, shops and post (even though these were less advantageous). Mediaprint's refusal to grant access was, therefore, not abusive.

In its *Google Shopping* decision, the Commission appears to have imposed a duty on Google to grant rival comparison shopping services access to its search results pages, without establishing a duty to supply by reference to the *Bronner* criteria.⁸⁴ Google has challenged this apparent change in the law in its appeal.⁸⁵

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.⁸⁶

iii Discrimination

Unlawful discrimination under Article 102(c) TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions. However, abusive 'price discrimination' requires proof that similar situations are being treated in a dissimilar manner without legitimate commercial reasons; and 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. In *MEO*, the Court of Justice confirmed that establishing a discrimination abuse under Article 102(c) TFEU requires the Commission to demonstrate – 'having regard to the whole circumstances of the case' – that the conduct leads to a distortion of competition.⁸⁷

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.⁸⁸ Other considerations that may be taken into account include, for example, whether the transactions involve similar products,⁸⁹ costs⁹⁰ or timing.⁹¹ Moreover, even if there is 'discrimination', the Court of Justice's *Post Danmark* judgment has made clear that such discrimination is only abusive if it is liable to foreclose equally efficient

84 Case AT.39740, *Google Search (Shopping)*, Commission decision of 27 June 2017.

85 Case T-612/17, *Google and Alphabet* (2017/C 369/51).

86 *Microsoft*, Paragraph 332; case C-418/01, *IMS Health*, judgment of 29 April 2004, EU:C:2004:257, Paragraph 52; and case C-241/91 P, *RTE and ITP*, judgment of 6 April 1995, EU:C:1995:98 (*Magill*), Paragraphs 50–56.

87 *MEO*, Paragraph 27.

88 *Michelin*, Paragraph 90.

89 See, for example, case COMP/38.096, *Clearstream*, Commission decision of 2 June 2004; case T-301/04, *Clearstream*, judgment of 9 September 2009, EU:T:2009:317; and case COMP/36.568, *Scandlines Sverige*, Commission decision of 23 July 2004 (*Scandlines Sverige*).

90 See, for example, case 95/364/EC, *Brussels National Airport*, Commission decision of 28 June 1995.

91 See, for example, case IV/28.841, *ABG/Oil Companies*, Commission decision of 19 April 1977.

companies.⁹² ‘Pure’ discrimination cases are quite rare.⁹³ 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) TFEU provides that an abuse may consist of ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’. 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,⁹⁴ although the Commission and national authorities have begun to pursue more exploitative abuse cases.⁹⁵ In *Scandlines Sverige*, the Commission set out what it considers the most appropriate methodology for assessing unfair prices. The questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive; and, if the answer to that is yes, then whether a price has been imposed that is either unfair in itself or when compared to the price of competing products.⁹⁶

In *AKKA-LAA*, the Court of Justice provided guidance on the conditions under which the imposition of high prices by a dominant firm might infringe Article 102(a) TFEU. The Court found that to identify unfair prices, comparisons with prices in neighbouring Member States may be appropriate, provided that the reference countries are selected ‘in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis’.⁹⁷ The Court also confirmed that excessive prices need to be significantly and persistently above the competitive level for there to be an exploitative abuse. Advocate General Wahl’s opinion appeared to set a higher threshold, advising that:

92 *Post Danmark I*, 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’, 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.’

93 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.

94 See, for example, *United Brands*, Paragraphs 248–268: the Court of Justice 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.

95 In May 2017, the Commission opened an investigation into whether Aspen Pharma committed an exploitative abuse by allegedly imposing sudden price increases for cancer medicine of up to several hundred per cent. See European Commission, ‘Antitrust: Commission opens formal investigation into Aspen Pharma’s pricing practices for cancer medicines’, 15 May 2017.

96 *Scandlines Sverige*, Paragraph 147.

97 Case C-177/16, *AKKA-LAA*, judgment of 14 September 2017, EU:C:2017:689, Paragraph 51 (*AKKA-LAA*).

*in its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.*⁹⁸

V REMEDIES AND SANCTIONS

Regulation 1/2003 provides the mechanism by which the Commission sanctions infringements of Article 102 TFEU. The Commission is entitled to impose structural or behavioural remedies, interim measures,⁹⁹ fines and periodic penalty payments.¹⁰⁰ 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.

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 TFEU. The Commission has set out in detail the methodology by which it sets fines, which will take into account, among other things, 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.¹⁰¹

Before 2004, the Commission had never imposed a fine for an infringement of Article 102 TFEU that exceeded 1 per cent of the turnover of the undertaking involved. In recent years, the Commission has shown a tendency to impose increasingly high fines for abusive conduct culminating in cases such as *Google Shopping*, where the Commission imposed a fine of €2.42 billion and *Google Android*, where it imposed a fine of €4.34 billion. Both decisions are under appeal.

Fines can be imposed for a failure to abide by interim measures or commitment decisions. In 2013, the Commission fined Microsoft €561 million for failing to comply with its browser choice screen commitments. 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 answers or answers late to the Commission's requests for information.¹⁰² Finally, the Commission is empowered to impose periodic penalty payments to compel companies to abide by remedies and commitments decisions.¹⁰³

Firms can also win a reduction in the fine if they admit liability. In the 2016 *ARA waste management* decision, the Commission for the first time employed the settlement mechanism

98 *AKKA-LAA*, Opinion of Advocate General Wahl of 6 April 2017, Paragraph 3.

99 In October 2019, in *Broadcom*, the Commission imposed interim measures for the first time in an abuse of dominance case for 20 years. The Commission ordered Broadcom to remove exclusivity provisions in its agreements with six manufacturers of TV set-top boxes and modems.

100 Articles 7, 8, 23 and 24 of Regulation 1/2003, respectively. Interim measures can only be imposed where there is a *prima facie* infringement of Article 102 TFEU; there is urgency due to the risks of serious and irreparable damage to competition; damage is considered 'irreparable'; and the balancing exercise between the public interest and the harm caused weighs in favour of the interim measure.

101 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.

102 Article 23(1) of Regulation 1/2003.

103 Article 24(1) of Regulation 1/2003. These can amount to 5 per cent of an undertaking's average daily turnover.

traditionally used for cartel cases. ARA admitted liability for refusing to supply its rivals with access to its essential household waste management infrastructure in return for a 30 per cent fine reduction.¹⁰⁴

ii Remedies

Remedies, whether imposed by the Commission or offered voluntarily by an undertaking as commitments, must fulfil certain objectives. They must bring the infringement to an end, be proportionate in both scope and duration, and not be easily circumvented.¹⁰⁵

Where an infringement can be brought to end in different ways, the Commission cannot ‘impose . . . its own choice from among all the various potential courses of actions which are in conformity with the treaty’.¹⁰⁶ This means that the Commission can only impose a specific behavioural remedy if it is ‘the only way of bringing the infringement to an end’.

Behavioural remedies

Considerations of expediency and proportionality mean that behavioural remedies are preferred in Article 102 TFEU cases.¹⁰⁷ 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.¹⁰⁸ Positive obligations have included the granting of a compulsory licence;¹⁰⁹ raising prices above an exclusionary level;¹¹⁰ and other forms of compulsory dealing.¹¹¹

Meanwhile, negative obligations have included unbundling products¹¹² and bringing rebates conditioned on exclusivity to an end.¹¹³

104 Case AT.39759, *ARA foreclosure*, Commission decision of 20 September 2016 (*ARA foreclosure*).

105 See Article 5(4) TFEU and case C-441/07 P, *Alrosa*, judgment of 29 June 2010, EU:C:2010:377 (*Alrosa*), Paragraph 36; see also Commission Notice on Best Practices for the Conduct of Proceedings concerning Article 101 and 102 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 Court of Justice has confirmed that these principles apply both to remedies imposed under Article 7 and remedies voluntarily offered under Article 9. See *Alrosa*, Paragraph 36.

106 Case T-24/90, *Automec*, judgment of 18 September 1992, EU:T:1992:97, Paragraph 52; case T-167/08, *Microsoft*, judgment of 27 June 2012, EU:T:2012:323, Paragraph 95; and case T-69/89, *RTE*, judgment of 10 July 1991, EU:T:1991:39, Paragraph 98.

107 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.’

108 Joined cases 6 and 7/73, *Commercial Solvents*, judgment of 6 March 1974, EU:C:1974:18, Paragraph 45.

109 Case C-238/87, *Volvo v. Erik Veng (UK)*, judgment of 5 October 1988, EU:C:1988:477.

110 Case COMP/38.233, *Wanadoo*, Commission decision of 16 July 2003.

111 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.

112 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.

113 Case COMP/37.990, *Intel*, Commission decision of 13 May 2009.

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'.¹¹⁴ In *ENI*, the Commission identified concerns with regard to conduct by ENI that result from its ownership of strategic natural gas pipeline infrastructure.¹¹⁵ ENI offered to divest its stake in its international transport businesses and, as a result, 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'.¹¹⁶

VI PROCEDURE

The procedural rules for the conduct of Commission investigations are laid out in Regulation 1/2003 and the Commission's Implementing Regulation.¹¹⁷ 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.¹¹⁸ 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 or on its own initiative. Sector inquiries can also provide the impetus for investigations.
- b* The Commission's primary instrument of investigation is issuing 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.¹¹⁹
- d* After considering the evidence, the Commission will decide whether to close proceedings, enter commitment discussions or issue a statement of objections (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.

114 Recital 12 of Regulation 1/2003.

115 Case COMP/39.315, *ENI*, Commission decision of 29 September 2010.

116 *ibid.*, Paragraph 89.

117 Commission Regulation EC No. 773/2004 of April 2004 on the conduct of proceedings pursuant to Articles 81 and 82 of the EC Treaty.

118 DG Competition Antitrust Manual of Procedures: Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012.

119 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*, judgment of 14 September 2010, EU:C:2010:512.

- f Following the defendant's reply to the SO, and a possible oral hearing, the Commission will proceed to a decision (this may occur only after a number of supplementary SOs or letter of facts that seek to bolster the Commission's initial charges). An adverse decision can be appealed to the General Court on both points of fact and law, and from there to the Court of Justice on points of law only.

Commission proceedings can 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 response. 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. Regulation 1/2003 also makes clear that commitments are not appropriate if the conduct at issue is not sufficiently serious to warrant a fine.

In addition, the Commission can settle cases with companies under investigation. This involves the company admitting liability in exchange for a fine reduction. Traditionally, this procedural mechanism has been limited to cartels, but in the *ARA* case, the Commission employed the settlement mechanism for the first time, rewarding *ARA* with a 30 per cent fine reduction in exchange for admitting liability.¹²⁰

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.¹²¹ The Commission aims to encourage and facilitate such actions. To this end, it published a proposal for a Directive on private damages actions in 2013, which was signed into law on 26 November 2014¹²² together with a practical guide on quantifying harm resulting from competition infringements,¹²³ and a recommendation for collective redress mechanisms in Member States.¹²⁴ The Directive's stated aim is to optimise

120 *ARA foreclosure*.

121 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', *Competition Policy International* (2008) 4(2); M Siragusa, *EU Competition Law – Cartels and Horizontal Agreements* (Interleuvenlaan: Leuven Claeys & Casteels, 2012), Paragraph 4.226 et seq.; and J Temple Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties Under European Antitrust Law', Fordham Antitrust Conference, September 2005.

122 Directive 2014/104/EU 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, 26 November 2014.

123 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.

124 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.

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, the joint and several liability of infringers, and the passing-on of damages as a possible defence.

VIII FUTURE DEVELOPMENTS

We identify the following trends to watch out for in the coming year.

First, on announcing that interim measures will be imposed on Broadcom in October 2019, Commissioner Vestager emphasised that interim measures are ‘so important’ in ‘fast-moving markets’ as a tool to uphold competition rules in a ‘fast and effective manner’. She highlighted her commitment to ‘making the best possible use of this important tool’.¹²⁵ The push for a greater use of interim measures has been encouraged by national competition authorities.¹²⁶ We can, therefore, expect to see an increase in the use of interim measures.

Second, Commissioner Vestager has been appointed to a second term, and has taken on an additional role as Executive Vice President of the Commission for a Europe fit for the Digital Age. Commissioner Vestager has been given mandates to coordinate Europe’s strategy on data and strengthen competition enforcement,¹²⁷ and we may see a continued focus on digital markets. On 24 April 2020, the Commissioner stated that she is considering a range of different strategies to address perceived competition problems in the digital sector, including: (1) developing *ex ante* regulation of digital platforms; (2) introducing a market study regime (similar to that employed by the UK Competition and Markets Authority); (3) swifter intervention in fast-moving markets; and (4) possible reversal of the burden of proof in certain situations (although the Commissioner recognised that this last proposal would likely require legislative changes).¹²⁸

Third, shortly before this publication went to press, the covid-19 pandemic struck. The pandemic has created unprecedented challenges for businesses and antitrust agencies. Firms have to grapple with spikes in demand and price volatility for certain goods, and antitrust agencies have placed some cases on the backburner as they prioritise addressing

125 European Commission, ‘Statement by Commissioner Vestager on Commission decision to impose interim measures on Broadcom in TV and modem chipset markets’, 16 October 2019.

126 In Germany, the government has proposed changing the law to make it easier to use interim measures. Instead of requiring a *prima facie* finding of an infringement, the government proposes a lower standard of whether it is more likely than not that an infringement will be established in the main proceedings when the interim measure is adopted. See R Podszun and F Brauckmann, ‘Germany’s Pressing Ahead: The Proposal for a Reformed Competition Act’, Competition Policy International, 6 November 2019. See also the UK Competition & Markets Authority’s letter to the Secretary of State for BEIS, 21 February 2019, pp. 7-8: ‘[interim] measures, or something similar, will be essential if the CMA is to respond to the challenges thrown up by rapidly changing markets, and to do so sufficiently quickly to prevent irreversible harm to consumer trust’.

127 See the President of the European Commission’s letter to M Vestager, ‘Executive Vice-President for A Europe fit for the Digital Age’, 1 December 2019.

128 See C Conner, ‘Vestager: EU may introduce competition rules for “digital gatekeepers”’, Global Competition Review, 24 April 2020.

issues such as allegations of price gouging. The European Competition Network has issued a joint statement identifying excessive pricing as a particular concern, and task forces have been set up in various Member States to investigate price inflation on important goods.¹²⁹ Besides increased vigilance in the area of excessive pricing, antitrust agencies may become more active in investigating allegations of predatory pricing and discriminatory allocation of scarce supplies by firms. Large digital platforms remain on the agenda for investigations by antitrust agencies. The Commission has stated that platform investigations are not placed on the back burner, but may take longer.¹³⁰

Finally, the Commission has several ongoing investigations, including: (1) an investigation launched in 2017 into Aspen Pharmacare's alleged imposition of unfair and excessive price increases for certain medicinal products in Member States (except Italy); (2) an investigation launched in 2018 to assess whether Qatar Petroleum's agreements for the supply of LNG into the EEA contain territorial restrictions; and (3) an investigation launched in 2020 into Amazon's use of data from independent retailers. The Commission is also considering a complaint by Spotify against Apple in relation to Apple's App Store, and is looking into Google and Facebook's data-gathering practices.

129 See, for example, Cleary Gottlieb's alert memorandum, "Exploitative Abuse of Dominance and Price Gouging" in *Times of Crisis Antitrust & Covid-19*, 31 March 2020.

130 See 'Tech probes not on "back burner" due to Covid-19, EU Kramler says', *MLex*, 29 April 2020.

FINLAND

*Jussi Nieminen and Kiti Karvinen*¹

I INTRODUCTION

The abuse of a dominant position is prohibited under 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 a dominant undertaking to terminate an unlawful conduct or resolve a 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 concepts of dominance and abuse thereof are, with minor exceptions, similar to those found in the EU competition rules. When an 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 on abuses of dominance have been issued by the FCCA; however, the guidelines on the assessment of the amount of fine⁵ and guidelines on prioritisation⁶ are relevant to abuse of dominance cases.⁷ In addition, the FCCA's brochure on the inspection of business premises is relevant also to abuse of dominance cases.⁸

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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.

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 Brochure on the inspection of business premises under Section 35 of the Competition Act (2017).

II YEAR IN REVIEW

Based on published data, the FCCA decided not to investigate or not to take an action in all the abuse of dominance cases decided in 2019. All of the investigations were concluded with a decision not to take an action since the FCCA did not find evidence of a restriction of competition.

In February 2019, the FCCA gave its decision in one of the most significant and complex dominance matters ever investigated by the FCCA, where it concluded the investigation into the OP Financial Group's bonus scheme.⁹ Between 2015 and 2018, the FCCA conducted an extensive economic and legal analysis related to OP's customer bonus scheme but found no evidence to support the alleged abuse of dominance. The case was initiated in 2015 based on a request for action made by a competing undertaking, If P&C Insurance Ltd. The essential claim by If was that OP was abusing its dominant position by tying retail banking services and nonlife insurance services together through the bonus scheme. OP grants its owner-customers a 0.25 per cent bonus on the total amount of banking, asset management and insurance services used. OP's service fees are relatively low, due to which a significant part of the obtained customer bonuses are used for insurance payments.

The FCCA completed the investigation as it did not find evidence that the bonus scheme would significantly restrict competition in the non-life insurance market to the detriment of consumers and closed the investigation without imposing any fines on OP. The FCCA left open the question whether OP was dominant in the first place but concluded that its investigations did not even support the contention that OP's bonus scheme could constitute abuse of a dominant position.

The other prioritisation 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.

The administrative courts did not adjudicate any cases related to abuse of dominance in 2019.

The District Court of Helsinki ordered competition damages of approximately €8 million in total with penalty interest to be paid by the Finnish dairy company *Valio* to two small local dairies on 18 June 2019. The case concerned follow-on competition damages relating to the decision of the Supreme Administrative Court of Finland in December 2016 regarding abuse of dominance. The *Valio* case is further discussed in Section VII.

The amended Competition Act entered into force in June 2019. As regards the abuse of dominance, the Competition Act now includes an additional ground for prioritisation of the FCCA's cases. The FCCA can take into consideration the significance of a competitive restraint as a ground for prioritisation. Other amendments relate, inter alia, to the inspection powers of the FCCA and information exchange between certain authorities notwithstanding the confidentiality regulations.

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 legislative materials that the definition of markets is an economic-based factual matter that may be

⁹ FCCA Decision No. 1015/KKV14.00.00/2015, *OP Financial Group*.

determined by, for example, conducting a market survey.¹⁰ 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.

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 EU competition law.¹¹

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.¹² 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.¹³

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 owner banks had joint dominance in the cash-dispensing market in Finland.¹⁴ 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 owner 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. In another more recent *Automatia* case, which concerned the real-time payment markets in Finland, the FCCA took a similar preliminary view. In its preliminary assessment, the FCCA stated that Automatia and its

10 Government Proposal 148/1987, p. 18.

11 Government Proposal 148/1987, p. 18.

12 Government Proposal 197/2012, p. 20.

13 FCCA Newsletter 26 March 2014.

14 FCCA Decision No. 964/61/2007, *Nordea Pankki Suomi Oyj, OP-Keskus cooperative and Sampo Pankki Oyj*.

owner banks had a structural, economic and ownership-based link and a market position where they could influence the market in a harmful manner and abuse the market power of their joint venture without significantly or immediately losing market shares to competitors. However, this case was also closed with a commitment decision.¹⁵

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

Exclusionary 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 *Akzo* judgment.¹⁶

In *Valio*,¹⁷ the Supreme Administrative Court found that the Finnish dairy company Valio had abused its dominant position by engaging in predatory pricing in the fresh milk market. The Supreme Administrative Court upheld the Market Court's decision to impose a €70 million fine on the company and found that Valio had abused its dominant position in the Finnish fresh milk market. A central issue in the case was 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 disagreed with the view to consider the cost of raw milk as a variable cost. The Court, however, held that the relevant average fresh milk prices of Valio were below the company's average variable costs between 1 March 2010 and 20 December 2012, and that application of such prices generally indicates predatory pricing.

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

15 FCCA Decision No. 1469/14.00.00/2015, *Automatia Pankkiautomaatit Oy*.

16 Decision of the Supreme Administrative Court, KHO:2016:221, *Valio Oy* and Market Court Decision No. 458/12/KR and 36/13/KR, *Valio Oy*.

17 *ibid.*

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

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 asymmetric digital subscriber line (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

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*.

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*.

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 (the Finnish number service) €90,000 for 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 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 from 2009 to 2011. The FCCA closed its investigations by stating that the average price level of the district heating companies was high compared with the profitability and risk level of their 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

24 Supreme Administrative Court Decision No. 2474/2/08, *Lännen Puhelin Oy*.

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.

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.

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 Supreme Administrative Court upheld the Market Court's decision to impose 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 Supreme Administrative Court and Market Court took into account, inter alia, the 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 decision³⁰ to comply with the FCCA's order. The FCCA may also oblige an undertaking to deliver a product to another undertaking on conditions similar to those that it offers others in a similar position. In addition, 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 (however, see Section VIII).

28 FCCA Fining Guidelines, p. 6.

29 Decision of the Supreme Administrative Court, KHO:2016:221, *Valio Oy*.

30 Market Court Decision No. 36/13/KR, *Valio Oy*.

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 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: 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; competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement; the complaint in the matter is manifestly unjustified; it is unlikely that an operating model or operating structure specified in Section 30a of the Competition Act will have a major impact on the conditions for healthy and functional competition; and it cannot be deemed likely that the suspected infringement would significantly impact on conditions for healthy and functional competition.

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 closing non-significant cases, and 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 an 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.

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 2017 to 2019.

The FCCA also gathers information by conducting inspections. These inspections may be announced, or they 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 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. The amended Competition Act allows the FCCA to make working copies of the investigated material and continue the investigation later in its own premises. The investigative powers of the FCCA will apply irrespective of the storage medium, which means that mobile phones and tablets used for private purposes may also now be subject to inspection. 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 the third-party service providers at the expense of the company subject to inspection and regardless of location of the outsourced information. In 2017, the FCCA published a brochure on the inspection of business premises under Section 35 of the Competition Act.

The rights of defence of an undertaking subject to proceedings, including the right to be informed about an ongoing 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 decision³⁴ 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.

A 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 reinitiate 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 that 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.

34 A proposal to the Market Court to impose a fine is not considered an administrative decision of the FCCA.

Actions for damages based on an infringement of competition law are covered by the Act on Actions for Antitrust Damages,³⁵ which entered into force on 26 December 2016.³⁶

Section 2 of the Act provides the right for damages to anyone who has suffered damage from an infringement regardless of whether the relationship is contractual or non-contractual. The liability to compensate the damage is joint and several. Joint and several liability of immunity recipients and small and medium-sized enterprises is, however, limited.

Collective actions are available but only to a limited extent in disputes between consumers and undertakings under the Act on Class Actions.³⁷ 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 *Asphalt cartel* and *Raw wood* cases, however, which involved numerous plaintiffs, practices that resemble those of collective actions were adopted. In these cases, the court 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. In general, a claimant's burden of proof is easier to meet in a follow-on case than in a stand-alone case. As of 26 December 2016, a final administrative decision concerning an infringement of competition law has a binding effect on the civil court.

On 18 June 2019, the District Court of Helsinki ordered competition damages of approximately €8 million in total with penalty interest to be paid by the Finnish dairy company Valio Oy to two small local dairies.³⁸ The case concerned follow-on competition damages relating to the decision of the Supreme Administrative Court of Finland in December 2016 regarding abuse of dominance in the Finnish fresh milk market during 2010–2012. According to the District Court of Helsinki, Valio's predatory intent could be directly based on the decision of the Supreme Administrative Court as the principle of efficiency could be breached if the claimants would have to give evidence on Valio's predatory intent in a follow-on competition damages case. However, the District Court of Helsinki found the claimants' damages claims too extensive and rejected the claimants' claim from the part that regarded the lost opportunity interest. The District Court was also of the view that the penalty interest is usually sufficient for covering additional financing costs, if any, of the damaged party. The parties did not appeal against the decision, and, thus, the judgment is final.

In Finland, only single damages can be awarded, and the damages law doctrine relies heavily on the principle of non-enrichment. Compensation covers both direct and indirect economic damage, inter alia, compensation of costs, price difference or lost profits.³⁹ Compensation also includes interest; in practice, penal and return interest may form a significant part of the compensation.

The burden of proof is reversed with respect to cartels; a cartel is expected to have caused damage unless proven otherwise by the defendant. Unlike in cartel damages cases, there is no legal assumption of damage in Finland in cases concerning the abuse of dominance, and

35 1077/2016. The Act implements the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

36 If the infringement occurred prior to 26 December 2016, the repealed Section 20 of the Competition Act or other applicable laws apply to the right for damages and liability thereof.

37 444/2007.

38 Decision of the District Court of Helsinki, L14/54043 and L14/54056, 19 June 2019.

39 See Government Proposal 83/2016.

the claimant bears the burden of proof of damage.⁴⁰ 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 the 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 was made. This means that there is no liability for indirect damage or consequential loss.⁴¹ Contributory negligence on the part of the injured party may also 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 10 of the Act on Actions for Antitrust Damages, the right to claim compensation expires if the action has not been instituted within five years of the date when a claimant has become aware, or should have become aware, of the infringement, the damage and the party responsible. The five-year limitation period is, however, suspended for the duration of an investigation by the competition authorities, until one year has elapsed from the issuance of a binding decision, as well as for the duration of settlement negotiations. The right to damages is not, however, time-barred if proceedings are brought within one year of the issuance of a binding decision, or within 10 years of the day of infringement of the competition law or the end of a continued infringement.

VIII FUTURE DEVELOPMENTS

The FCCA has indicated that it will focus on removing structural restraints on competition, and on discriminating and binding practices aimed at foreclosing competitors from a market.⁴² The FCCA's 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 assessments in the future, which can already be seen in the *OP Financial Group* case resolved in February 2019.⁴³

The importance and effectiveness of private enforcement is expected to increase in Finland, both through the landmark judgments in the *Asphalt cartel* case and the *Raw wood* case, as well as through the Act on Actions for Antitrust Damages.

40 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.

41 Government Proposal 88/2010, p. 66.

42 The operational and financial agreement for 2019 to 2022 between the Ministry of Employment and Economy and the FCCA, p. 2.

43 FCCA Decision No. 015/KKV14.00.00/2015, *OP Financial Group*.

In March 2017, the Ministry of Employment and Economy published a report of the working group on reforming the Competition Act.⁴⁴ The amended Competition Act entered into force in June 2019.⁴⁵ Some of the amendments proposed by the working group, such as the possibility of structural remedies as a consequence of an abuse of dominant position, were left out of this amendment owing to the forthcoming legislative process of the directive to make national competition authorities more effective enforcers (ECN+ Directive). A working group is currently drafting a report regarding the implementation of the ECN+ Directive, and government proposal is expected to be given in September 2020.

⁴⁴ Ministry of Employment and Economy's Publication, Competition and Consumers 16/2017.

⁴⁵ Government Proposal 68/2018, 24 May 2018.

FRANCE

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I INTRODUCTION

In addition to Article 102 of the Treaty on the Functioning of the European Union (TFEU), French law provides for specific rules applicable to dominant firms. Article L420-2 of the French Commercial Code provides for the prohibition of abuses of a dominant position, as well as abuses of economic dependence. A dominant position is defined based on a relevant market whereas a situation of economic dependence is defined with regard to a trading partner. Article L420-4 of the Commercial Code provides for a possible exemption from the prohibition of Article L420-2 when the practices at stake result from a regulation or if they have the effect of achieving economic progress – including creating and maintaining employment – while reserving for consumers a fair share of the resulting benefits and without allowing an undertaking to eliminate competition in respect of a substantial part of the products in question. The exemption is rarely applied in practice. Another relevant provision is Article L420-5 of the Commercial Code, which prohibits abusively low prices to consumers. Abusively low pricing, as defined by Article L420-5, 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 L420-5 has only been applied in rare cases.

The French Competition Authority (FCA) has jurisdiction over abuses of dominance practices. As an independent administrative body, 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 L420-2 of the Commercial Code. The European Commission's guidance on Article 102 TFEU (formerly Article 82 of the EC Treaty), however, provides useful indications as to how Article L420-2 is applied in France.² French judges can also directly apply the relevant provisions of the Commercial Code concerning abuses of dominance or abuses of economic dependence in the context of civil or commercial litigation.

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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, p. 7. See also the European Union chapter.

II YEAR IN REVIEW

In 2019, the FCA issued nine decisions on the basis of Article L420-2 of the Commercial Code (and none on the basis of Article L420-5 of the Commercial Code). The FCA imposed a fine in only one case in 2019, which amounted to a total of €150 million, along with several injunctions.³ The FCA did not accept any commitment in 2019, but it has already done so once in early 2020.⁴ The FCA rejected one claim in 2019 at a preliminary stage for lack of jurisdiction,⁵ and two cases for lack of evidence.⁶ The FCA dismissed four other cases following an investigation on the merits.⁷ The FCA imposed interim measures on Google in one case in early 2019⁸ and did so again in early 2020.⁹

The most noteworthy decisions and rulings of 2019 are the following.

In *Janssen-Cilag*,¹⁰ the Paris Court of Appeal partially quashed the €25 million fine imposed by the FCA on Janssen-Cilag in December 2017. The FCA had found that Janssen-Cilag abused its dominant position by hindering the development of the generic versions of its Durogesic drug in France following the expiry of the patent protection for Fentanyl.¹¹ In its ruling of July 2019, the Court first confirmed that the FCA had jurisdiction to assess Janssen-Cilag's conduct before an independent regulatory authority, the French National Agency for the Safety of Medicines and Health Products (AFSSAPS, later named ANSM). The Court noted that the FCA did not intrude in the scientific debate on Durogesic's generic drugs. The FCA had rather carried out a legal analysis assessing whether Janssen-Cilag's conduct sought to preserve its dominant position, an analysis which was within the scope of the FCA's jurisdiction. Second, the Court of Appeal confirmed that Janssen-Cilag's conduct

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- 3 FCA Decision No. 19-D-26 of 19 December 2019 concerning practices implemented in the search online advertising sector. An appeal is pending before the Paris Court of Appeal. In early 2020, the FCA also imposed a €1.1 billion fine on Apple in FCA Decision No. 20-D-04 of 16 March 2020 concerning practices implemented in relation to the distribution of Apple products, including an abuse of economic dependence (this Decision has not yet been published on the FCA's website) and a €900,000 fine on PMU in FCA Decision No. 20-D-07 of 7 April 2020 for failing to comply with the commitments set out in FCA Decision No. 14-D-04 of 25 February 2014 concerning practices in the online horse betting sector.
 - 4 FCA Decision No. 20-D-06 of 2 April 2020 concerning practices implemented in the parcel delivery sector.
 - 5 FCA Decision No. 19-D-22 of 22 November 2019 concerning practices implemented in the coach passenger transport sector.
 - 6 FCA Decisions Nos. 19-D-03 of 16 January 2019 concerning practices implemented in the cross-Channel transport of day-old chicks and 19-D-04 of 21 February 2019 concerning practices implemented in the field of online air ticket booking services.
 - 7 FCA Decisions Nos. 19-D-07 of 25 April 2019 concerning practices implemented in the television advertising sector, 19-D-16 of 24 July 2019 concerning practices implemented in the fuel sector in La Reunion Island, an appeal is pending before the Paris Court of Appeal; 19-D-18 of 31 July 2019 concerning practices implemented in the bank card payment sector and 19-D-23 of 10 December 2019 concerning practices implemented in the online hotel booking industry.
 - 8 FCA Decision No. 19-MC-01 of 31 January 2019 concerning a request for interim measures from Amadeus, partially annulled by the Paris Court of Appeal on 4 April 2019.
 - 9 FCA Decision No. 20-MC-01 of 9 April 2020 concerning requests for interim measures submitted by the *Syndicat des éditeurs de la presse magazine*, the *Alliance de la presse d'information générale* and others, and *Agence France-Presse*.
 - 10 Paris Court of Appeal, 11 July 2019, *Janssen-Cilag*.
 - 11 FCA Decision No. 17-D-25 of 20 December 2017 concerning practices implemented in the sector of transdermal systems of Fentanyl. An appeal is pending before the French Supreme Court.

amounted to an abuse of dominance. The Court held that the FCA rightfully found that Janssen-Cilag abused its dominant position by challenging the qualification of a competitor's (Ratiopharm's) drug as a generic before the AFSSAPS while (1) the European Commission had already settled this point, and the AFSSAPS was bound by this determination, and (2) reopening the discussions with the AFSSAPS would likely delay the generic's registration on the French repertoire of generic drugs thereby reducing competition on the market. Further, the Court confirmed that Janssen-Cilag denigrated Ratiopharm's generic by carrying out a campaign vis-à-vis pharmacists. Janssen-Cilag had falsely claimed that the AFSSAPS was not convinced by Ratiopharm's drug qualification as a generic and that the generic could not replace the Durogesic without risk. Nevertheless, the Court reduced the fine as it held that the FCA incorrectly found that Janssen-Cilag's intervention delayed the issuance of AFSSAPS' market authorisation. Instead, Janssen-Cilag's intervention aimed at delaying the registration of the generic on the French repertoire of generic drugs. While this hindered pharmacists from prescribing the generic for patients using Durogesic, it did not prevent the generic from being marketed. As a result, the Court found that the damage to the economy was less serious than found by the FCA and reduced the fine to €21 million. An appeal against the Court's ruling is now pending before the French Supreme Court.

In *Sanicorse*,¹² the Paris Court of Appeal annulled the FCA decision of September 2018 imposing a €199,000 fine on Sanicorse for abusing its dominant position through the imposition of excessive price increases. The FCA had found that Sanicorse, the only infectious medical waste treatment company in Corsica, had abruptly, significantly, and durably increased the waste disposal prices it charged hospitals and clinics in Corsica between 2011 and 2015 without any objective justification.¹³ The FCA had concluded that Sanicorse had imposed unfair trading conditions on healthcare establishments. In its ruling of November 2019, the Paris Court of Appeal clarified the conditions for establishing an exploitative abuse. Relying on the landmark *United Brands* ruling, the Court found that an exploitative abuse arises in a situation where a dominant firm 'has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'.¹⁴ The Court of Appeal made clear that two conditions must, therefore, be met for the FCA to conclude that trading conditions imposed by a dominant firm are unfair: (1) it must be the undertaking's dominant position which enabled it to obtain the trading advantages concerned; and (2) the advantages obtained must be objectively unfair, having regard to all the circumstances of the case. The Court of Appeal concluded that the FCA failed to demonstrate that the second condition was met as it did not demonstrate that Sanicorse's price increases were objectively unfair. The Court of Appeal annulled the FCA decision. The FCA is currently challenging this decision before the French Supreme Court.

The FCA established another exploitative abuse based on the unfair trading conditions theory in late 2019 in *Gibmedia*.¹⁵ The FCA imposed on Google its second largest fine for an abuse of dominance, as well as a series of injunctions relating to the Google Ads advertising

12 Paris Court of Appeal, 14 November 2019, *Sanicorse*.

13 FCA Decision No. 18-D-17 of 20 September 2018 concerning practices implemented in the infectious medical waste management sector in Corsica. An appeal is pending before the French Supreme Court.

14 Case C-27/76, *United Brands*, Court of Justice judgment of 14 February 1978, Paragraph 249.

15 FCA Decision No. 19-D-26, see footnote 3.

platform.¹⁶ The decision follows a complaint filed by Gibmedia, an advertiser whose Google Ads account was suspended in 2015, for having violated the policies applied by Google on its advertising platform. The FCA rejected Gibmedia's request for interim measures but decided to continue the investigation on the merits.¹⁷ The FCA found that Google abused its dominant position on the online search advertising market between July 2012 and October 2018 by defining and implementing its Google Ads policies in a non-objective, non-transparent and discriminatory manner. In legal terms, it found that the definition and implementation of the policies were unfair under Article 102(a) TFEU. The FCA, therefore, imposed a fine of €150 million on Google and several injunctions that will have to remain in force until 1 January 2025. These injunctions cover (1) the clarification of the Google Ads Policies, (2) the application of the Google Ads account suspension procedures, (3) several measures to prevent, detect, and treat violations of the Google Ads Policies, and (4) the publication of a summary of the decision. An appeal against the decision is currently pending before the Paris Court of Appeal.

III MARKET DEFINITION AND MARKET POWER

Under French law, as under EU law, regulators and judges must typically start their analysis by defining the relevant markets where the alleged practices took place. They then analyse whether a situation of dominance (single or collective dominance) or of 'economic dependence' can be established in the relevant market before assessing 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 substitution, the FCA takes into account the nature and use of a 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 are available, the FCA may also use quantitative techniques such as cross-elasticity of demand to delineate product markets.

In situations where there are complementary products (e.g., hardware and consumables or maintenance services), the FCA determines, based on a combination of qualitative and quantitative criteria, whether a single market exists for both or whether the products form distinct product markets. In *Nespresso*,¹⁸ the FCA defined a primary market for espresso pod coffee machines, and a distinct secondary market composed only of coffee capsules compatible with Nespresso coffee machines. The FCA found that espresso pod coffee machines and coffee capsules did not belong to the same product market because coffee machines and

¹⁶ The FCA had already investigated complaints from Google Ads advertisers in the past, but those complaints never resulted in an infringement decision. In *NavX*, the FCA imposed interim measures and then accepted commitments (FCA Decisions Nos. 10-MC-01 of 30 June 2010 concerning the practices of Google in the online advertising sector and 10-D-30 of 28 October 2010 concerning the practices of Google in the online advertising sector). In *E-Kanopi*, the FCA dismissed the complaint filed by E-Kanopi (FCA Decision No. 13-D-07 of 28 February 2013, upheld by the Paris Court of Appeal on 24 June 2014 and by the Supreme Court on 19 January 2016, No. 14-21.670).

¹⁷ FCA Decision No. 15-D-13 of 9 September 2015 concerning a request for interim measures filed by Gibmedia.

¹⁸ FCA Decision No. 14-D-09 of 4 September 2014 concerning practices in the espresso coffee machines sector.

coffee capsules are not necessarily bought simultaneously or at the same shops and are not manufactured and marketed by the same firms. In addition, a Nespresso internal document considered that the two products were separate. The FCA also found that the secondary market could be narrowly defined as only including coffee capsules compatible with Nespresso machines because users of Nespresso machines were not in a position to use any other kind of capsule. Conversely, in *Photocopiers*,¹⁹ pursuant to the *Pelikan v. Kyocera* EU case law,²⁰ the FCA refused to define a separate secondary market for the maintenance of photocopiers. The FCA found that when buying photocopiers, purchasers also take into account the price of maintenance services. The FCA further found that the intense competition at the primary level and the short life cycle of photocopiers (three to five years) exerted a sufficient competitive constraint on the conditions of maintenance services at the secondary level. The FCA applied the same reasoning in *IT Maintenance*²¹ where it refused to identify a secondary maintenance market in all cases where maintenance contracts are purchased alongside a server or storage system, given that customers take into account maintenance conditions when purchasing a server or a storage system and the primary market for servers and storage systems is very competitive.

Supply-side substitution also constitutes a relevant criterion for market definition. In *Mobile Telephony*,²² the FCA found that each operator held a monopoly in the wholesale market for the termination of voice calls on its own network because of, inter alia, the lack of supply-side substitution, as only the terminating operator is capable of localising the recipient of the call. The Court of Appeal followed the same reasoning.²³

In *Gibmedia*,²⁴ the FCA defined a market for online search advertising based both on demand-side and supply-side substitution factors. The FCA first considered that online advertising is separate from offline advertising, in line with EU and French past case law.²⁵ The FCA further retained a narrower sub-segmentation within online advertising by distinguishing search advertising from non-search advertising. In particular, the FCA concluded that: (1) online search advertising is based on users' explicit requests on search engines which precisely indicate users' intentions and facilitate immediate online purchases; (2) in terms of format, online search advertising is mainly text-based, and advertising creation is less important and cheaper compared to other forms of online advertising; and (3) the structure

19 FCA Decision No. 16-D-29 of 19 December 2016 concerning practices implemented in the after-sales market of photocopiers.

20 Case No. IV/34.330, *Pelikan/Kyocera*, Commission decision of 22 September 1995. According to this case law, any dominant position on the secondary market for the sale of consumables or services of an operator active on the market for primary goods may be ruled out if adequate competition is shown to exist in the primary market and if the primary and secondary markets are closely associated in the eyes of customers at the time of their purchasing decision.

21 FCA Decision No. 18-D-10 of 27 June 2018 concerning practices implemented in the IT maintenance sector.

22 FCA Decision No. 12-D-24 of 13 December 2012 concerning practices in the mobile telephony sector.

23 Paris Court of Appeal, 19 May 2016, *Mobile Telephony*, upheld by French Supreme Court, 5 April 2018, Nos 16-19.186 and 16-19.274.

24 FCA Decision No. 19-D-26, see footnote 3.

25 Cases Nos. M.8180, *Verizon/Yahoo*, Commission decision of 21 December 2016; M.7217, *Facebook/Whatsapp*, Commission decision of 3 October 2014; M.5727, *Yahoo Search Business*, Commission decision of 18 February 2010; M.4731, *Google/DoubleClick*, Commission decision of 11 March 2008; FCA Decision No. 10-MC-01, see footnote 16; FCA Opinion No. 10-A-29 of 14 December 2010 on the online advertising sector.

of the online search advertising market gave rise to significant supply-side specificities given that there are fewer suppliers and substantial barriers to entry and expansion (e.g., suppliers first need to develop a general search engine and significantly invest in technologies dedicated to the provision of search advertising).

As regards the geographic dimension of the market, the FCA typically determines the area where the conditions of competition are homogeneous. The FCA also analyses, for example, the applicable legal framework, transportation costs, logistical constraints and the way tenders are structured to delineate geographic markets. In *Termite Traps*,²⁶ the insular nature of the department of Réunion Island led the FCA to limit the relevant market to that department alone. In *Gibmedia*,²⁷ the FCA found that the online search advertising market had a national dimension based on: (1) the linguistic barriers (as online search ads are mainly text-based and, therefore, displayed in different languages); (2) Google's commercial organisation, which has dedicated teams in charge of advertisers depending on their geographic location; and (3) the different legal frameworks applicable in the various countries.

The FCA also uses the 'small but significant and non-transitory increase in price' test approach to define geographic markets (i.e., the relevant geographic market is defined as the area in which a hypothetical monopolist can use its market power, for example, to raise prices profitably without being constrained by other players located in other areas).²⁸

ii Single dominance

Dominance is achieved when a company can determine its pricing policy in the relevant market independently from its competitors and customers.²⁹ The FCA typically considers that market shares above 50 per cent are a strong indicator of market power.

To establish single dominance, the FCA also examines the following criteria in addition to market shares:

- a* the countervailing market power of competitors;
- b* the intensity of competition on the market;
- c* the existence of potential new entrants; and
- d* the specific advantages of the leading firm (e.g., brands, organisation, better products or services).

In *Pet Food*,³⁰ Royal Canin held a market share limited to 40 per cent. It was still considered to be a dominant player, because: (1) the second and third-largest competitors respectively held a 12 and 7 per cent market share; (2) Royal Canin had a very good brand image bolstered by high advertising expenses and regular contact with prescribers; and (3) the relevant market was one that presented high barriers to entry.

In *Gibmedia*,³¹ the FCA relied on Google's very high – and stable – market share on a restrictively defined online search advertising market (around 90 per cent according to the

26 FCA Decisions No. 18-D-03 of 20 February 2018 concerning practices implemented in the sector of the distribution of termite traps with biocide in Réunion Island, French Antilles and French Guiana.

27 FCA Decision No. 19-D-26, see footnote 3.

28 FCA Annual Report for 2011, p. 118.

29 FCA Decision No. 04-D-48 of 14 October 2004 concerning practices implemented by France Telecom, SFR Cegetel and Bouygues Telecom.

30 FCA Decision No. 05-D-32 of 22 June 2005 concerning practices in the pet food sector.

31 FCA Decision No. 19-D-26, see footnote 3.

FCA) to find that Google has an ‘extraordinary’ dominant position on this market. The FCA also emphasised the importance of barriers to entry given that: (1) new entrants need to undertake significant investments to develop, maintain and improve a general search engine and an advertising platform; and (2) there are significant network effects between online search advertising services and a general search engine. The FCA concluded that Google benefits from a competitive advantage that is hard to match for potential new entrants.

iii Collective dominance

Collective dominance may result from structural links between undertakings, whether capitalistic or contractual, from the market structure, or from both. In the absence of structural links, the FCA applies the cumulative *Airtours* criteria (i.e., oligopolistic market, significant market transparency, possibility to engage in retaliation and absence of countervailing power from the fringe players).³²

In *Saint-Pierre-et-Miquelon*,³³ 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 entering into an anticompetitive agreement and abusing their collective dominant position. In particular, the FCA found that four undertakings held a collective dominant position as:

- a they together held a market share in excess of 80 per cent in the relevant markets;
- b they had structural links through the operation of a common quarry and had adopted a common strategy;
- c deviation would be unlikely given their historical links;
- d entry barriers were high; and
- e there were no alternative competitors.³⁴

Although collective dominance cases are rare,³⁵ 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.

32 Case No. T-342/99, *Airtours*, General Court judgment of 6 June 2002.

33 FCA Decision No. 12-D-06 of 26 January 2012 concerning practices implemented in the civil engineering sector in Saint-Pierre-et-Miquelon.

34 In addition to FCA Decision No. 12-D-06 (see footnote 33), see FCA Decisions Nos. 05-D-49 of 28 July 2005 concerning practices in the sector of hiring maintenance for postage machines; and 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 Appeal with respect to collective dominance in a ruling of 15 April 2010.

35 The FCA also found in some circumstances that companies held a collective dominant position without finding any abuse (see, for instance, FCA Decisions No. 00-D-83 of 13 February 2001 concerning practices implemented during the 1998 Football World Cup, upheld by the Paris Court of Appeal on 30 October 2001 and by the French Supreme Court on 8 July 2003, No. 01-17.015; No. 06-D-02 of 20 February 2006 concerning practices in the roadworks sector for the manufacture of bituminous asphalt in the Ardennes department; and No. 06-D-18 of 28 June 2006 concerning practices implemented in the film advertising sector).

iv Economic dependence

An abuse of economic dependence is a specific infringement under French competition law, which has no equivalent in EU competition law. Pursuant to Article L420-2(2) of the Commercial Code, the exploitative abuse of economic dependence is prohibited when the FCA proves that three cumulative conditions are met: (1) a position of economic dependence towards a commercial partner exists; (2) the commercial partner abused of this situation, through anticompetitive practices; and (3) these practices are capable of affecting the functioning or structure of competition. This provision was originally drafted to protect suppliers from large retail chains (i.e., supermarkets), but is rarely applied in practice due to the high standard of proof that needs to be met, in particular to prove a position of ‘economic dependence’.

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. Both the FCA and the Paris Court of Appeal have established strict criteria for proving a position of economic dependence and examine the following four cumulative conditions:

- a* the commercial partner’s brand notoriety;
- b* the commercial partner’s market share;
- c* the commercial partner’s share in the turnover of the dependent company; and
- d* the possibility for the dependent company to find an alternative commercial partner.³⁶

Until recently, the FCA had only imposed a fine for abuse of economic dependence in three cases, more than 15 years ago.³⁷ However, the concept was revived in early 2020 in the *Apple* case.³⁸ The FCA found that Apple premium resellers (APRs) were in a position of economic dependence towards Apple. APRs are mostly small resellers specialising in the distribution of Apple products. The FCA noted in this regard that the contracts required the APRs’ purchases of Apple products to account for 70 per cent of their turnover, failing which they would lose their premium reseller status. APRs were also prohibited during the term and up to six months after the contract’s expiry from opening any shop specialising in the exclusive sale of a competing brand throughout Europe. The FCA found that Apple’s abusive practices consisted in particular in delays and cancellations of deliveries, discriminatory treatment, non-stable remuneration of the APR (discounts and outstanding credit lines) and a discretionary implementation of Apple’s terms. The FCA concluded that Apple’s practices abusively restricted the APRs’ commercial freedom, and placed them at a competitive disadvantage compared to Apple’s own distribution network.

36 Paris Court of Appeal, 4 May 2004, *CNPA v. Honda Motor ea*. See also FCA Decisions No. 14-D-07 of 23 July 2014 concerning practices implemented in the distribution of brown goods, upheld by the Paris Court of Appeal on 3 December 2015; No. 10-D-08 of 3 March 2010 concerning practices implemented by Carrefour in the general food retail sector; No. 04-D-26 of 30 June 2004 concerning implemented by Champagne Ardenne, upheld by the Paris Court of Appeal on 25 January 2005 and by the French Supreme Court on 28 February 2006, No. 05-12.138; No. 02-D-77 of 27 December 2002 concerning a complaint from Daniel Grenin SA; and No. 01-D-49 of 31 August 2001 concerning a complaint and a request for interim measures from Concurrence against Sony.

37 FCA Decisions Nos. 96-D-44 of 18 June 1996 concerning practices implemented in the advertising sector; 04-D-26 (see footnote 36) and 04-D-44 of 15 September 2004 concerning a claim brought by the Ciné-Théâtre du Lamentin in the film distribution and exploitation sector.

38 FCA Decision No. 20-D-04, see footnote 3.

IV ABUSE

i Overview

Article L420-2 of the Commercial Code specifically mentions a number of abuses, including refusal to supply or deal, tying, or discriminatory practices. However, the list is not exhaustive.

The FCA can find that a company's behaviour is abusive by object or by effect. In past cases, the FCA found that abusive conduct could be established even in the absence of an actual effect on the market. Attempts to abuse a dominant position may, thus, in certain cases also be challenged. In *SNCM*,³⁹ the Court found that a ferry line operator between Corsica and Marseilles abused its dominant position by submitting a bundled and indivisible offer (i.e., island-to-continent) to the call for tenders launched by the Corsican Transport Office, while its competitors submitted point-to-point (i.e., harbour-to-harbour) bids as required by the request for proposals. By doing so, SNCM did not allow the tendering authority to compare bids on a point-to-point basis, and allocate the contract between several ferry operators. Although the bidding procedure was ultimately declared void by the administrative courts and the practice thereby not having any effect, the FCA fined SNCM €300,000 for its attempted abuse of a dominant position. The FCA also considers that it does not need to establish anticompetitive effects for exploitative abuses, to the extent that the objective is to exploit customers, not to exclude competitors.⁴⁰

ii Exclusionary abuses

Predatory pricing

Predatory pricing is a pricing strategy whereby a dominant firm offers below-cost prices, thereby incurring losses or forgoing profits in the short term in order to eliminate actual or potential competition. The FCA relies on the EU *Akzo* test and considers that the following two situations create a presumption of predatory pricing:

- a* when the dominant company's prices are lower than the average variable costs (unless a company can convincingly explain that its behaviour did not result from a predatory strategy aimed at eliminating competitors); or
- b* 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.⁴¹

French authorities use a slightly stricter, economics-based, test compared to the European Commission's approach. In particular, the FCA has to show that there is a realistic possibility of the dominant player recouping its losses. This may explain why, to date, there has been no successful precedent of predatory pricing where the FCA imposed a fine.⁴² While

39 Paris Court of Appeal, 9 March 2010, *SNCM* confirming FCA Decision No. 09-D-04 concerning practices implemented in the maritime transport sector between Corsica and the mainland.

40 FCA Decision No. 19-D-26, see footnote 3, Paragraph 353.

41 See the European Union chapter.

42 In 2007, the FCA imposed a fine of €10 million on GSK for having applied predatory prices in relation to an injectable antibiotic called cefuroxime sodium sold by GSK under the name Zinnat in order to appear as an aggressive player and deter generic manufacturers from entering the market on which GSK held a dominant position through the sale of its injectable antiviral Zovirax (FCA Decision No. 07-D-09 of 14 March 2007 concerning practices implemented by GSK). However, this decision was annulled by the Paris Court of Appeal on the ground that the FCA had not established the necessary link between

predatory pricing concerns were raised by the FCA in several cases, the FCA's investigations were ultimately closed, or generally ended with injunctions or commitments taken by the dominant undertaking to remedy those concerns.⁴³

In *SNCF*,⁴⁴ the FCA held that the French rail operator pursued price-based exclusionary practices for its freight services activity by full-trainload because SNCF's prices, although higher than direct average variable costs, were lower than the costs that would be avoided over a three-year period if SNCF terminated its freight services activity by full-trainload. Although SNCF's pricing policy was not considered predatory, as the losses incurred by SNCF were sustainable and predated the opening-up of the sector to competition, the FCA nevertheless considered that it was abusive. The Paris Court of Appeal, however, overturned this part of the decision, considering that charging prices superior to average variable costs but inferior to average total costs could only be considered abusive based on evidence that the dominant firm had made specific plans to exclude competitors from the market.⁴⁵ The Court found that the FCA had not sufficiently established the existence of an exclusionary strategy. However, in a second judgment after the case was referred back by the Supreme Court,⁴⁶ the Paris Court of Appeal ultimately confirmed SNCF's abusive pricing policy. The Court held in particular that the FCA had applied a relevant cost test and had established the existence of an eviction strategy.⁴⁷

In *Bottin Cartographes*,⁴⁸ following an opinion by the FCA, the Paris Court of Appeal dismissed a predatory pricing claim against Google. Bottin Cartographes, a competitor of Google in online mapping services, claimed that offering mapping services free of charge constituted an abusive predatory strategy. However, the FCA,⁴⁹ as confirmed by the Court, reaffirmed that for multi-product companies, the predation test to be conducted is a modified *Akzo* test, where only the incremental cost attributable to a given product should be taken

GSK's behaviour on the non-dominated market for cefuroxime sodium and its dominant position on the injectable Zovirax market (Paris Court of Appeal, 8 April 2008, *GSK*). The French Supreme Court upheld the position of the Court of Appeal by noting that the assumption under which there is a link between the anticompetitive practice and the dominated market should not come into play when the prohibited practice is implemented in a market other than the dominated market (French Supreme Court, 17 March 2009, No. 08-14.503). In this case, the French Supreme Court recalled that there must be 'particular circumstances' establishing (a) that it was to strengthen its dominant position in a market that a company decided to implement a prohibited abusive practice in another market in which it has no dominant position; or (b) that the two concerned markets are so closely related that a company is placed in a situation comparable to that of holding a dominant position in the markets in question as a whole, which was not the case here.

43 See, in particular, FCA Decisions No. 17-D-16 of 7 September 2017 concerning practices implemented by Engie in the energy sector; No. 17-D-26 of 21 December 2017 concerning practices implemented in the collection and recycling of non-hazardous office waste; and No. 17-D-09 of 1 June 2017 concerning practices implemented by the National Institute of Preventive Archaeological Surveys in the preventive archaeology sector.

44 FCA Decision No. 12-D-25 of 18 December 2012 concerning practices implemented in the railway freight sector. A fine was imposed on SNCF but not in relation to the dominant company's pricing practices. An appeal is pending before the French Supreme Court.

45 Paris Court of Appeal, 6 November 2014, *SNCF*.

46 French Supreme Court, 22 November 2016, Nos. 14-28.224 and 14-28.862.

47 Paris Court of Appeal, 20 December 2018, *SNCF*. The Court, however, annulled one of the three injunctions ordered by the FCA upon the SNCF. An appeal is pending before the French Supreme Court.

48 Paris Court of Appeal, 25 November 2015, *Bottin Cartographes v. Google*.

49 FCA Opinion No. 14-A-18 of 16 December 2014 concerning a dispute between Bottin Cartographes and Google.

into account (to the exclusion of costs that are common to other products). In practice, average variable costs are to be replaced by average incremental costs, and average total costs by long-run average incremental costs. The FCA found that the relevant costs were those specifically associated with the allegedly abusive activity to the exclusion of common costs supported by Google in its capacity 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 in any event for its search engine activity). Conversely, 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 into account are those associated with all versions of the product. On this basis, the FCA and the Court of Appeal found 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 would have been impossible for Google to recoup the potential losses, and as such no predatory strategy could be found.

More recently, in *Vendée Sea Crossings*,⁵⁰ the FCA ended a 17-year predatory pricing saga involving a public provider of sea transport services, the *Régie départementale des passages d'eau de la Vendée* (RDPEV). The RDPEV is a state-owned entity operating maritime transport services between continental France and the Île d'Yeu in the Vendée region (western France) to the benefit of the local municipality. The service is provided as part of RDPEV's public service mission, except during the peak summer season where commercial transport services are offered in competition with private operators. In 2004, the FCA rejected a complaint from a competitor that claimed that the RDPEV abused its dominant position by offering commercial transport services at predatory prices.⁵¹ However, the FCA's decision was ultimately annulled by the Paris Court of Appeal in 2012,⁵² notably on the ground that the FCA did not correctly define the relevant costs to determine the existence of predatory prices (i.e., whether the common costs incurred for RDPEV's public service mission should

50 FCA Decision No. 18-D-07 of 31 May 2018 concerning practices implemented in the sector of maritime passenger crossing services between the mainland and the Island of Yeu.

51 FCA Decision No. 04-D-79 of 23 December 2004, relating to concerning practices implemented by the Régie départementale des passages d'eau de la Vendée (RDPEV).

52 In a first ruling of 28 June 2005, the Paris Court of Appeal dismissed the predatory pricing claim made by the same competitor, confirming, in particular, the scope of the relevant costs to be taken into account in determining the incremental costs (Paris Court of Appeal, 28 June 2005, *Vedettes Vendéennes*). The French Supreme Court, in June 2008, held, however, that the Court of Appeal should have examined whether the RDPEV could have avoided the costs linked with the operation of its summer fleet in order to carry out its public service mission (French Supreme Court, 17 June 2008, No.05-17.566). The case was thereby referred back to the Court of Appeal. Again in June 2009, the Court of Appeal confirmed the 2004 FCA decision by ruling that the RDPEV had not abused its dominant position since the traditional predatory pricing test could not be applied to the allegedly infringing company because of its public service mission (Paris Court of Appeal, 9 June 2009, *Vedettes Vendéennes*). The French Supreme Court, in July 2010, overruled the Court of Appeal and held that the standard competition law test for predatory pricing should be applied in the present case since the RDPEV, alongside its public service mission, also carries out competitive activities (French Supreme Court, 13 July 2010, No.09-67.439). The Court of Appeal, to which the case was then referred, ultimately overturned the 2004 FCA decision (Paris Court of Appeal, 20 December 2012, *Vedettes Vendéennes*). This follows several proceedings before the French jurisdictions, including two rulings of the Paris Court of Appeal on 28 June 2005 and 9 June 2009, and two annulment decisions of the French Supreme Court on 17 June 2008 (No. 05-17.566) and 13 July 2010 (No. 09-67.439).

be taken into account). In 2018, following a new investigation, the FCA again rejected the predatory pricing allegations. The FCA recalled that when implementing the *Akzo* test and save for exceptional circumstances, the costs to be taken into account are, in principle, those that are actually incurred by the dominant undertaking itself, not those incurred by potential or actual competitors of the dominant undertaking.⁵³ The FCA clearly identified incremental costs incurred by the RDPEV and compared the RDPEV's profits resulting from its commercial activity during the peak summer season with its average incremental costs. The latter are the costs that could have been avoided had the transporter not operated any competitive activity during the peak summer season (including salaries, fuel and other costs related to marketing services, but excluding the owner's insurance premiums and the major repairs). The FCA concluded that the transporter's profits resulting from its commercial activity during the peak summer season actually exceeded its incremental costs. In any event, the FCA noted that RDPEV's pricing practice did not lead to any foreclosure effect on competitors. Indeed, one of its competitors was still active and had actually opened a new transport line since 2001, while the two other competitors exited the market almost 15 years after the practices at stake.

Leveraging practices

Leveraging practices consist of a dominant firm taking advantage of its superior market position in a 'dominated' market to expand its position in another related market.

In *PMU I*,⁵⁴ the FCA expressed concerns that the French legal monopolist for offline horse race betting leveraged its position to exclude competitors from the competitive market for online horse race 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 would be a greater pool of debts. The FCA accepted commitments from PMU to stop pooling its online and offline bets, and that 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. In early 2020, in *PMU II*,⁵⁵ the FCA fined PMU €900,000 for breaching its commitments to separate its online and offline betting services regarding international horse races.

In *Passenger Transport*,⁵⁶ the FCA accepted the commitments offered by SNCF to prevent its subsidiary Keolis from leveraging SNCF's monopoly in the railway passenger transport market into the competitive market for the urban transport of passengers (i.e., bus, metro, tram). More specifically, the FCA was concerned that Keolis could rely on its parent company's railway expertise to submit bids that cannot be replicated by competitors for the supply of advice and technical assistance to urban transport operators. To alleviate

53 See, in this regard, Paris Court of Appeal, 12 October 2017, *Société TDF*.

54 FCA Decision No. 14-D-04, see footnote 3.

55 FCA Decision No. 20-D-07, see footnote 3.

56 FCA Decision No. 15-D-05 of 15 April 2015 concerning certain practices in the passenger urban transport sector.

the FCA's concerns, SNCF committed, in particular, to only allow its subsidiaries that are fully independent from its railway passenger transport activities to respond to calls for tender regarding technical assistance to urban transport operators.

In *Engie*,⁵⁷ the FCA found that Engie abused its dominant position by leveraging its position as the incumbent gas operator in order to obtain more contracts in the competitive gas and electricity markets. In particular, the FCA found that Engie used (1) its historical customer database for regulated tariffs for gas to convert customers to market-based contracts for gas and electricity; (2) the business infrastructure and resources developed for its regulated tariff activity in order to offer new market-based contracts and win former customers back; and (3) misleading sales arguments including allegations that Engie could guarantee a better security of gas supply than its competitors. The FCA considered that these practices were particularly harmful to competition as they were implemented at a time when the market was opening up to competition. Engie did not challenge the objections and settled the case against a €100 million fine.

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 squeezes restrict competition only if a potentially as-efficient competitor would be unable to enter the downstream market without incurring losses. Such restriction of competition 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.⁵⁸

In *Eiffel Tower*,⁵⁹ 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 these grounds.

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 foreclosing competitors. To assess whether exclusivity clauses may restrict competition, the FCA examines the clauses' scope and duration, the existence of a technical justification and the economic consideration granted to the customer.⁶⁰

57 FCA Decision No. 17-D-06 of 21 March 2017 concerning practices implemented in the gas and electricity supply sector which imposed a €100 million fine on Engie.

58 French Supreme Court, 3 March 2009, No. 08-14.435.

59 FCA Decision No. 15-D-10 of 11 June 2015 concerning practices implemented by TDF on the Eiffel Tower site, upheld by the Paris Court of Appeal on 12 October 2017 (an appeal is pending before the French Supreme Court).

60 FCA Decision No. 08-D-16 of 3 July 2008 concerning practices in the ID photos sector.

In *Mobile Telephony Equipment*,⁶¹ the FCA was concerned about the duration (20 years) and the restrictive early termination terms of the agreements between mobile operators and the incumbent infrastructure operator TDF for the hosting of their antennae (in particular, early termination was possible only for very few sites each year) which created *de facto* exclusivity. To address these concerns, TDF offered commitments designed to allow mobile operators to switch to alternative hosts more easily. TDF committed in particular to limit the duration of new hosting agreements to 10 years, cap the penalties in the event of early termination, and increase the number of sites (or quotas) for which early termination was possible.

In *Sugar Beet*,⁶² Saint-Louis Sucre claimed that Tereos, a cooperative and the largest sugar producer in the French market (and owner of the Beghin Say brand), abused its dominant position by entering into long-term exclusive contracts with sugar beet growers in the Picardy region, which represents about 40 per cent of French sugar beet production. The FCA found that the contractual terms offered by Tereos raised a number of concerns, especially in light of the opening up to competition of the French sugar procurement market following the abolition of sugar production quotas in October 2017:

- a Tereos could potentially lock in all its growers until 2022 as it had introduced a five-year exclusivity commitment for producers willing to increase their beet production by 20 per cent, in addition to the 10-year commitment initially undertaken by Tereos' growers to cover usual beet tonnage;
- b the articles of association of Tereos' cooperative did not expressly indicate that cooperative partners could supply part of their beet production to other sugar groups, such as Saint-Louis Sucre; and
- c Tereos had required cooperative partners that wished to leave the cooperative to give a 12-month notice period (instead of three months), making it even more difficult to switch to Tereos' competitors.

In light of these concerns, Tereos offered a number of commitments that led the FCA to close its investigation.

Loyalty rebates

Under French law, loyalty rebates granted by a dominant firm may be considered abusive when a discount tends to remove or restrict a buyer's freedom to choose its sources of supply absent a legitimate economic *quid pro quo*.⁶³ The FCA considers that forward-looking 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. Other forms of loyalty rebates may be considered abusive.

61 FCA Decision No 15-D-09 of 4 June 2015 concerning implemented in the mobile telephony equipment sector.

62 FCA Decision No. 17-D-12 of 26 July 2017 concerning practices implemented in the sugar beet supply sector.

63 FCA Decision No. 04-D-65 of 30 November 2004 concerning practices in the postal services sector. See also FCA Decision No. 05-D-32 (see footnote 30).

In *DTT Broadcasting*,⁶⁴ the FCA found that TDF had abused its dominant position by granting loyalty rebates to channel editors that hired TDF for a substantial share of their broadcasting sites. The FCA found that TDF generally granted rebates only if channel editors assigned TDF at least 70 per cent of their sites, which prevented other competitors from developing their activity, even though they also offered rebates to channel editors.

In *La Poste*,⁶⁵ the FCA expressed concerns in respect of La Poste's loyalty rebates policy for parcel delivery services offered to online sales sites, following a complaint lodged by parcel delivery firm Kiala and the French Minister of the Economy in 2010. The FCA noted that La Poste offered retroactive rebates on (1) home parcel deliveries and out-of-home parcel deliveries (i.e. deliveries to a parcel pick-up point or the post office) based on the cumulated number of home and out-of-home deliveries; and (2) home parcel deliveries increasing with the volume of deliveries entrusted to La Poste. Given La Poste's market shares on the home delivery segment (exceeding 80 per cent), the FCA found that such rebates could encourage customers to entrust their out-of-home and home deliveries to La Poste without its competitors being able to compete with these discounts. It noted that since a large portion of the customers have no choice but to use La Poste for at least part of their home parcel deliveries, they would have strong incentives to meet the requirements to benefit from La Poste's rebates. The FCA ultimately accepted the commitments offered by La Poste and closed the investigation (see below).

Tying and bundling

Tying and bundling consist of tying or bundling two distinct products that typically 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.⁶⁶

In *Golf Insurance*,⁶⁷ the FCA expressed 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

64 FCA Decision No. 16-D-11 of 6 June 2016 concerning practices implemented in the terrestrial television broadcasting sector, imposing a €20.6 million fine on TDF. The Paris Court of Appeal reduced the amount of the fine to €17.2 million on 21 December 2017, considering that the disparagement charge was not established (Paris Court of Appeal, 21 December 2017, *TDF*. An appeal is pending before the French Supreme Court).

65 FCA Decision No. 20-D-06 (see footnote 4), related to FCA Decision No. 11-MC-01 of 12 May 2011 concerning practices in the delivery of parcels to pick-up points sector. The French Minister of the Economy and Kiala's complaints concerned among other things La Poste's alleged agreement with parcel delivery firm Mondial Relay as well as La Poste's loyalty rebates schemes. In May 2011, the FCA issued an interim measure decision ordering the suspension of the signature of La Poste's partnership agreement with Mondial Relay until the FCA's decision on the merits. Following its investigation on the merits, the FCA decided that some aspects of the complaints, including La Poste's partnership with Mondial Relay, did not give rise to competition concerns. However, the FCA expressed concerns about La Poste's loyalty rebate policy.

66 FCA Decision No. 11-MC-01, see footnote 65.

67 FCA Decision No. 12-D-29 of 21 December 2012 concerning practices in the distribution of insurance products to golfers sector.

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 giving commitments to prevent tying practices. In 2015, the FCA adopted another decision, finding that these commitments were no longer justified given the developments in the market.⁶⁸

In *Nespresso*,⁶⁹ the FCA accepted commitments addressing its concerns that Nespresso needlessly modified its coffee machines in order to discourage consumers from buying its competitors' coffee capsules. Nespresso also allegedly falsely implied that only its capsules were compatible with its own machines so as to favour tied sales of its own capsules with its Nespresso machines and exclude its competitors' capsules. Nespresso committed to inform competing manufacturers of Nespresso-compatible coffee capsules of future technical changes in Nespresso machines so that they would have time to adapt their own production and their communication towards consumers. Nespresso also committed to stop commenting on its competitors' capsules.

In *Schneider Electric*,⁷⁰ the FCA was concerned that Schneider Electric abused its dominant position by refusing to sell a significant number of spare parts necessary for the in-depth maintenance of its electric equipment to third-party maintenance providers unless they agreed to have Schneider Electric's own employees perform the associated maintenance services. Schneider Electric argued before the FCA that this restriction aimed at ensuring the safety of property and people as well as at protecting its business model, in particular its brand image, know-how and the expertise of its technicians. However, the FCA found that Schneider Electric's policy was not necessary to achieve these objectives. It found that it was likely to constitute an unlawful tied sale by potentially preventing other maintenance providers from carrying out a full range of maintenance services on Schneider Electric's high voltage and low voltage equipment, which respectively accounted for around 70 and 60 per cent of the relevant equipment sales in France. The FCA also found that it was likely to deprive customers of services that might be cheaper and of higher quality. Schneider Electric offered commitments to address the FCA's concerns.

In *IT Maintenance*,⁷¹ the FCA rejected a third-party maintainer's claim that IBM, HPE and Oracle each abused their individual dominant position on the market for the sale of firmware updates by implementing a global strategy to exclude third-party maintainers from the downstream markets for the maintenance of server and storage systems by restricting access to firmware updates that are necessary for maintenance services. The FCA found that the complainant, Econocom, had failed to provide evidence of any abuse of market power for any of the possible commercial relationships corresponding to the sale of maintenance services. First, in all cases where the maintenance contracts are purchased alongside the server or storage system, the FCA found that the secondary maintenance market could not be distinguished from the primary hardware market and that any risk of abuse of dominance regarding maintenance had therefore to be excluded. Second, where customers purchase maintenance solutions for mature systems, the FCA noted that the access to firmware updates is rarely required – or not required at all – since the hardware and software are stabilised

68 FCA Decision No. 15-D-16 of 27 November 2016 concerning the revision of the commitments of the French Federation of Golf.

69 FCA Decision No. 14-D-09; see footnote 18.

70 FCA Decision No. 17-D-21 of 9 November 2017 concerning practices implemented in the medium and low-voltage electrical distribution equipment maintenance sector.

71 FCA Decision No. 18-D-10, see footnote 21.

and manufacturers offer long-term maintenance contracts that enable customers to cover the entire lifetime of the server or storage system from the moment of the purchase of the system. Third, where customers issue tender offers for multi-brand maintenance contracts, the FCA considered that server manufacturers effectively give access to their firmware updates – including to third-party maintainers, such as the complainant – and do not prevent competitors from bidding. Finally, the FCA acknowledged that manufacturers were under no obligation to supply firmware updates for free, and that it was legitimate for suppliers to monetise access to firmware updates given that these updates necessitate development costs and contain software innovation.

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:

- a* the facility belongs to a dominant firm;
- b* access to the facility is necessary to compete in a related market;
- c* competitors cannot duplicate the facility at reasonable costs;
- d* the dominant firm unduly refuses access to the facility (or imposes unduly restrictive conditions); and
- e* access to the facility is possible.⁷²

The same principles apply *mutatis mutandis* for refusals to supply a product as well as refusals to provide a service. For example, in the area of intellectual property rights, French courts consider that copyrighted 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 such economic conditions were less favourable than those under which the dominant undertaking operates).⁷³ In practice, the following facilities have been considered essential under French law: transport facilities,⁷⁴ the electricity network,⁷⁵ the telephone network⁷⁶ and certain databases.⁷⁷

In *SNCF*,⁷⁸ the FCA and the Paris Court of Appeal considered that SNCF abused its dominant position by restricting access to the railway infrastructure. More specifically, the abuse consisted in:

72 FCA Decisions Nos. 20-D-02 of 23 January 2020 concerning practices implemented by Orange in the electronic communications sector and No. 19-D-16, see footnote 7.

73 Paris Court of Appeal, 31 January 2006, *NMPP*.

74 FCA Decision No. 19-D-03, see footnote 6.

75 FCA Decision No. 17-D-06, see footnote 57.

76 FCA Decision No. 07-MC-03 of 7 June 2007 concerning a request for interim measures filed by Solutel against France Télécom and FCA Decision (on the merits) No.08-D-21 of 7 October 2008 concerning practices implemented by France Telecom on the market for engineering, consulting and technical control of telephone installations in the private sector.

77 FCA Decision No. 14-MC-02 of 9 September 2014 in the gas and electricity sector, partially quashed by Paris Court of Appeal on 31 October 2014 and FCA Decision (on the merits) No.17-D-06, see footnote 57.

78 FCA Decision No. 12-D-25, upheld by the Paris Court of Appeal on 6 November 2014; see footnote 44. An appeal is pending before the French Supreme Court.

- a delaying the release of information concerning access to freight yards, thereby preventing its competitors from accessing rail capacities essential to their business activity;
- b retaining exclusive use of certain railway cars that are used for large tonnage transportation and constitute an essential part of the infrastructure; and
- c pursuing a train path overbooking policy that prevented its rivals from participating in certain calls for tenders or honouring certain contracts.

In *Cegedim*,⁷⁹ the FCA imposed a €5.7 million fine on a company active both in the provision of healthcare databases and customer relation management (CRM) software for refusing access to its database of medical information to pharmaceutical laboratories that used the CRM software of one of its competitors, Euris. The FCA considered that Cegedim's database was not an essential facility because there were alternative, albeit inferior, rival databases. However, it found that the practice amounted to an abusive refusal to deal, since Cegedim sought to foreclose Euris from the CRM market by discriminating against customers using Euris' CRM software (the FCA pointed out that the practice had caused Euris 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.⁸⁰ The French Supreme Court validated the Court's reasoning.⁸¹

In *Orange*,⁸² the FCA dismissed a refusal to supply claim as it found that Orange's fibre-to-the-home (FttH) infrastructure does not constitute an essential facility, in particular since it is not indispensable and can be replicated. The FCA first considered that – given the existence of various national alternatives – access to Orange's FttH offer does not appear to be strictly necessary (or indispensable) to compete in the relevant market. Second, the FCA noted that it appears to be possible to duplicate Orange's FttH infrastructure since several alternative optical fibre networks are currently being deployed in France. The FCA, therefore, rejected the refusal to supply claim.

Termination of a contractual relationship

The termination of on-going commercial relationships may also be sanctioned on the basis of Article L420-2 of the Commercial Code. This can be the case in particular if (1) the conditions of termination are abrupt, and (2) the termination has an anticompetitive object or (actual or potential) anticompetitive effects.⁸³

In *Satellite TV Decoders*,⁸⁴ following a complaint of a third-party satellite decoder manufacturer, the FCA expressed concerns about the decision of French pay-TV operator Groupe Canal Plus (GCP) to terminate its Canal Ready partnership with third-party decoder

79 FCA Decision No. 14-D-06 of 8 July 2014 concerning practices in the medical information database sector, upheld by the Paris Court of Appeal on 24 September 2015 and by the French Supreme Court on 21 June 2017, No. 15-25.941.

80 Paris Court of Appeal, 24 September 2015, *Cegedim*.

81 French Supreme Court, 21 June 2017, see footnote 79.

82 FCA Decision No. 20-D-02 of 23 January 2020, see footnote 72.

83 FCA Decision No. 13-D-07, see footnote 16. Absent the demonstration of an anticompetitive object or effect, the abrupt termination of a commercial relationship may be sanctioned under commercial law on the basis of Article L442-1 II of the Commercial Code.

84 FCA Decision No. 18-D-14 of 24 July 2018 concerning practices implemented in the marketing of satellite TV decoders sector.

manufacturers. Until July 2014, in order to receive GCP linear programmes by satellite, consumers had to use one of the decoders rented out by GCP or insert a card in a decoder. This decoder could be purchased from an authorised third-party decoder manufacturer that had concluded a Canal Ready partnership agreement with GCP (the card-only system). However, in July 2014, GCP decided to put an end to its card-only system and to terminate its Canal Ready partnership agreements because of content piracy affecting third-party decoders. While the FCA noted that a company, even when it holds a dominant position, is free to modify its strategic model or its business plan as long as these changes do not have an anticompetitive object and can be justified by legitimate reasons, it also clearly stated that a rapid and sudden change can, in some circumstances, amount to an abuse of dominance. The abusive nature of the conduct depends on the justification brought forward for the decision to change model, the conditions in which it takes place, and the effects this decision has on competitors or third parties. According to the FCA's preliminary assessment, GCP's plan necessarily led to the exclusion of third-party decoder manufacturers from the market and could deprive actual and potential consumers from having the option to purchase decoders that were potentially cheaper or offered different features. While taking into account GCP's piracy concerns, the FCA therefore held that the termination of the card-only system had to provide for appropriate measures to remedy the FCA's concerns. This led GCP to offer commitments. GCP agreed to allow third-party decoder manufacturers to manufacture and distribute decoders compatible with GCP satellite programs, provided these decoders include a software access module called 'myCanal' (that users can download) designed, monitored and updated directly by GCP.

Disparagement

Under French law, disparagement consists of 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 (when disparagement originates from a dominant player).

In *Sanofi*⁸⁵ and *Schering-Plough*,⁸⁶ the FCA fined two pharmaceutical companies for disparagement that consisted of widely publicising differences between their originator drug (or the generic manufactured by the producer of the originator drug) and other generic drugs at the time of the entry of the generic drugs into the market. Irrespective of whether such differences were verified or not, the companies could not prove that they had therapeutic consequences. Although neither Sanofi nor Schering-Plough had explicitly presented generic drugs as being inferior, but only pointed at factual differences, the very fact of shedding doubts without scientific supporting evidence was found to be abusive by the FCA. Sanofi was fined €40.6 million and Schering-Plough was fined €15.3 million.

85 FCA Decision No. 13-D-11 of 14 May 2013 concerning practices in the medicinal products sector, upheld by the Paris Court of Appeal on 18 December 2014 and by the French Supreme Court on 18 October 2016, No. 15.10-384.

86 FCA Decision No. 13-D-21 of 18 December 2013 concerning practices implemented in the French market for high-dosage buprenorphine sold in private practices, upheld by the Paris Court of Appeal on 26 March 2015 and by the French Supreme Court on 11 January 2017, No. 15-17.134.

In *Janssen-Cilag*,⁸⁷ the Paris Court of Appeal confirmed that Janssen-Cilag had abused its dominant position by hindering the development of the generic versions of its Durogesic drug in France but reduced the amount of the fine from €25 million to €21 million on the ground that the damage to the economy was lower than that found by the FCA. The FCA had found that Janssen-Cilag submitted legally unfounded arguments to the AFSSAPS⁸⁸ aimed at casting doubts on the innocuousness and effectiveness of the generic drug. This had led the French authority to temporarily refuse to recognise the generic status of Ratiopharm's Fentanyl drug. The AFSSAPS ultimately granted generic status to Ratiopharm's drug after a delay of more than a year, but added a warning to this authorisation, recommending careful medical supervision of some patients switching from one Fentanyl drug to another. In addition, the FCA had found that once the authorisation was granted, Janssen-Cilag had started a massive disparagement campaign of the generic drugs among health professionals, using different media and channels, with the aim of discrediting the generic drugs' reputation by highlighting quantitative, qualitative and size differences from the Durogesic patch. The FCA had also considered that Janssen-Cilag in its communication distorted the content of the warning issued by the AFSSAPS by providing an inaccurate and incomplete presentation of the risks associated with substitution. The FCA had concluded that Janssen-Cilag's practices constituted a single and continuous infringement that had significant foreclosure effects on competitors by delaying the arrival of generics, and then contributing to their low penetration rate, on a market already marked by the reluctance of healthcare professionals to prescribe generics. The FCA's reasoning on the disparagement practices was upheld by the Paris Court of Appeal. An appeal is now pending before the French Supreme Court.

Most-favoured nation clauses

In *Booking.com I*,⁸⁹ the FCA accepted commitments addressing its preliminary concerns that the most-favoured nation (MFN) clauses imposed by Booking.com could have exclusionary effects. MFN clauses prevented hotels from offering to rival reservation platforms or other distribution channels (including through their own sales channels) lower prices or better commercial conditions (i.e., 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. A few months later, Article L311-5-1 of the French Tourism Code was modified to guarantee the freedom of hospitality operators to offer discounts and price advantages by prohibiting MFN clauses.⁹⁰ In parallel, French courts

87 Paris Court of Appeal, 11 July 2019, *Janssen-Cilag* and FCA Decision No. 17-D-25, see footnotes 10 and 11.

88 On 1 May 2012, the AFSSAPS became the ANSM.

89 FCA Decision No. 15-D-06 of 21 April 2015 concerning practices implemented in the online hotel booking sector.

90 Law No. 2015-990, 6 August 2015, Article 133.

also took issue with MFN clauses and fined Expedia €1 million for creating a significant imbalance in its relationship with hotel partners⁹¹ as well as ordered Expedia and Booking.com to remove price and availability MFN clauses from their contracts with hotels.⁹²

In 2019, in *Online hotel booking*,⁹³ the FCA issued a decision regarding the claims made by hotels against Expedia and HRS which unlike Booking.com had refused to offer commitments. The FCA found that the MFN clauses at issue had already been dealt with by other national competition authorities, namely in Sweden, Italy, Greece, Poland and the United Kingdom. In addition, the FCA noted that the European online hotel booking sector had evolved since the beginning of the investigation, as shown by the increased price differentiation in the wake of the *Booking.com I* commitments and the statutory prohibition of price MFN clauses in France. The FCA also pointed to the smaller presence in France of Expedia and HRS compared to Booking.com. As a result, the FCA decided to reject the initial complaint and close its investigation.

Other exclusionary tactics

The FCA may intervene under Article L420-2 of the Commercial Code where a dominant company's allegedly abusive conduct is likely to lead to anticompetitive foreclosure.

In *Petanque Balls*,⁹⁴ the FCA imposed a fine of €320,000 on Obut for imposing resale prices on some of its distributors. The FCA considered that Obut held a dominant position in the market for the production of petanque balls for use in competitions and relied on its dominant position to impose resale prices to its distributors active in the downstream market for the distribution of petanque balls in which Obut was also active. The FCA also found that Obut's sales forces monitored compliance with the suggested list prices, and threatened distributors with delayed deliveries, blocked orders and delisting in cases of deviation. The FCA concluded that Obut's pricing policy aimed at ensuring that its distributors could not compete on price with its own retail outlets. In its decision, the FCA noted that such practices are also prohibited under Article L420-1 of the Commercial Code, but decided to rely on Article L420-2 of the Commercial Code. Obut agreed not to challenge the facts before the FCA and settled the case. Interestingly, in early 2020, in *Itas/TDF*,⁹⁵ the FCA dismissed a complaint by French terrestrial digital television broadcaster towerCast which alleged that its competitor TDF's acquisition of Itas (a major French industrial player in the telecoms sector in France and abroad) constituted an abuse of dominance on the wholesale markets for digital terrestrial television broadcasting services. While the concentration did not meet

91 Paris Commercial Court, 7 May 2015, *Expedia*, as amended by Paris Court of Appeal, 21 June 2017. The Paris Commercial Court rejected the Minister of the Economy's claim to impose a civil fine on Expedia, due to lack of evidence of the latter's involvement in the alleged practices. In this regard, the Commercial Court ruled that Expedia was not a party to the contracts containing the problematic MFN clauses.

Although the Court of Appeal agreed with this finding, the Court however imposed a civil fine on Expedia on the basis of another infringement, i.e., the significant imbalance in Expedia's commercial relationship with hotel partners entailed by MFN clauses.

92 Paris Commercial Court, 7 May 2015, *Expedia* confirmed by Paris Court of Appeal, 21 June 2017 (see footnote 91); Paris Commercial Court, 29 November 2016, *Booking.com II*.

93 FCA Decision No. 19-D-23, see footnote 7.

94 FCA Decision No. 17-D-02 of 10 February 2017 concerning practices implemented in the competitive petanque balls sector.

95 FCA Decision No. 20-D-01 of 16 January 2020 concerning practices implemented in the sector of digital terrestrial television broadcasting services.

the French or the European merger control thresholds, towerCast argued before the FCA that the transaction would constitute an abuse of dominance by significantly strengthening TDF's position. Indeed, post-transaction, TDF and towerCast would remain the only two competitors on the market. TowerCast's complaint relied on the 1973 *Continental Can* ruling whereby the Court of Justice held that a company may abuse its dominant position by acquiring one of its competitors, in particular when the acquisition strengthens the acquiring company's dominant position 'in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one'.⁹⁶ However, the FCA recalled that the *Continental Can* ruling was delivered prior to the adoption of any European merger control regulation and concluded on this basis that the principle laid down in this ruling could no longer apply. The FCA found that under both EU and French law a concentration could not be considered, in itself, as an abuse of a dominant position.

iii Exploitative abuses

Exploitative abuses consist of a dominant firm imposing 'unfair' conditions on its trading partners. The imposition of excessively high prices by a dominant undertaking might infringe Article L420-2 of the Commercial Code. Prices are considered excessive where they have no reasonable relation to the economic value of the product or service supplied; in particular, where the difference between the costs actually incurred and the price actually charged is excessive and where the price imposed is either unfair in itself or when compared with competing products.⁹⁷ Imposing non-price unfair terms can also be considered abusive under certain circumstances.

In 2009, the FCA fined Orange €27.6 million in the *Telecommunication in Overseas Départements* case.⁹⁸ In this case, the FCA investigated the rates applied by Orange for connection services between Réunion Island and the mainland, and found that 'there existed a clear disproportion between these rates and the value of the services', which resulted in the imposition of excessive prices on consumers (residential and professional), and hindered the development of the high-speed market on Réunion Island, and the development of Orange's competitors.

In *Sanicorse*,⁹⁹ the Paris Court of Appeal annulled the FCA decision of September 2018 insofar as it had found that Sanicorse abused its dominant position in the market for the treatment of infectious medical waste in Corsica by imposing excessively high price increases.¹⁰⁰ In its decision, the FCA had concluded that Sanicorse's price increases were imposed on Corsican healthcare establishments for more than four years without any prior notice. These prices were excessive because they could not be justified by Sanicorse's increased costs and additional investments. The FCA had considered that Sanicorse's practices were particularly serious as they had the – potential or actual – effects of: (1) exploiting healthcare establishments that are legally obliged to manage infectious medical waste under strict conditions and that for some of them experienced financial difficulties; and (2) preventing

96 Case C-6/72, *Continental Can*, Court of Justice judgment of 21 February 1973, Paragraph 26.

97 Case 27/76, *United Brands*, see footnote 14. See also the European Union chapter.

98 FCA Decision No. 09-D-24 of 28 July 2009 concerning practices implemented in the telecommunications sector in overseas departments.

99 Paris Court of Appeal, 14 November 2019, *Sanicorse*, see footnote 12.

100 FCA Decision No. 18-D-17, see footnote 13.

the development of competitive alternatives. In its ruling, the Paris Court of Appeal found that an exploitative abusive can be established by the FCA when two conditions are met: (1) the dominant firm uses its dominant position to obtain trading advantages; and (2) these advantages are objectively unfair in light of all the relevant circumstances of the case. It also found that prices can be considered unfair when they have no reasonable relation to the economic value of the product or service supplied. Concerning price increases in particular, the Court noted that they may be considered unfair only to the extent that they lead to prices that are themselves unfair or if the dominant firm violates the contractual agreements concluded with its customers to impose such early price increases. The Paris Court of Appeal concluded that the FCA had failed to show that the prices resulting from Sanicorse's increases were objectively unfair (i.e., that they had no reasonable relation to the economic value of the service provided by Sanicorse). As regards the effects of Sanicorse's practices, the Court noted in any event that the FCA had not proven to the requisite standard that Sanicorse's conduct had the object or effect – either potential or actual – of deterring healthcare establishments from developing competing alternatives. The Court in particular noted that none of the Corsican healthcare establishments indicated that they had abandoned an alternative waste treatment project. Conversely, Sanicorse's conduct was likely to persuade healthcare establishments to develop competing alternatives. The FCA has challenged the Court of Appeal's ruling before the French Supreme Court.

In *Gibmedia*,¹⁰¹ following a complaint from an advertiser, Gibmedia, whose Google Ads account had been suspended, the FCA found that Google abused its dominant position by defining and implementing its Google Ads policies in a non-objective, non-transparent, and discriminatory manner between July 2012 and October 2018. In particular, the FCA found that Google imposed unfair trading conditions on advertisers active on its online advertising platform. First, the FCA considered the definition of Google's policies to be unfair because (1) some policies were not sufficiently 'objective and transparent' or 'clear', and (2) the policies were 'unstable' as Google regularly changed them over the period at stake. Second, the FCA considered that the application of the Google Ads policies was unfair because the definition of the policies left an excessive margin of discretion to Google. According to the FCA, this led to a 'differentiated and random' enforcement of the policies among advertisers. The FCA also noted that Google's conduct could not constitute a 'reasonable' means to achieve Google's consumer protection objectives and was therefore not justified. The FCA concluded that Google's conduct had – at least potential - effects on the market for online search advertising on which Google holds according to the FCA an 'extraordinary' dominant position and on the 'downstream digital services markets' on which advertisers are active. The FCA imposed a €150 million fine on Google as well as a series of injunctions (see above). An appeal before the French Supreme Court against the decision is currently pending.

iv Discrimination

Abusive discrimination usually consists in the application by a dominant company of dissimilar conditions to trading partners in equivalent transactions, thereby placing certain trading partners at a competitive disadvantage.¹⁰² The FCA considers that discriminatory

101 FCA Decision No. 19-D-26, see footnote 3.

102 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.

practices may restrict competition when the dominant firm competes on the downstream market and discriminates against rivals (first-line discrimination). Discrimination may also occur when the dominant firm is not active downstream but discriminates between its customers, thereby altering competition between them (secondary-line discrimination). While first-line discrimination is an exclusionary abuse, second-line discrimination seems to fall within the category of exploitative abuses.

In *Electronic Communications*,¹⁰³ the FCA found that Orange gave access to more comprehensive information regarding the operation of the copper local loop to its own commercial entities than to third-party operators. The FCA considered that the (first-line) discrimination in the access to information had artificially strengthened Orange's dominant position, and affected third-party operators by making them appear less reactive and less informed than Orange.

In 2018, in *Photovoltaic Electricity*,¹⁰⁴ the FCA dismissed a first-line discriminatory claim concerning favouritism practices carried out by EDF in favour of its subsidiaries (Enedis and RTE) that were likely to unduly foreclose downstream competitors. The core of the allegations was based on EDF's discriminatory treatment with regard to the filing date of applications for connection to the photovoltaic electricity grid.¹⁰⁵ Relying on the EU *MEO* precedent,¹⁰⁶ the FCA pointed out that it is necessary, based on concrete market conditions, economic and legal context and having regard to the circumstances of the case, to demonstrate that the discriminatory conduct in question is likely to produce a competitive disadvantage through a distortion of competition among business partners. The FCA also recalled that setting a *de minimis* threshold in order to determine the existence of an abuse of dominance was not justified.¹⁰⁷ It specified, however, that for discrimination to be likely to create a competitive disadvantage, it must affect the interests of the operator concerned.¹⁰⁸ The FCA concluded that having regard to the circumstances of the case EDF's behaviour did not create a distortion of competition among photovoltaic electricity producers active on the downstream market.¹⁰⁹

The FCA has also assessed secondary-line discrimination claims in several cases involving Google's policies for the operation of its Google Ads advertising platform (formerly Adwords). In *NavX*, the FCA took a strict approach towards secondary-line discrimination, suggesting that dominant firms have an obligation to treat all of their customers in the same manner, even when the dominant undertaking is not active in the downstream market.¹¹⁰ In particular, the FCA found that the Google Ads policies should be applied to all advertisers

103 FCA Decision No. 15-D-20 of 17 December 2015 concerning practices implemented in the telecommunications services sector.

104 FCA Decision No. 18-D-11 of 4 July 2018 concerning practices implemented by EDF in the photovoltaic electricity sector.

105 This discriminatory treatment included delays in the connection and commissioning of competitors' production units, delaying strategies and backdating strategies for accepting technical and financial proposals necessary for connection to the grid which allegedly benefited the production units proposed by EDF and its subsidiaries.

106 Case C-525/16, *MEO*, Court of justice judgment of 25 May 2018.

107 Case C-23/14, *Post Danmark*, Court of justice judgment of 6 October 2015.

108 Case C-525/16, *MEO*, see footnote 106.

109 In any case, the FCA noted that if backdating practices do not raise a competition issue, they may, however, fall within the jurisdiction of criminal, civil or administrative courts.

110 FCA Decisions Nos. 10-MC-01 and 10-D-30, see footnote 16.

in an ‘objective, transparent and non-discriminatory manner’, and that discriminatory treatment could be considered abusive. The FCA ultimately accepted commitments from Google to clarify certain policies applicable to advertisers; in particular, in respect of the conditions of suspension of their accounts. In *Gibmedia*,¹¹¹ while the FCA qualified Google’s conduct as ‘unfair’ and noted that ‘the notion of unfairness is not the same as the notion of discrimination’, it also concluded that Google’s conduct was ‘discriminatory’ but stopped short of attempting to establish an abusive secondary-line discrimination.

V REMEDIES AND SANCTIONS

Article L464-2 of the Commercial Code provides that the FCA can impose fines on infringing undertakings of up to 10 per cent of the firms’ worldwide turnover. The FCA can also order undertakings to terminate anticompetitive practices within a specified time limit, impose remedies, or both. As an alternative to fines, the FCA may accept commitments offered by the dominant firms being investigated in response to the FCA’s competition concerns. In the event that an undertaking does not comply with the FCA’s decision to terminate anticompetitive practices or with the FCA’s orders, or does not implement the commitments, the FCA may impose a fine of up to 10 per cent of the undertaking’s worldwide turnover, as well as penalty payments of up to 5 per cent of the undertaking’s average daily turnover.

i Sanctions

According to Article L464-2 of the Commercial Code, fines should be proportionate to:

- a* the gravity of the infringement;
- b* the importance of the damage to the economy;
- c* the group or company’s individual situation; and
- d* the possible 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 method for determining fines.¹¹² The basic amount of the fine is calculated as a proportion of the value of sales affected by 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, and the existence of aggravating circumstances (e.g., if the undertaking has a specific ability to influence) 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 recidivism.

With respect to repeat offenders, the French Supreme Court ruled in 2016 in *SNCF* that recidivism can be established even though the two infringements were implemented on two different markets.¹¹³ In late 2018, in *Photovoltaic Solar Power*¹¹⁴ the Paris Court of Appeal

111 FCA Decision No. 19-D-26, see footnote 3.

112 Notice of 16 May 2011 on the Method Relating to the Setting of Financial Sanctions.

113 See footnote 46.

114 Paris Court of Appeal, 27 September 2018, *Photovoltaic Solar Power*.

clarified the conditions under which recidivism can be established. The Court upheld a 2013 FCA decision imposing a €13.5 million fine on EDF,¹¹⁵ including a 25 per cent increase for reiteration. The FCA had found that EDF, as the incumbent electricity supplier, unfairly favoured its subsidiary, EDF ENR, operating in the competitive market for photovoltaic solar power offered to individual customers. In particular, EDF made various resources available to its subsidiary that could not be replicated by competitors, notably for prospecting, promoting and marketing photovoltaic offers. The FCA had applied a 25 per cent fine increase for recidivism on EDF on the ground that EDF had previously been sanctioned in 2000 for other abusive practices in the public lighting sector. Those other practices consisted in (1) bidding at very low prices in response to calls for tenders organised by municipalities, behaviour that then discouraged municipalities from maintaining any tendering process, EDF thereby being automatically attributed the market; and (2) concluding agreements with municipalities for an excessive period of time with termination clauses that made it more difficult to end the commercial relationship.¹¹⁶ On appeal, the Paris Court of Appeal first held that recidivism was not established and reduced the amount of the fine by half.¹¹⁷ However, in 2017, the French Supreme Court quashed this analysis and referred the case back to the Paris Court of Appeal.¹¹⁸ In its new ruling in late 2018, the Paris Court of Appeal essentially found that the 25 per cent fine increase was justified and proportionate since:

- a* the two infringements that led to the FCA's decisions of 2000 and 2013 were similar both in terms of object and effects (in both cases, EDF restricted competition on markets related to the electricity supply market where it holds a dominant position owing to its former legal monopoly through methods falling outside the scope of competition on the merits);
- b* the practices sanctioned in the 2013 decision were neither unprecedented nor innovative and EDF was fully aware of applicable competition rules; and
- c* the seven-year period that had elapsed between the 2000 decision and the beginning of the new practices represented less than half of the 15-year period after which the FCA typically waives recidivism.¹¹⁹

Since the issuance of the FCA's fining guidelines, fining decisions have been issued in 24 abuse of dominance cases:

- a* *Saint-Pierre-et-Miquelon*;
- b* *Mobile Telephony*;
- c* *SNCF*;
- d* *Ordre des Experts Comptables*;
- e* *Sanofi*;
- f* *Photovoltaic Solar Power*;
- g* *Schering-Plough*;
- h* *Amaury*;

115 FCA Decision No. 13-D-20 of 17 December 2013 concerning the practices implemented by EDF in the photovoltaic solar power sector.

116 FCA Decision No. 00-D-47 of 22 November 2000 concerning practices implemented by EDF and its subsidiary, Citélum, in the public lighting sector.

117 Paris Court of Appeal, 21 May 2015, *EDF*.

118 French Supreme Court, 27 September 2017, Nos. 15-20.087 and 15-20.291.

119 In its fining guidelines, the FCA indeed indicates that it will typically waive recidivism when a period of 15 years (or more) between the practices has elapsed (Paragraph 51).

- i* *Mobile Telephony at Réunion Island and Mayotte* (residential customers);
j *Cegedim*;
k *Antilles Dairy Products*;
l *Overseas DDT Deployment*;
m *Eiffel Tower*;
n *Mobile Telephony at Réunion Island and Mayotte* (non-residential customers);
o *Electronic Communications*;
p *DTT Broadcasting*;
q *Zinc*;
r *Pétanque Balls*;
s *Engie*;
t *Funeral Services in the Ain Department*;
u *Janssen-Cilag*;
v *Termite Traps*;
w *Sanicorse (quashed by the Paris Court of Appeal)*;
x *Gibmedia*.¹²⁰

In 2015, the FCA imposed a record-breaking fine of €350 million on Orange in the *Electronic Communications* case (after settlement).¹²¹ Although the FCA applied its fining guidelines in most of the cases mentioned above, it decided to depart from its guidelines in some other instances.¹²² In *Gibmedia*,¹²³ the FCA recently expressly departed from its fining guidelines in

120 FCA Decisions No. 12-D-06 (see footnote 33); No. 12-D-24 (see footnote 22); No. 12-D-25 (see footnote 44); No. 13-D-06 of 28 February 2013 concerning practices implemented in the sector of online transmission of tax and accounting data in EDI format to the tax administration, upheld by the Paris Court of Appeal on 26 February 2015 and by the French Supreme Court on 8 February 2017; No. 15-15.005; No. 13-D-11 (see footnote 85); No. 13-D-20 (see footnote 115); No. 13-D-21 (see footnote 86); No. 14-D-02 of 20 February 2014 concerning practices implemented in the sports press sector, upheld by the Paris Court of Appeal on 15 May 2015 and by the French Supreme Court on 1 March 2017; No. 15-19.068; No. 14-D-05 of 13 June 2014 concerning practices implemented in the mobile telephony sector for residential customers in Réunion Island and Mayotte; No. 14-D-06 (see footnote 79); No. 14-D-08 of 24 July 2014 concerning practices implemented in the sector for the sale of fresh dairy products in the French West Indies (the Paris Court of Appeal reduced the amount of the fine on 24 September 2015); No. 15-D-01 of 5 February 2015 concerning practices implemented in the deployment of DTT broadcasting contracts in French overseas territories; No. 15-D-10 (see footnote 59); No. 15-D-17 of 30 November 2015 concerning practices implemented on the mobile telephony market for non-residential customers in Réunion Island and Mayotte; No. 15-D-20 (see footnote 103); No. 16-D-11 (see footnote 64); No. 16-D-14 of 23 June 2016 concerning practices implemented in the rolled zinc sector (the Paris Court of Appeal reduced the amount of the fine on 17 May 2018; an appeal is pending before the French Supreme Court); No. 17-D-02 (see footnote 94); No. 17-D-06 (see footnote 57); No. 17-D-13 of 27 July 2017 of 27 July 2017 concerning practices implemented in the funeral sector in the Ain department; No. 17-D-25 (see footnote 11; the Paris Court of Appeal reduced the amount of the fine on 11 July 2019; an appeal is pending before the French Supreme Court); No. 18-D-03 (see footnote 26); No. 18-D-17 (see footnote 13; the Paris Court of Appeal quashed the FCA decision; an appeal is pending before the French Supreme Court); and No. 19-D-26 (see footnote 3; an appeal is pending before the Paris Court of Appeal).

121 FCA Decision No. 15-D-20, see footnote 103.

122 See for instance, FCA Decisions No. 15-D-10 (see footnote 59), No. 15-D-20 (see footnote 103); No. 17-D-02 (see footnote 94); No. 17-D-06 (see footnote 57); No. 17-D-13 (see footnote 120); No. 18-D-03 (see footnote 26) and No. 19-D-26 (see footnote 3).

123 FCA Decision No. 19-D-26, see footnote 3.

order to impose a €150 million fine on Google. This is the second largest fine ever imposed by the FCA for an abuse of dominance.¹²⁴ The FCA relied on a ‘lump-sum’ method to calculate the fine as it considered that the application of its fining guidelines would lead to a fine which would not be proportionate to the gravity of the facts and to the importance of the damage to the economy, and would therefore be deprived of any deterrent and punitive effect. This is the first time that the FCA has applied a lump-sum method for deterrence and punitive purposes.

ii Behavioural remedies

The FCA can impose behavioural remedies either as an interim measure or as part of a decision on the merits.

Pursuant to Article L464-1 of the Commercial Code, the FCA may grant interim measures 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 consumers or the complainant. Since 2010, interim measures have been granted in seven abuse of dominance cases.¹²⁵

Pursuant to Article L464-2 of the Commercial Code, the FCA may also order undertakings to terminate anticompetitive practices within a specific time frame or impose behavioural remedies in addition to fines in its decision on the merits.

In *SNCF*,¹²⁶ the FCA used behavioural remedies as an alternative to sanctions in relation to exclusionary pricing objections. The FCA ordered SNCF to:

- a* implement an analytical accounting system for its freight services activity by full-trainload separate from its wagon-load freight services activity, so as to clearly identify costs that are common to the two types of activities;
- b* prepare a report identifying the costs that could be avoided over a three-year period in the event that the SNCF were to abandon its freight services activity by full-trainload; and
- c* guarantee, within three years of the FCA’s decision, that prices offered to shippers for full-trainload freight services covered the average avoidable costs related to this activity over a three-year period.

The Paris Court of Appeal, however, annulled the third injunction in late 2018 as it found that such an injunction unduly interfered with SNCF’s power to determine its pricing policy.¹²⁷

124 In 2020, in the aforementioned Decision No. 20-D-04 (see footnote 3), the FCA imposed a record fine of €1.1 billion on Apple for a series of practices that included an abuse of a situation of economic dependence, but also two vertical anticompetitive agreements within its distribution network. However this Decision has not yet been published on the FCA website, and the portion of the fine attributable to the abuse of economic dependence has not been disclosed to date.

125 FCA Decisions No. 10-MC-01 (see footnote 16); No. 11-MC-01 (see footnote 65); No. 14-MC-01 of 30 July 2014 concerning practices in the pay TV sector, partially quashed by Paris Court of Appeal on 9 October 2014; No. 14-MC-02 of 9 September 2014 in the gas and electricity sector, partially quashed by Paris Court of Appeal on 31 October 2014 (see footnote 77); No. 16-MC-01 of 2 May 2016 on a request for interim measures filed by Direct Energie, upheld by Paris Court of Appeal on 28 July 2016; No. 19-MC-01 (see footnote 8; partially quashed by Paris Court of Appeal on 4 April 2019) and No. 20-MC-01 (see footnote 9).

126 FCA Decision No. 12-D-25, see footnote 44.

127 See footnote 45.

In *Electronic Communications*,¹²⁸ the FCA ordered Orange to provide competitors with 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.

In *Cegedim*,¹²⁹ the FCA ordered Cegedim to stop any form of discrimination among its customers based on whether they used Cegedim or competitor CRM software.

More recently, in *Gibmedia*,¹³⁰ the FCA imposed several injunctions on Google relating to the operation of its Google Ads platform, that will remain in force until 1 January 2025 and that will apply to Google's contractual relationships with French advertisers. The FCA ordered Google to:

- a* clarify the wording of the Google Ads policies that aim at protecting Google's users against bad ads and websites, and notify relevant advertisers of policy changes at least two months in advance;
- b* clarify its Google Ads account suspension procedures, so as to limit immediate account suspensions only for egregious policy violations and provide advertisers with a warning at least one week before any account suspension for non-egregious violations;
- c* adopt measures to prevent, detect, and deal with violations of the Google Ads policies, more specifically to: (1) organise a mandatory annual compliance training for Google's sales teams in charge of providing support to advertisers; (2) put in place an easily accessible policy violation reporting tool for consumers; and (3) provide the FCA with an annual report in order for the FCA to verify that account suspensions are adequate to the objective of consumer protection, and publish a non-confidential version of the report on its Google Ads website;
- d* present to the FCA a report detailing all the measures that Google envisages implementing to comply with the injunctions as well as a report detailing all the measures that Google has implemented to comply with the injunctions.

In addition, the FCA ordered Google to publish a summary of its decision on the homepage of Google's search engine and on the homepage of the Google Ads service. An appeal against the decision is currently pending before the Paris Court of Appeal.

iii Structural remedies

Pursuant to Article L430-9 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 any agreement that gave rise to the underlying dominant position, including a merger agreement previously authorised by the FCA in the context of a merger review. This provision 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 *Water Market*,¹³¹ 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

128 FCA Decision No. 12-D-25, see footnote 44.

129 FCA Decision No. 14-D-06, see footnote 79.

130 FCA Decision No. 19-D-26, see footnote 3.

131 FCA Decision No. 02-D-44, see footnote 34.

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 terminated their joint venture agreements.

The FCA is also empowered to order structural remedies in the event of abuse of dominance or economic dependence in the retail sector (see Article L752-26 of the Commercial Code).

In *Itas/TDF*,¹³² the FCA stated that merger control and antitrust rules are strictly distinct. The FCA, however, specified that any abusive conduct distinct from the transaction itself may constitute an anticompetitive practice, and could result in the transaction being annulled under Article L430-9 of the Commercial Code. In the case at hand, the FCA nonetheless concluded that this provision did not apply, in the absence of any abusive conduct by TDF that could be detached from the merger itself.

iv Commitments

As an alternative to sanctions and remedies, the FCA may also accept commitments offered by undertakings pursuant to Article L464-2 of the Commercial Code. The FCA can make such commitments binding in exchange for the closing of an investigation on the merits without making any finding of an infringement or imposing any sanction, provided the commitments are accepted before the FCA issues a statement of objections. The FCA uses the commitments procedure in order to intervene more quickly and avoid the administrative costs and legal constraints of establishing an abuse of dominance.

The FCA did not issue any commitment decision in 2019, compared to one in 2018 and five in 2017. However, the FCA has already issued one commitment decision in early 2020 regarding La Poste, as well as a decision imposing a fine on PMU for having breached the commitments offered in 2014.

In *La Poste*,¹³³ the FCA closed an investigation into La Poste's loyalty rebates schemes after La Poste offered commitments. The French postal incumbent agreed to end any price bundling between home and out-of-home parcel deliveries by fixing the rebates associated with both services separately. La Poste also agreed to suppress the loyalty effects resulting from rebates applicable to home parcel deliveries by setting standardised volume rebates for its customers with standard rates and by limiting price variations for customers whose rates are set by La Poste on a case-by-case basis. These commitments are applicable for a period of five years and will become binding at the end of a period of one month following the end of the French state of health emergency due to the coronavirus pandemic.

In *PMU II*,¹³⁴ the FCA fined PMU €900,000 for breaching its commitments to separate its online and offline betting services. More specifically, it found that PMU had not separated bets placed online and in-store for international horse races. The FCA found that this was a 'serious breach' of the commitments offered by PMU in 2014 in *PMU I*.¹³⁵ The FCA considered that the 2014 commitments were unambiguous and thus PMU could not reasonably allege that it ignored that the commitment to separate bets applied not only to French races, but also to international races.

132 FCA Decision No. 20-D-01, see footnote 95.

133 FCA Decision No. 20-D-06, see footnote 4.

134 FCA Decision No. 20-D-07, see footnote 3.

135 FCA Decision No. 14-D-04, see footnote 3.

VI PROCEDURE

The French Minister of the Economy, certain other public entities and any company may refer practices falling within the scope of Article L420-2 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 prior to the investigation unless a procedural act interrupts this statute of limitations (see Article L462-7 of the Commercial Code). If the FCA considers that a complaint is unsubstantiated, it can issue a reasoned decision rejecting the complaint at a preliminary stage.

i Interim measures

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:

- a* the FCA has jurisdiction over the relevant practices on the merits;
- b* the alleged practices are susceptible of breaching competition rules; and
- c* the alleged practices may have serious and immediate effects on consumers, the sector or 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 of the hearing, although it sometimes issues its decision within a very short time frame (for instance, within one week of the hearing in the *Amadeus* case).¹³⁶ The parties may appeal the interim measure decision before the Paris Court of Appeal within 10 days of the notification of the decision.

In both 2019 and 2020, the FCA ordered interim measures against Google. In 2019, in *Amadeus*,¹³⁷ the FCA considered that Google's decision to suspend the Google Ads accounts of paid phone directory services operator Amadeus and to refuse to display its ads on Google Ads may amount – at the interim measure stage – to a sudden termination of the commercial relationship under conditions that are not objective, not transparent and discriminatory. In particular, the FCA noted:

- a* the absence of prior notice before any account suspension or clear indication of the violations justifying such suspensions; and
- b* the fact that Google's sales teams were involved in Amadeus' advertising campaigns that were deemed non-compliant with the Google Ads policies.

The FCA found that the practices had a serious and immediate impact on Amadeus which lost approximately 90 per cent of its revenues, and therefore justified granting interim measures pending a decision on the merits. Interestingly, the interim measures go beyond the individual situation of Amadeus and extend more generally to all companies operating in the sector of paid phone directory services. Specifically, the FCA ordered that Google:

- a* clarify the Google Ads policies applicable to paid phone directory operators;

¹³⁶ FCA Decision No. 19-MC-01, see footnote 8.

¹³⁷ FCA Decision No. 19-MC-01, see footnote 8.

- b* provide, save in exceptional circumstances, a prior warning specifying the alleged violation before suspending an account;
- c* organise face-to-face training on the content and scope of the clarified policies for Google's sales teams in charge of providing personalised support to advertisers operating in the sector; and
- d* review manually the compliance of Amadeus' ads with the clarified policies.

On appeal, the Paris Court of Appeal annulled the measure related to the sales teams' training as it considered that it was not necessary to respond to the emergency situation but confirmed the three other measures.¹³⁸

In early 2020, the FCA found that Google's refusal to compensate press publishers and news agencies for the reproduction of previews of their content in its search results may amount to an abuse of Google's dominance on the French market for general search services. The FCA found – at the interim measure stage – that Google may have relied on its dominant position to: (1) impose unfair trading conditions on press publishers and agencies through a 'zero compensation' policy; (2) impose discriminatory conditions by applying the same policy to all publishers and agencies, irrespective of their individual situations and (3) circumvent the spirit and letter of French law No. 2019-775 of 24 July 2019 transposing Directive 2019/790,¹³⁹ which created related rights to the benefit of publishers, by giving them the right to authorise or prohibit the reproduction of their publications by platforms, aggregators and search engines. The FCA considered that Google's practices caused a serious and immediate damage to the press sector, in particular given the importance that Google search services play in attracting traffic to the publishers' websites. As a consequence, and pending its decision on the merits, the FCA ordered Google to:

- a* negotiate in good faith with any publisher and news agency or collective management organisation that request it, the remuneration owed by Google to the latter for the use of protected content on its services, in accordance with the law of 24 July 2019 and based on transparent, objective and non-discriminatory criteria;
- b* communicate to publishers and news agencies the information necessary for a transparent assessment of the remuneration of related rights as provided by law of 24 July 2019;
- c* maintain, during the negotiation period, the principles for the display of protected content put in place since the entry into force of the law of 24 July 2019, according to the parameters chosen by the publishers;
- d* conduct the negotiations within three months of the receipt of a request to enter into negotiations;
- e* take the necessary measures to ensure that the existence and the outcome of the negotiations do not affect the indexing, ranking or presentation of the protected content on Google's services;
- f* take the necessary steps to ensure that the negotiations do not affect any other economic relationship that Google maintains with publishers and news agencies; and
- g* send monthly compliance reports to the FCA until the publication of the FCA's decision on the merits.

138 Paris Court of Appeal, 4 April 2019, *Amadeus*.

139 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

The FCA found that these injunctions were necessary to ensure fair trading conditions between Google and the publishers and news agencies in relation to their related rights until the publication of its decision on the merits. The FCA, however, underlined that these injunctions did not impact the publishers and news agencies' right not to enter into negotiations with Google or to grant Google a free licence for their related rights if they wished to do so.

ii Investigation on the merits

If the FCA considers that a complaint is well grounded, it appoints case handlers 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. They can also interview employees. The investigation period typically lasts from six months to three years (or sometimes more), until the case handler notifies the companies involved of its objections. The companies have two months to respond to the objections. This is followed by a second exchange of written briefs and a hearing. The exchange of written submissions generally lasts one to 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 investigation. 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 fine on the undertakings and order remedies. The parties may appeal the decision before the Paris Court of Appeal within a month. Paris Court of Appeal's 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 an 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.¹⁴⁰ 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 require amendments. If the FCA finally considers that the commitments offered address its competition concerns, it closes the investigation without any finding of infringement and makes the commitments binding in its final decision.

vi Settlement

The settlement procedure was modified by Law No. 2015-990 of 6 August 2015. It is available only after the FCA investigation services have issued a statement of objections. Under the new regime, settling companies commit to not challenging the objections notified by the

140 See Notice of 2 March 2009 on the commitment procedure.

FCA and, in exchange, can negotiate a fine range with the investigation services. Companies may also offer behavioural commitments. The FCA board takes the ultimate decision but will comply with the fine range negotiated with the investigation services.

In December 2018, the FCA adopted its procedural notice on the new settlement procedure.¹⁴¹ While not containing any major change, the notice provides some welcome clarifications, notably concerning the possibility for companies to file written comments before the FCA board on the fining determinants and implement the settlement procedure in conjunction with the leniency procedure. The notice also reaffirms the FCA's preference for cases in which all parties opt in to the procedure, thereby avoiding 'hybrid' scenarios. From the point of view of the FCA, the use of the settlement procedure enables companies to save procedural costs and to obtain a fine reduction (that can sometimes be substantial). In addition, the settlement procedure is likely to facilitate the adoption of shorter decisions in a shorter time frame than the ordinary procedure, and saves on resources consumed by any contentious appeal. However, the inability to negotiate the scope of the statement of objections received prior to settling remains at odds with the European Commission's settlement process and significantly reduces the scope of the negotiations.

In *Electronic Communications*,¹⁴² although the new regime was not yet applicable, the FCA's investigation service anticipated the reform of the settlement procedure and negotiated with Orange a €350 million cap on the fine in exchange for Orange's commitment not to challenge the objections and to implement behavioural remedies. The FCA's board eventually imposed the maximum fine on Orange.

In addition, the FCA has adopted two settlement decisions in abuse of dominance cases since the entry into force of the new settlement regime (before the publication of the settlement notice). In *Petanque Balls*, the FCA settled a fine of €320,000 with Obut, as well as receiving their commitment to implement an antitrust compliance programme.¹⁴³ In *Engie*,¹⁴⁴ Engie did not challenge the FCA's objections, and the FCA imposed a €100 million fine following a settlement procedure.

VII PRIVATE ENFORCEMENT

Private enforcement claims may be brought under general tort law provisions on the basis of Article 1240 of the Civil Code, within five years of the day the victim becomes aware or should have become aware of the wrongdoing (as provided by Article 2224 of the Civil Code). Private enforcement claims require the defendant to prove a fault, a damage and a causal link between the two. Since the implementation into French law of the EU Damages Actions Directive,¹⁴⁵ an FCA decision sanctioning anticompetitive practices creates a non-rebuttable presumption before civil and commercial courts provided that all appeals against the FCA's decision are exhausted. Establishing a fault is significantly more difficult in stand-alone actions. Proving the existence and the amount of the damage is also difficult in

141 See Notice of 21 December 2018 on the settlement procedure. The FCA is bound by its provisions.

142 FCA Decision No. 15-D-20, see footnote 103.

143 FCA Decision No. 17-D-02, see footnote 94.

144 FCA Decision No. 17-D-06, see footnote 57.

145 Law No. 2016-1691 of 9 December 2016 (Article 148); Order No. 2017-303 of 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305 of 9 March 2017 on damages actions relating to anticompetitive practices.

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 but there are no punitive damages).

Antitrust class actions have been 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, and there has not yet been any antitrust class action. The majority of cases are settled out of court. In addition, there is no easy access to evidence for claimants who bear the burden of proof (although the implementation of the EU Damages Actions Directive under French law will be helpful for claimants). Further, 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 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 (known as ‘follow-on damages actions’).

For instance, in *Outremer Telecom v. Orange*,¹⁴⁶ Outremer Telecom brought an action before the Paris Commercial Court based on a 2009 FCA decision.¹⁴⁷ Outremer Telecom alleged that Orange’s abuses of its dominant position (and anticompetitive agreements) on the mobile telephone market in the Antilles and Guyana (French overseas territories) prevented it from expanding on this market. The Paris Commercial Court awarded Outremer Telecom €7.9 million to compensate for the damage resulting from Orange’s abusive loyalty rebates and excessive prices policy on off-net calls. However, the Paris Court of Appeal cut the damages granted to Outremer Telecom to €2.6 million after reviewing the calculation of the damage estimate.¹⁴⁸ In December 2017, in *Digicel v. Orange*,¹⁴⁹ the Paris Commercial Court ruled on a separate follow-on damages action against Orange in relation to the same FCA decision. The Paris Commercial Court found that Digicel had been harmed by Orange’s abusive loyalty rebates and discounts applied on calls from fixed phones to Orange mobiles in the Caribbean overseas territories. In the ruling, the Court acknowledged that Orange’s practices had significant restrictive effects on Digicel’s development since its entry into the Caribbean market in 2000 and therefore awarded Digicel €180 million based on an expert calculation of lost revenues, plus 10.4 per cent interest per year starting from 2009. This led to a total of €346 million in damages to be paid by Orange and its affiliate, Orange Caraïbe. The judge, however, rejected Digicel’s claims in relation to Orange’s other infringements. It

146 Paris Commercial Court, 16 March 2015, *Outremer Telecom v. Orange*.

147 FCA Decision No. 09-D-36 of 9 December 2009 concerning practices in the mobile telephony sector in the Antilles and Guyana, ultimately confirmed by the French Supreme Court on 6 January 2015, Nos. 13-21.305 and 13-22.477.

148 Paris Court of Appeal, 10 May 2017, *Outremer Telecom v. Orange*.

149 Paris Commercial Court, 18 December 2017, *Digicel v. Orange*.

found that Orange's exclusivity clauses with distributors and repairers did not have any impact on Digicel's development, as the latter had deliberately chosen a single-brand distribution network and had decided to undertake the reparations in mainland France.

In addition, in *Betcliv v. PMU*,¹⁵⁰ the Paris Court of First Instance ruled that a commitment decision that led the FCA to close the investigation on the merits without making a finding of infringement does not prevent ordinary courts from finding that the company having taken these commitments has engaged in abusive conduct. The Court also held that courts are free to rely on information contained in the commitment decision and use it as an indication or even prima facie evidence of the anticompetitive nature of the practices. The Court clearly stated that a company cannot invoke a commitment procedure to claim that it did not commit a fault so as to avoid compensating victims for the damage they suffered. In practice, the Paris Court of First Instance relied on the FCA's *PMU* commitment decision¹⁵¹ to find that PMU held a dominant position on the offline and online horse racing betting markets. The Court also relied on feedback during the market test when the PMU offered commitments in 2014 to find that the PMU had indeed abused its dominant position by pooling together its online and offline bets to gain an unfair competitive advantage. The Court ultimately decided to stay the proceedings, and ordered an expert to evaluate what could have been Betcliv's market share had the PMU not pooled together its online and offline bets to determine the amount of damages to award to Betcliv. The Paris Court of Appeal confirmed the judgment of the Court of First Instance and extended the expert's mission.¹⁵²

In 2019, French courts issued (conflicting) decisions regarding the determination of the starting point of the limitation period for damages actions, in the context of follow-on claims. Article 2224 of the Civil Code provides that the limitation period starts running from the date on which the victim knew or could have known that it was a victim of the offence and knew or could have known about the characteristics of the offence, its imputability and its duration. In *Arkeos v. EDF*,¹⁵³ the Paris Court of Appeal found that an FCA interim measures decision could not be considered as the starting point of the limitation period. It found that interim measures decisions are less detailed than FCA decisions on the merits, do not sanction an established anticompetitive practice and are likely to be called into question later by the FCA after its investigation on the merits. The Paris Court of Appeal concluded that the limitation period started running from the day the FCA's decision on the merits was adopted and the claimants' action was thus not time-barred. On the other hand, in *CNAMTS v. Sanofi*,¹⁵⁴ the Paris Commercial Court found that the limitation period started running when the claimant, CNAMTS, provided the FCA with a study calculating its losses due to Sanofi's conduct in response to a request for information. The Paris Commercial Court, therefore, ruled that CNAMTS' claim was time-barred.

150 Paris Court of First Instance, 22 February 2018, *Betcliv v. PMU*.

151 FCA Decision No. 14-D-04, see footnote 3.

152 Paris Court of Appeal, 12 September 2018, *Betcliv v. PMU*.

153 Paris Court of Appeal, 6 March 2019, *Arkeos* which relates to FCA Decision No. 09-MC-01 of 8 April 2009 concerning a complaint and request for interim measures of Solaire Direct and FCA Decision No. 13-D-20 (see footnote 115). See also, French Administrative Supreme Court, 22 November 2019 where the Court considered that the five-year period started on the date of the FCA Decision No. 12-D-25 (see footnote 44).

154 Paris Commercial Court, 1 October 2019, *CNAMTS v. Sanofi* which relates to FCA Decision No. 13-D-11 (see footnote 85).

Purely stand-alone actions (not based on a previous FCA decision) are rare. Nevertheless, in *Bottin Cartographes v. Google*,¹⁵⁵ the Paris Commercial Court granted €500,000 in damages based on a stand-alone claim brought by Bottin Cartographes. The latter alleged that Google implemented predatory prices by offering its Google Maps application programming interface (API) service, which enables third-party website operators to display a map on their website, free of charge. The Paris Court of Appeal, however, overruled the first instance decision and dismissed all the plaintiff's claims.¹⁵⁶ The 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.¹⁵⁷ 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. In any event, there was no evidence of a predatory strategy, especially as there were 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.

In *SFR v. Orange*,¹⁵⁸ the Paris Commercial Court granted €51.4 million in damages against Orange following a stand-alone claim made by SFR. SFR claimed that Orange had implemented a margin-squeeze strategy by allowing secondary residence owners to suspend their landlines while they were away from their secondary residence.¹⁵⁹ On this upstream market, Orange, however, refused to offer suspendable telephone access to telecoms operators. The Commercial Court found that this practice constituted a margin squeeze because as a result, SFR was not in a position to propose to its downstream customers to have suspendable landline access. The Paris Court of Appeal, however, annulled the Paris Commercial Court's judgment. The Court of Appeal found that the market for secondary residences was not a relevant product market because from the demand-side perspective, 90 per cent of secondary residence owners considered that the suspendable line was substitutable with other telephone lines; and from the supply-side, the data used by SFR to demonstrate the cost difference as compared with other telephone lines was not sufficiently reliable.¹⁶⁰ In 2016, the French Supreme Court overturned the Court of Appeal's ruling.¹⁶¹ The Supreme Court found that the Court of Appeal should have conducted a more detailed analysis on demand-side substitution, notably by making a distinction between secondary residence owners that purchased a simple fixed line and those that purchased multi-service fixed lines and mobile lines. The Supreme Court also found that the Court of Appeal should have ignored the unreliability of the data on supply-side substitution and should have discussed the relevance of the criteria used by SFR. The Supreme Court referred the case back to the appellate court. The Paris Court of Appeal ultimately awarded SFR €53 million in damages.¹⁶²

In purely stand-alone actions, claimants may be exposed to a risk of conviction for abusive proceedings. Recently, the Paris Court of Appeal imposed a civil fine (€3,000)

155 Paris Commercial Court, 30 January 2012.

156 Paris Court of Appeal, 25 November 2015, see footnote 48.

157 FCA Opinion No. 14-A-18; see footnote 49.

158 French Supreme Court, 12 April 2016, No. 14-26.815.

159 Paris Commercial Court, 12 February 2014, *SFR v. Orange*.

160 Paris Court of Appeal, 4 October 2014, *SFR v. Orange*.

161 French Supreme Court, 12 April 2016, No. 14-26.815.

162 Paris Court of Appeal, 8 June 2018, *SFR v. Orange*.

and damages (€20,000) on *Avi Charente* for abusive proceedings consisting of bringing a stand-alone action for abuse of dominance without having sufficient evidence to prove its claims.¹⁶³ Conversely, in another case, the Paris Court of Appeal reversed the judgment of the Court of First Instance which had ordered *Inforad* to pay €60,000 in damages to *Coyote* for abusive proceedings. The Court of Appeal considered that such an abuse requires an intention to harm, the proof of which was not provided in this case.¹⁶⁴

Private enforcement is expected to continue developing as the EU Damages Actions Directive is now implemented under French law.¹⁶⁵

VIII FUTURE DEVELOPMENTS

The adaptation of antitrust enforcement to the digital economy will remain one of the FCA's top priorities for 2020. In a press release of January 2020 on its priorities for 2020,¹⁶⁶ the FCA announced the creation of a dedicated Digital Department within the FCA, supervised by the *Rapporteur Général*. This specialist unit will be in charge of providing support in cases related to the digital sector by first developing new tools to better understand the economics underlying the regulation of platforms and detect potential violations more efficiently. The impacts of digital technology on the financial sector and the retail sector will also be further examined by the FCA in two studies to be released in 2020. Regarding the financial sector, the FCA will pay particular attention to the emergence of worldwide digital players in payment services.

In its contribution to the debate on competition policy in the digital sector of February 2020,¹⁶⁷ the FCA expressed its views on the possible lines of approach to enhance antitrust enforcement in the digital sector, both at the European and French levels. The FCA suggested extending the notion of dominant position to 'structuring digital platforms', which would be defined as companies which provide online intermediation services and have structuring market power (by virtue of their size, financial capacity, user community or the data they hold), enabling them to control access to the market or significantly affect the functioning of the market. Moreover, structuring platforms would be those to which competitors, users or third parties require access in order to carry out their economic activity. In this context, the FCA proposed introducing new rules applicable only to structuring platforms, in particular to identify a non-exhaustive list of practices that may raise competition concerns when implemented by structuring platforms (including practices such as discrimination against competitors, restriction of access to non-dominated markets, use of data to raise barriers to entry, restriction of product interoperability, restriction of data portability or limitation of multi-homing possibilities). The FCA even suggested allowing competition authorities

163 Paris Court of Appeal, 13 March 2019, *Avi Charente v. Lactalis*.

164 Paris Court of Appeal, 19 December 2018, *Inforad v. Coyote*.

165 Law No. 2016-1691 of 9 December 2016 (Article 148); Order No. 2017-303 of 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305 of 9 March 2017 on damages actions relating to anticompetitive practices.

166 FCA Press release of January 9, 2020, 'The Autorité de la concurrence announces its priorities for 2020' available on the FCA's website: <https://www.autoritedelaconurrence.fr/en/article/autorite-announces-its-priorities-2020>.

167 FCA's contribution to the debate on competition policy in the digital sector of 19 February 2020 available on the FCA's website: <https://www.autoritedelaconurrence.fr/en/press-release/autorite-publishes-its-contribution-debate-competition-policy-and-challenges-raised>.

to impose commitments or prohibiting these practices unless the structuring platform can demonstrate that the practices generate efficiencies and are, therefore, objectively justified. The FCA also stated that the notion of essential facilities should be adapted in order to include certain databases, communities of users or ecosystems.

Regarding artificial intelligence, the FCA published in November 2019 a joint study on algorithms and their implications on competition with the German Federal Cartel Office. Although mostly focused on the risks of collusion, the study highlights the links between market power and algorithms, the use and access to which can lead to additional barriers to entry. The study also lists examples of abuses that can result from the use of pricing and ranking algorithms. Discriminatory and self-preferencing practices carried out by dominant platforms seem to be the two competition authorities' main focus.

Finally, interim measures cases may substantially increase in the coming years as the transposition of the ECN+ Directive into French law in 2020 will allow the FCA to impose interim measures on its own initiative, without having to wait for complaints from market players. This opportunity will undoubtedly be seized by the FCA, which considers interim measures to be particularly well-suited to the fast-evolving digital sector (as shown by the adoption of two interim measures decisions against Google in 2019 and 2020).¹⁶⁸ In order to further facilitate the use of interim measures, the FCA in its contribution to the debate on competition policy in the digital sector even suggested allowing parties to submit a request for interim measures without having to simultaneously file a request on the merits, allowing this to be submitted afterwards.¹⁶⁹

168 FCA Decisions Nos. 19-MC-01 (see footnote 8) and 20-MC-01 (see footnote 9).

169 FCA's contribution to the debate on competition policy in the digital sector of 19 February 2020 (see footnote 167).

GERMANY

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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 the abuse of a (single or collective) dominant position, and 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 Treaty on the Functioning of the European Union (TFEU). Another distinct characteristic of German competition law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance.

Guidance on the application of the rules can mainly be gathered from the case law of the German courts, notably the Federal Court of Justice (FCJ), and to a lesser degree the German Federal Cartel Office (FCO). Abuse of dominance enforcement is largely private enforcement in Germany, and there are few FCO cases. There is currently no formal general guidance paper on unilateral conduct available, so one has to look into the case law.

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 competition law.³ However, abuse of dominance cases in Germany are normally handled in administrative proceedings in which no fines are imposed.

No special rules apply in Germany to the public sector or state-owned enterprises. Section 185(1) 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, post and railway. The Federal Network Agency (FNA) monitors compliance with certain of these regulations in cooperation with the FCO.

The German government and legislator are concerned that the current German legal framework does not allow effective enforcement against dominant companies’ abusive practices in light of the increasing importance of globally active digital platforms benefiting from network effects. The current draft proposal for the 10th amendment of the ARC (to be adopted by the German legislature in 2020 or early 2021) envisages a fundamental reform

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2 An English version of the ARC is available at www.gesetze-im-internet.de/englisch_gwb/index.html.

3 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&cv=3.

of the abuse of dominance legal framework with a view to digital markets, and to extend the FCO's enforcement powers against digital platforms significantly. However, there is currently only a draft proposal from the German Federal Ministry for Economic Affairs and Energy (FME).⁴

II YEAR IN REVIEW

The FCO's enforcement activity in the abuse of dominance area over the past couple of years has continued to be quite limited in terms of actual decisions. It has only issued one single formal prohibition decision in 2019 and none so far in 2020. However, despite the limited number of actual decisions, the FCO closely monitors the digital economy and, in particular, the online platforms in multi-sided markets. The FCO's prohibition decision against Facebook marks another milestone in this regard. For the first time, the FCO based its finding of abusive exploitative practices by Facebook on non-compliance with the EU General Data Protection Regulation (GDPR) and imposed limitations on Facebook's current practice of collecting and processing user data, and prohibited using the related terms of service.⁵ The *Facebook* decision further complements the FCO's previous notable 'online' dominance cases, including its decision against CTS Eventim⁶ (recently confirmed by the Düsseldorf Court of Appeal (DCA)),⁷ Google,⁸ and hotel booking platforms Booking.com⁹ and HRS.¹⁰ Upon Facebook's appeal, the DCA suspended the FCO's *Facebook* decision in interim proceedings, expressing 'serious doubts' about its legality.¹¹ The FCO has appealed the interim order to the FCJ. A decision is expected for mid-2020. In July 2019, the FCO

4 The FME's draft proposal of 24 January 2020 is available in German at https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf?__blob=publicationFile&cv=10.

5 FCO decision of 7 February 2019; the case report and press release are available on the FCO's website.

6 CTS Eventim – the operator of Germany's largest ticketing system (acting as the intermediary between event organisers and ticket offices) – had required organisers of live events to distribute the tickets for their events exclusively via CTS Eventim's ticketing system, while at the same time requiring ticket offices to source tickets only from the same system. In its decision, the FCO took account of CTS Eventim's significant market share, but also applied the newly introduced criteria for the assessment of a company's dominance on multi-sided platform markets under Section 18(3a) ARC (see FCO decision of 4 December 2017, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_12_2017_CTS_Exklusivit%C3%A4t.html?nn=3591568).

7 DCA decision of 5 December 2018, case VI-Kart 3/18 (V).

8 FCO decision of 9 September 2015, case B6-126/14. A press release is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html?nn=3591568.

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.

10 Most online cases were dealt with under Article 101 of the TFEU and its German equivalent, Section 1 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 ARC (abuse of dominance). Given the violation of Article 101 TFEU and Section 1 ARC, the DCA 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 DCA order of 26 August 2019, case VI-Kart 1/19 (V).

closed its investigation against Amazon's terms and conditions and its behaviour with regard to the retailers on its German marketplace platform, amazon.de, without a formal decision after Amazon had committed to change its terms and conditions.¹²

In 2019, the FCO also rendered a commitment decision to complete its proceedings against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC) regarding certain advertising restrictions that they imposed on athletes (prohibiting athletes participating in the Olympic Games from using their person, name, picture or information on their performance during the Olympic Games – and some days before and after – for advertising purposes). According to the FCO's preliminary view, these restrictions constituted an abuse of the DOSB's and the IOC's dominant positions (as the athletes – who are performers at the games – do not profit directly from the very high advertising revenues generated by the official Olympic sponsors). After evaluating, and market testing, proposals by the DOSB and the IOC to reduce the scope of the restrictions, the FCO and the two sports federations reached an agreement to amicably resolve the case by commitments.¹³ Under the sports federations' new rules, athletes now have more freedom to engage in advertisement activities with their own sponsors during the duration of Olympic Games insofar as these constitute generic advertising.

In recent years, the FCO has 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.¹⁴ Since May 2011, the FCO has published a total of nine reports on investigations into different sectors,¹⁵ of which seven specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel, food retail, the sub-metering and billing of heating and water consumption, and cement and ready-mixed concrete). In addition, the FCO is currently conducting further investigations, for example, regarding the household waste disposal and hospital sectors. With respect to the digital economy and online platforms, the FCO has launched a sector inquiry into online advertising with a focus on technological developments and their impact on the market structure and market opportunities of the various players concerned, in particular the impact of walled gardens set up by incumbent operators on the ability of other companies to compete.¹⁶

Very recently, the FCO also paid increased attention to the energy sector. In September 2019, the FCO and the FNA published joint guidelines on the control of abusive behaviour in the electricity generation and wholesale trade sector emphasising that price peaks caused by an artificial limitation of supply (either caused by physical or financial capacity restraints)

12 FCO press release of 17 July 2019, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html?nn=3591568; case summary available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5.

13 FCO press release of 27 February 2019, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/27_02_2019_DOSB_IOC.html?nn=3591568.

14 Arguably, this process limits the defence rights of companies subject to the subsequent competition proceedings, as they are obliged to respond to the sector inquiry without knowing the specific allegations that will be brought against them later on.

15 English summaries of some of the FCO's sector inquiry reports are available at www.bundeskartellamt.de/EN/AboutUs/Publications/Sectorinquiries/sectorinquiries_node.html.

16 FCO press release of 1 February 2018, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html?nn=3591568.

may qualify as an exploitative abuse.¹⁷ In December 2019, the FCO published its first report on the competitive situation in the energy production sector and found that energy producer RWE was very close to being dominant and that even a relatively small reduction of capacities in the course of the nuclear and coal phase-out in Germany could change this into a dominant position.¹⁸

In November 2019, the FCO has initiated abuse proceedings against Deutsche Bahn concerning the sale of Deutsche Bahn tickets via mobility platforms which aggregate information on multiple traffic operators and travel options.¹⁹ The FCO is investigating contractual restrictions imposed on mobility platforms regarding advertising in app stores, search engines and social networks, and looks into conditions imposed by Deutsche Bahn according to which platforms cannot grant discounts on Deutsche Bahn tickets. Another focus areas is whether and to what extent mobility platform operators must have access to real-time information about departures and delays in order to be able to offer new mobility concepts.

The following tables list the significant cases and decisions dealing with abuse of a dominant position adopted by the FCO in 2019 and 2020, and important ongoing proceedings.²⁰

i 2019/2020 FCO decisions

Sector	Company	Conduct	Fine
Lease and operation of basalt quarries	Constantia Forst GmbH	Repeated threats of termination and ultimately termination of lease agreement	€80,000; case closed
Software for tax advisers	Bundessteuerberaterkammer (German Tax Advisers Chambers); DATEV	Exclusive award of the operation of an electronic database for the administration of mandates to DATEV	No fine; case closed with commitments
Online sales platforms	Amazon	Potentially exploitative abusive conduct towards retailers using Amazon's marketplace	No fine, case closed with commitments
Social networks	Facebook	Exploitative abuse by inappropriate collection and processing of Facebook users' personal data, in particular from third-party sources	No fine; prohibition decision. Appeal pending
Sports federations	IOC, DOSB	Exploitation of athletes (advertising restrictions)	No fine; case closed with commitments

17 FCO press release of 27 September 2019, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/27_09_2019_Leitfaden_Preisspitzen.html?nn=3591568; guidelines available only in German at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden_Preisspitzen.pdf?__blob=publicationFile&cv=4.

18 FCO press release of 17 December 2019, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/19_12_2019_Marktmachtbericht.html?nn=3591568; full report available on in German at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Marktmachtbericht%202019.pdf?__blob=publicationFile&cv=7.

19 FCO press release of 28 November 2019, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/28_11_2019_DB_Mobilitaet.html?nn=3591568.

20 A comprehensive list of the FCO's past dominance cases is available on its website in German only at https://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3591512&cl2Categories_Format=Entscheidungen&cl2Categories_Arbeitsbereich=Missbrauchsaufsicht&docId=3590026.

In addition to the listed cases, the FCO intervened in 2020 against furniture retailer XXXLutz for requesting unjustified ‘anniversary rebates’, albeit without launching a formal investigation. The FCO dropped its proceedings after XXXLutz committed to stop demanding these rebates and to negotiate the rebate with each of its suppliers on an individual basis.²¹

ii Ongoing cases

Sector	Company	Conduct	Case opened
Online sales platforms	Deutsche Bahn AG	Potentially abusive conduct by Deutsche Bahn AG concerning the sale of tickets via third-party mobility platforms	28 November 2019

III MARKET DEFINITION AND MARKET POWER

There are two different concepts of market power in German competition law. The assessment of ‘absolute’ single or collective dominance requires a definition of the relevant market as well as the assessment of market power on the relevant market based on the prevailing market structure and market conditions. In the assessment of dominance, the FCO and the German courts continue to place considerable importance on market shares and have only slowly started to adopt the more sophisticated economic analyses used by the EU Commission. In contrast, the assessment of ‘relative’ market power focuses more on the distribution of bargaining power between potential addressees of the provisions on relative market power and small and medium-sized companies as their trading partners or competitors.

i Market definition

In defining relevant product markets, the German courts and the FCO primarily analyse the substitutability of goods and services from a demand-side perspective based on the intended use, characteristics and price of the relevant products. In some cases, the FCO also refers to the ‘small but significant and non-transitory increase in price’ test as an additional, but not the only or the principal, criterion for market definition.²² 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 taken into account if the demand-side perspective leads to overly narrow markets.²³

As under EU law, the relevant geographic market comprises the area in which the enterprises concerned compete, in which the conditions of competition are sufficiently homogeneous, and that can be distinguished from neighbouring areas because of appreciably different competitive conditions.²⁴

21 FCO press release of 27 February 2020, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/27_02_2020_XXXLutz.html?nn=3591568.

22 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*; FCJ judgment of 4 March 2008, case KVR 21/07, *Soda-Club II*.

23 For example, FCJ judgment 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).

24 FCJ judgment of 5 October 2004, case KVR 14/03, *Melitta/Schultink*.

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 that cannot switch to alternative suppliers, can sometimes influence the assessment.

The German legislator has also clarified that a relevant market may be found even if the relevant services are rendered free of charge.²⁵

ii Dominance

As previously noted, German competition rules on unilateral conduct apply to companies in a position of single or collective dominance, and to companies enjoying 'relative' market power over small and medium-sized companies. Section 18 ARC defines single and collective dominance.

Single dominance

According to Section 18(1) ARC, single dominance exists if a company is either without competitors, or not exposed to significant competition or in a 'superior market position' as compared with its competitors (which can exist even if there is significant competition in the market). Single dominance exists where the market power of an enterprise enables it to act without sufficient constraints from the marketplace (i.e., a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, consumers).

Section 18(3) 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. An appraisal of market shares (both in absolute and relative – compared with competitors – terms) is still the most important factor. The rebuttable market share-based presumption pursuant to Section 18(4) ARC provides an important first indication of possible dominance where the market share of a company exceeds 40 per cent.²⁶ 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. The underlying reason is that 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.

25 See recently introduced Section 18(2a) ARC.

26 Dominance may also (exceptionally) be found to exist if the market share remains below the presumption threshold.

In line with the FCO's recent focus on digital markets, the German legislator has introduced additional criteria for the assessment of market power in multi-sided markets and networks.²⁷ According to Section 18(3a) ARC, in particular, the following criteria must be taken into account when assessing a company's market position on multi-sided and network markets:

- a direct and indirect network effects;
- b the parallel use of more than one service (multi-homing) and the difficulties faced by users in switching services;
- c economies of scale in connection with network effects;
- d the company's access to data relevant for competition; and
- e competitive pressure driven by innovation.

The FCO applied these additional criteria in its decisions against German ticketing system operator, CTS Eventim, and Facebook. In *CTS Eventim*, the FCO found that the ticket platform enjoyed a dominant position with regard to event organisers and ticket offices in the two-sided platform market for ticketing services in Germany. In *Facebook*, the FCO based its dominance analysis of the German market for social media networks, in particular, on three factors:

- a direct network effects resulting from Facebook's large number of users (creating a 'lock-in effect' for its users, as they would lose all their existing contacts if they switched to another social network – creating high entry barriers);
- b indirect network effects that Facebook enjoys in relation to its advertisement customers (given the large number of Facebook users, advertisers cannot easily switch to another social network to reach as many users); and
- c Facebook's access to users' personal data.

While the DCA has suspended the FCO's *Facebook* decision, it did not challenge the FCO's finding of market power in the interim proceedings (see Section IV.ii.).

In its recent proceedings regarding Amazon's terms and conditions and its behaviour towards retailers on its German marketplace platform *amazon.de*, the FCO focused on Amazon Marketplace's role as an intermediary between resellers and consumers and gatekeeper to consumers who purchase their products online, in its assessment of market power on the two-sided market for the provision of online marketplace services.

Collective dominance

According to Section 18(5) ARC, collective dominance exists where there is no significant competition between the two or more largest companies in a market and where they jointly are not constrained sufficiently by competition from third parties. 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.

Section 18(6) 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 of the market. These

²⁷ See also the FCO's working paper of 9 June 2016 regarding market power of platforms and networks, available in German at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=2.

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. For a *non liquet*, the presumption stands.

German courts have so far rarely addressed collective dominance issues outside of merger cases. The FCO and the German courts generally employ the criteria established by the EU General Court in *Airtours v. Commission* in determining collective dominance (albeit in a somewhat modified form).

‘Relative’ dominance and ‘superior market power’

As noted above, going beyond the scope of Article 102 TFEU, Section 20 ARC prohibits exclusionary (and discriminatory) conduct not only by companies that are dominant in ‘absolute’ terms, but also (1) the abuse of ‘relative dominance’ in vertical relations by companies on which ‘small or medium-sized companies depend’ as suppliers or purchasers of certain kinds of goods or commercial services (Section 20(1) ARC), and (2) the abuse of ‘superior market power’ at horizontal level by companies enjoying ‘stronger market power in comparison to their small and medium-sized competitors’ (Section 20(3) ARC). These provisions aim at protecting small and medium-sized companies against anticompetitive conduct by their larger competitors.

Relative market power in vertical relationships pursuant to Section 20(1) ARC requires that the small or medium-sized enterprise is dependent upon another company as supplier or customer without adequate alternatives. Section 20(1) ARC considers the following forms of dependency: the small or medium-sized company (1) is dependent on the other company’s ‘must have’ brands or ‘must have’ products; (2) is in a position of ‘company-specific dependency’ (e.g., because it has specialised and designed its product or service to the needs of an particular purchase (‘lock-in’ after transaction-specific investments); or (3) is dependent due to scarcity of the product.

Section 20(1) second 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 granted to other purchasers. Further, 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. The FCJ recently confirmed that in the case of dependency because of ‘must have’ products, retailers are qualified as small or medium-sized companies in relation to their competitors. In particular, with respect to a leather goods retailer being dependent on suitcase manufacturer Rimowa’s ‘must have’ products, the FCJ found a leather goods retailer with six retail stores still a small or medium-sized company because its competitors are not only other leather goods retail shops, but also large department stores also selling leather goods and suitcases.²⁸

Section 20(3) ARC further enlarges the scope of the abuse of dominance legal framework to companies that do not even qualify for relative market power in vertical relations, but that have particular power, (i.e., ‘superior market power’ at horizontal level over certain smaller but not all rivals) and prohibits exclusionary conduct like tying/bundling, predatory pricing and margin squeeze. Its main application area is retail food trade. An example of prohibited exclusionary conduct is frequent pricing below cost.²⁹

28 See FCJ judgment of 12 December 2017, case KZR 50/15.

29 Section 20(3) ARC.

IV ABUSE

i Overview

Section 19(1) ARC contains a general prohibition of the abuse of a dominant position similar to Article 102 TFEU which addresses exclusionary conduct, exploitative abuse as well as discrimination. Section 19(2) ARC lists non-exhaustive examples of specific types of abusive conduct. Prohibited are, inter alia, the following types of conduct:

- a* unfair hindrance of competitors (exclusionary conduct) and discrimination (Section 19(2) No. 1 ARC). Typical types of exclusionary conduct under this provision are refusal to deal scenarios, lack of admission into the distribution system or termination of distribution agreements, exclusivity provisions or loyalty rebates, bundling/tying and predatory pricing. Section 19(2) No. 1 ARC also captures discrimination of trading partners (i.e., treating an undertaking, directly or indirectly, differently from other similar undertakings without objective justification);
- b* excessive prices or terms and conditions, notably ‘imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition’ (exploitative abuse, Section 19(2) No. 2 ARC). To determine which prices or business terms would have applied hypothetically on a competitive market, the situation on other comparable markets with effective competition is taken into account. In particular, an extreme difference between production costs and revenue, but also a price that exceeds the average prices of other comparable enterprises for similar products or services,³⁰ can be regarded as an indication of this prohibited exploitative conduct. Exploitative abuses may further arise under the more general provision of Section 19(1) ARC. The FCO’s *Facebook* decision shows that inappropriate contractual terms and conditions may also constitute an exploitative abuse under the general provision of Section 19(1) ARC (see further Section IV.ii);
- c* price or margin squeezes, if a vertically integrated dominant company sells products to its downstream competitors at a (wholesale) price that is either higher than the price that it charges itself on the downstream market, or so high that its downstream competitors are left with a profit or margin that is too small to effectively compete with the dominant company’s product on the downstream market. Price or margin squeezes are considered an abuse under Section 19(2) No. 1 ARC. Under Section 20(3) No. 3 ARC, such behaviour is also expressly prohibited for vertically integrated undertakings with relative market power with respect to small or medium-sized undertakings;
- d* access to essential facilities (Section 19(2) No. 4 ARC), if a dominant company refuses to grant another company access to its network or other infrastructure entirely, or only in exchange for unreasonably high fees, if the facility constitutes an essential facility. A facility is essential if without access 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. Access to an essential facility may, however, be refused if the joint use is impossible for practical reasons due to limited capacity or for legal reasons –for example, a necessary public authorisation is not granted. Where the possibility

30 FCJ judgment of 15 May 2012, case KVR 51/11, *Wasserpreise Calw*,

of joint use of an essential facility by both parties is unclear, the dominant enterprise bears the burden of proof.³¹ Section 19(2) No. 4 ARC, however, does so far not apply to access to intellectual property; and

- e abuse of buyer power by asking for unjustified commercial conditions (Section 19(2) No. 5 ARC), notably by ‘inviting or causing other undertakings to grant it advantages without objective justification’. German courts have, historically, been very reluctant to find that a dominant purchaser abused its market position by asking suppliers for advantages, such as special rebates. The FCO, however, intervened against food retail chain Edeka based on Article 19(2), No. 5 ARC, because Edeka had, inter alia, insisted on suppliers retroactively granting it the same preferential conditions and benefits that they had previously granted to another retail chain that Edeka had acquired (‘wedding rebates’).³² While the DCA overturned the FCO’s decision,³³ the FCJ reinstated it in key points, agreeing in particular that Edeka’s retroactive demand for more favourable price components of certain products without regard to the price structures otherwise in use (‘cherry picking’ of rebates that had previously been granted) was abusive.³⁴ In the same vein, the FCO intervened against furniture retailer XXXLutz for requesting unjustified wedding rebates in 2018 and anniversary rebates in 2020. In both cases, the FCO dropped its proceedings after XXXLutz had committed to abandon its demands for such rebates and to negotiate the rebate with each of its suppliers on an individual basis.³⁵

As noted above, Section 20(1) ARC extends the prohibition of exclusionary and discriminatory conduct of Section 19 (2) No. 1 ARC to companies with ‘relative’ dominance. Section 20(3) ARC further enlarges the scope of the abuse of dominance legal framework to companies that do not even qualify for relative market power, but that have particular power over certain smaller but not all rivals and prohibits exclusionary conduct like tying/bundling, predatory pricing and margin squeeze.³⁶

As a general rule, the FCO or plaintiff have to prove the market power and the abuse and the company accused has to advance possible justifications for its conduct. However, in administrative proceedings, the *ex officio* investigation rule applies which means that the FCO still has to investigate possible justifications for the relevant conduct, but the company has a duty to cooperate and in the event of a *non liquet* on the justification, the conduct is found to be abusive.

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- 31 See, in particular, FCJ judgment of 11 December 2012, case KVR 7/12, *Puttgarten/German ferry terminal*, for further details.
- 32 FCO decision of 3 July 2014, case B2-58/09.
- 33 DCA decision of 18 November 2015, case VI – Kart 6/14 (V).
- 34 FCJ judgment of 23 January 2018, case KVR 3/17, *Hochzeitsrabatte*.
- 35 FCO press release of 11 January 2018, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/11_01_2018_Moebel_Hochzeitsrabatte.html; jsessionid=20D2BFFF2E0D1EB3D04360940ACCD2FB.2_cid387?nn=3591568; FCO press release of 27 February 2020, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/27_02_2020_XXXLutz.html?nn=3591568.
- 36 In addition to the rules laid out in Sections 18 to 20 ARC, which apply only to enterprises with dominant market positions or enterprises that are dominant at least in relative terms by enjoying relative market power with respect to small or medium-sized undertakings, Section 21 ARC stipulates a number of prohibited forms of unilateral behaviour by individual enterprises or groups of enterprises that do not require any from dominance (e.g., no enterprise may request that other enterprises boycott a third enterprise).

ii Illustrative cases

Since the lists of abusive conduct in Sections 19, 20 ARC are not exhaustive, there are also other kinds of abuses. For example, German courts have found that the intentional and deceptive failure to disclose intellectual property rights (essential patents) during a standard-setting procedure might lead to an abuse (patent ambush). An abuse, however, occurs only if an undertaking actually claims royalties for the use of the intellectual property after the intellectual property is incorporated in the standard. This is because the undertaking does not hold a dominant position at the time of its failure to disclose, but only achieves dominance once its intellectual property is (deceptively) incorporated into the standard.³⁷ Upon referral from the Düsseldorf District Court, the European Court of Justice has specified certain perceived discrepancies between German case law and the position that the European Commission took on the conditions under which the holders of standard essential patents may seek an injunction against users of their standard essential patents without committing an abuse.³⁸

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 objective justification).

An illustrative example of a discrimination case is the FCO investigation into Google's refusal to pay for news snippets in its search engine. After the German legislator 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 (i.e., '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 2014,³⁹ and issued a formal rejection decision in September 2015⁴⁰ 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.

Exploitative abuses

An illustrative example of an exploitative abuse is the recent FCO's *Facebook* case even though it did not concern pricing, but the use of certain contractual terms and conditions.⁴¹ Specifically, the FCO found Facebook's terms and conditions exploitative because they

37 See, for instance, the judgment of the Düsseldorf District Court in *MPEG 2-Standard*, case 4b O 346/05, 30 November 2006, where the court, however, ultimately did not find an abuse.

38 ECJ, judgment of 16 July 2015, case C-170/13 – *Huawei*.

39 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.

40 FCO decision of 9 September 2015, case B6-126/14. A press release is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_2015_VG_Media_Google.html?nn=3591568.

41 The FCJ considered it abusive under Section 19(1) ARC if a dominant enterprise invoked terms and conditions that are invalid under civil law. Such conduct is, in particular, abusive if the clause in question

violated European and German data protection rules.⁴² In the FCO's view, a key objective of European data protection law is to protect the fundamental right of informational self-determination and, hence, users' control over how and for what purposes private networks, such as Facebook, use their personal data. The FCO found that Facebook's terms and conditions provided it with access to vast amounts of personal user data, as users were practically unable to reject Facebook's data collection if they wanted to join and access its network (under Facebook's terms of service, users could only join the social network if they also agreed to Facebook collecting and matching user data obtained from sources other than their core platform, including not only other Facebook-owned platforms, but also third-party websites). In addition, users lacked viable alternatives to Facebook's private network because of Facebook's dominant market position. In the FCO's view, users' consent to Facebook's data collection could not be considered as freely given – which is the key requirement for the consent's validity under the GDPR. The FCO therefore imposed limitations on Facebook's current practice of collecting and processing user data, and prohibited the use of the relevant terms of service. Upon Facebook's appeal, the DCA suspended the FCO's decision in interim proceedings, expressing 'serious doubts' about the prohibition decision's legality. In particular, it disagreed with the FCO's finding of a competitive harm caused by Facebook's conduct and criticised the normative causality standard applied by the FCO under which any infringement of provisions other than competition law by a dominant company would constitute an abuse.⁴³ The court held that for an exploitative abuse, there must be a strict causal link between dominance and the conduct and found that the FCO had failed to establish the existence of such a causal link between Facebook's dominance and its far-reaching data collection practices (and thus the alleged infringement of the European data protection rules). The FCO has appealed the interim order to the FCJ. A decision is expected for mid-2020.

The FCO also opened an investigation into Amazon's terms and conditions with retailers on its German marketplace platform *amazon.de* and the case was closed with commitments, because Amazon undertook to change its contractual framework.⁴⁴ As with Facebook, the FCO considered that inappropriate business terms imposed by a dominant company can constitute an exploitative abuse. Even though not every single clause of the terms and conditions that is potentially disadvantageous to or burdensome for the retailers raised competition concerns,⁴⁵ the FCO took the view, that, on the basis of an overall assessment, Amazon's application of possibly inadequate contractual terms and conditions could hinder

had only been accepted because of the company's dominance; see FCJ judgment of 24 January 2017, case KZR 47/14, *VBL Gegenwert II*, Paragraph 35.

42 FCO decision of 6 February 2019; a non-confidential version is available in German only at www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html. The case report and press release are available on the FCO's website at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591286.

43 DCA order of 26 August 2019, case VI-Kart 1/19 (V).

44 FCO press release of 17 July 2019, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html?nn=3591568; case summary available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&cv=5.

45 For example, under the previous terms and conditions, Amazon had an unlimited right to immediately terminate and block retailers' accounts without justification, was practically exempted from any liability

retailers on Amazon's marketplace or even make their activity on the marketplace impossible, particularly due to a lack of means to enforce Amazon's compliance with main contractual obligations. In instances where Amazon's imposition of these business terms could be considered as a request for benefits for no objective reason, the FCO considered also an abuse by demanding unjustified benefits or commercial conditions from the retailers. In addition, the FCO assessed whether certain terms and conditions (in particular the cancellation and blocking of seller accounts, rights of use and parity requirements, product reviews and seller ratings or European delivery schemes) also constituted an exclusionary abuse. The FCO took into account that Amazon as the operator of the marketplace could use its business terms to improve the position of Amazon Retail on the corresponding retail markets. The FCO also took the preliminary position that some terms led to a pull effect towards Amazon marketplace to the detriment of other sales channels (e.g., due to uniform product descriptions across sales channels as stipulated in the parity requirement).

V REMEDIES AND SANCTIONS

i Sanctions

In Germany, abuse of dominance infringements are normally pursued by the FCO in administrative procedures, which end in a finding of an infringement and cease-and-desist decision (Section 32 ARC) or a commitment decision (Section 32b ARC). Alternatively, the FCO can decide that there is no reason to intervene (Section 32a ARC) or close the proceedings. In an administrative procedure no fines can be imposed.

The legal framework also allows for a fine procedure, but in practice abuse of dominance cases in Germany are run under the administrative procedure without imposition of fines. Fines can at least in theory be imposed against the company and individuals involved for infringements of Section 19, 20 ARC, the German abuse of dominance provisions (Section 81(2) No. 1, (4) ARC), as well as Article 102 TFEU (Section 81(1) No. 1 ARC). In that case, the duration and gravity of the infringement is taken into account and the FCO's 2013 Fining Guidelines apply. The statutory maximum fines amount to €1 million for individuals and 10 per cent of the consolidated group turnover for an undertaking.⁴⁶

ii Remedies

As stated above, the FCO either issues a finding of an infringement and cease-and-desist decision (Section 32 ARC) or accepts commitments in a commitment decision (Section 32b ARC) or closes the proceedings, for example, for lack of evidence or making use of its discretion whether to take up a case. Section 32a ARC allows the FCO to impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition. However, this power has so far not been used.

Sections 32(2) ARC allows for behavioural remedies. Thus, the FCO may impose all measures necessary to bring an infringement effectively to an end and that are proportionate

towards retailers, and retailers had to grant Amazon very extensive rights to use their own product material such as information, descriptions and images, and had to provide Amazon Marketplace with product material of the same high quality as the one that they use in other sales channels.

46 Section 81(4) ARC.

to the infringement. This includes the right to impose measures that require action by the infringer. For instance, the FCO has ordered hotel online booking platforms HRS⁴⁷ and Booking.com⁴⁸ to delete best-price clauses from their contracts with hotel partners.

Section 32(2) ARC also provides for the possibility of ordering 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.

Section 32b ARC provides the possibility for companies to voluntarily offer commitments that are intended to address the preliminary competition concerns raised by the FCO during the proceedings. The parties can offer commitments of a behavioural or structural nature provided that they address adequately and effectively the competition concerns identified. Commitments which do not adequately remedy these concerns will not be accepted by the FCO. The FCO then adopts a decision which makes the commitments binding on the party under investigation. The main difference between a decision pursuant to Section 32 ARC and a commitment decision pursuant to Section 32b ARC is that the former contains a finding of an infringement while the latter makes the commitments binding without finally concluding whether there was an infringement. A commitment decision also concludes that there are no longer grounds for action by the FCO (in particular not for imposing a decision pursuant to Sections 32 or 32a ARC).

VI PROCEDURE

In administrative proceedings, the FCO carries out investigations to decide whether to issue a cease-and-desist decision, accept commitments, adopt preliminary measures or close the case. Its decisions are subject to full judicial review of the facts and the law by the DCA. The Court's decisions can be further appealed – on points of law only – to the FCJ. 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. A recent example is the DCA's suspension of the FCO's *Facebook* decision in interim proceedings (see further Section IV.ii).

i Commencement of investigations and investigative powers

The FCO may commence investigations *ex officio* or, and in practice more frequently, following complaints of third parties (e.g., competitors, customers or suppliers).⁴⁹ The FCO may carry out informal discussions or send informal questionnaires. It can also take formal measures, such as sending mandatory information requests or, subject to a prior court order, conducting surprise inspections (dawn raids), in the course of which it can seize documents and electronic files.

47 FCO decision of 20 December 2013, case B9-66/10. A press release is available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3591568.

48 FCO press release of 23 December 2015, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html?nn=3591568.

49 There is no formal complaint procedure, however, which means, notably, that complainants do not have a legal remedy against a rejection of their complaint.

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 conduct that might constitute an infringement, but the FCO is open to informal contacts and is more likely to provide informal guidance in this context than the Commission.

iv Cooperation with other authorities

Cooperation between the FCO, the other national competition authorities and the European Commission takes place 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. 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), and the FCO's president has chaired the ICN's Steering Group since 2013.

VII PRIVATE ENFORCEMENT

Unlike in cartel damage cases, abuse of dominance actions often do not follow an investigation and decision by the FCO (or other competition authorities), but are brought on a stand-alone basis. They normally do not just aim for damages, but for a specific action by the potential addressee of the abuse of dominance provisions. Typical scenarios pursued in court are refusal to supply actions, discrimination claims and requests for access to a distribution system or complaints about termination of an agreement. There is also the possibility to claim damages. Section 33 ARC provides an express legal basis for damage claims based on infringements of competition 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) based on alleged restrictive unilateral conduct have also become fairly frequent. A recent example is Idealo's complaint against Google for damages as a result of the Commission's 'Google Shopping' case.⁵⁰

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 competition law.⁵¹ The binding effect

50 See, Idealo press release of 12 April 2019, available in German at: <https://www.ideal.de/unternehmen/pressemitteilungen/ideal-verklagt-google-auf-schadensersatz-wegen-missbrauchs-seiner-marktbeherrschenden-stellung/>.

51 Section 33b ARC (formerly, Section 33(4) ARC, changed by the recent amendment to the ARC).

is, however, limited to the determination of the competition law infringement, so causation and the amount of damages need to be established subject to the normal rules on the burden of proof in German court proceedings.⁵²

VIII FUTURE DEVELOPMENTS

Both the FCO and the German legislator have focused on digital markets in recent years, and this trend is set to continue.

According to the FCO president, Andreas Mundt, the FCO intends to preserve a leading role among competition authorities with respect to the internet economy and e-commerce sector. Having identified ‘big data’ as an important source of market power, the FCO’s recent proceedings against Google, Facebook and Amazon will likely not be the end of this trend. As also evidenced by the sector inquiry on the conduct of price comparison websites, the FCO is particularly intrigued by the market power of (online) platforms in multi-sided markets. As the FCO is taking great interest in the combination of (direct or indirect) network effects, large amounts of personal data, and the gatekeeper function of online platforms for evolving markets, several additional dominance proceedings can be expected in the future. Another indicator of the FCO’s continued interest in this regard is the project on algorithms and their implications for competition, including interdependencies between algorithms and market power, that the FCO launched in June 2018 in cooperation with the French Competition Authority. They published a joint working paper in November 2019.⁵³

The German government and legislator are currently reviewing the ARC, in particular, assessing whether it still allows effective enforcement against abuse of market power in light of the increasing digitalisation and importance of globally active digital players. Thus, in September 2018, the FME issued an expert report that outlined several potential amendments to the ARC’s rules on the abuse of dominance.⁵⁴ The FME had also appointed an expert commission called ‘Commission Competition Law 4.0’ to draw up policy recommendations for the further development of European competition law in light of the digital economy. In September 2019, the expert commission published its final report which focuses on market power and abusive behaviours of digital platforms and contains a number of proposals for European and also for German competition policy.⁵⁵

Based on these reports, the FME published a draft proposal for the 10th amendment to the ARC in January 2020. Its main objectives are, inter alia, a reform of the abuse of dominance provisions with a view to more effective enforcement and changes to the procedural

52 Munich Court of Appeals judgment of 21 February 2013, case U 5006/11 Kart; and Berlin District Court judgment of 6 August 2013, case 16 O 193/11 Kart.

53 FCO press release of 19 June 2018. A joint working paper on algorithms and their implications for competition, including interdependencies between algorithms and market power (Algorithms and Competition, 6 November 2019) is available on the FCO’s website https://www.bundeskartellamt.de/SharedDocs/Publication/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5.

54 See expert opinion, ‘Modernising the law on abuse of market power’, 29 August 2018; for a summary, see www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3.

55 See report of the Commission Competition Law 4.0, Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, 9 September 2019, for an English summary see https://www.bmwi.de/Redaktion/EN/Downloads/a/a-new-competition-framework.pdf?__blob=publicationFile&v=2.

framework to speed up proceedings. Most notably, the draft proposal introduces an entirely new concept of abuse, targeting companies with ‘paramount cross-market significance’, a novel concept that does not require a dominant position in a specific market and thus aims to enable the FCO to better monitor and control large digital players’ activities at an early stage and even when they are not (yet) dominant in that specific market. These powers are meant to keep markets open by allowing the FCO to prohibit certain practices based on a rebuttable presumption of harm to competition. These practices include self-preferencing, hindering competitors in markets in which the company could quickly expand its position if this is likely to significantly impede the competitive process, using data collected in a dominated market to make market entry to other markets more difficult for other companies, hampering interoperability or data portability, and making the assessment of service value difficult for commercial customers, for example, by giving insufficient information. Under the draft proposal, the company would then bear the burden of proof that the behaviour in question, which may have both anticompetitive and pro-competitive effects, is objectively justified.

The draft proposal also targets the platform economy more generally. It suggests adding the new concept of ‘intermediation power’ to the catalogue of criteria for assessing market power in digital markets. Additionally, the concept of relative dominance shall be extended to all companies, irrespective of their size, which means that also large companies will be able to claim that they are dependent on another supplier. The draft proposal assumes that digital platforms with gatekeeper functions will be a likely area of application, since even large companies may depend on them. The draft proposal also aims at a competition law-based right of access to data by (1) extending the access to essential facilities provision in Section 19(2) No.4 ARC to expressly include data, and (2) in cases of relative market power, requiring non-dominant companies to grant access to data if a supplier’s or customer’s business model depends on access to this data.

Finally, while recently the DCA suspended the FCO’s *Facebook* decision in interim proceedings because the FCO did not establish a strict causal link between dominance and the abusive conduct, the draft proposal aims to remove this causal link between market power and abuse in the new Section 19(1) ARC. While the 10th Amendment is planned for late 2020 or early 2021, there may still be changes to the FME’s draft proposal.

GREECE

Marina Androulakakis, Tania Patsalia and Vangelis Kalogiannis¹

I INTRODUCTION

In Greece, Law 3959/2011 on the ‘Protection of Free Competition’ (Greek Competition Act) is the main piece of legislation regulating free competition. The prohibition of abuse of dominance is established, in particular, by virtue of Article 2 of the Greek Competition Act, which essentially mirrors Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Hence, the abuse may consist in:

- a* directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b* limiting production, distribution or technical development to the prejudice of consumers;
- c* applying dissimilar conditions to equivalent trading transactions with other trading parties, especially the unjustified refusal to sell, buy or otherwise trade, thereby placing certain undertakings 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 practice, have no connection with the subject of such contracts.

The Hellenic Competition Commission (HCC) is the national competition authority, which, without prejudice to the responsibilities of other authorities, is competent for the enforcement of the provisions of the Greek Competition Act, as well as of Articles 101 and 102 of the TFEU.²

The HCC has issued acts on procedural issues that apply also in investigations for abuse of dominance cases, such as rules on procedure for the acceptance of commitments (HCC decision No. 588/2014), the treatment of confidential information (HCC Notice of 13 January 2015) and access to file (HCC Rules of Internal Procedure and Management of 16 January 2013).

In assessing abuse of dominance cases, the HCC follows the relevant guidance of the European Commission and respective EU case law.

Finally, in relation to the telecommunications sector, the Hellenic Telecommunications & Post Commission (EETT) is pursuant to the provisions of Act 4070/2012 on electronic

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2 Articles 101 and 102 TFEU are directly applicable in Greece in cases where it is proven that trade between Member States is affected.

communications and other provisions, responsible for, inter alia, applying the provisions of the Greek Competition Act, as well as of Articles 101 and 102 of the TFEU and EU Regulation 1/2003 in relation to the exercise of electronic communications activities.

II YEAR IN REVIEW

i HCC

In 2019, the HCC issued three decisions on abuse of dominance cases, of which two concerned adoption of interim measures,³ and the third decision was an acceptance of the commitments decision.⁴

During 2012-2017, the HCC issued 11 decisions on abuse of dominance,⁵ whereas in 2018 the authority rendered a notable decision against Elais-Unilever Hellas for alleged implementation of abusive practices at retail and wholesale level in the margarine market resulting in the imposition of a fine of approximately €8.7million.⁶

ELMIN Bauxite SA

By virtue of Decision 690/2019, HCC adopted, on 30 July 2019, interim measures against ELMIN Bauxite SA (ELMIN), a company active in the market for the production and trade of bauxite, for having allegedly abused its (super)dominant position, being the only producer-supplier of bauxite in Greece. The above decision was issued on HCC's own initiative and following its *ex officio* investigation, upon receipt of a complaint by Mytilineos SA (Mytilineos), an entity active in the metalworking industry.

The case involved the aimed sudden and substantial reduction by ELMIN of the bauxite (including bauxite derivatives) quantities that it supplied to Mytilineos. According to HCC, ELMIN's behaviour, entailed the danger of excluding certain suppliers/products from the relevant market, thus restricting intra-brand competition. In addition, the increase of prices was deemed probable as a result of ELMIN's anti-competitive behaviour to the consumers' harm.

In particular, the HCC found that ELMIN's behaviour constituted: (1) an unjustified refusal to sell; (2) an indirect imposition of unfair sales conditions; and (3) a limitation to the production of bauxite to the detriment of consumers.

3 Pursuant to Paragraph 5 of Article 25 of the Greek Competition Act, the HCC has the power of taking interim measures, on its own initiative or following a request of the Minister of Finance (currently Minister of Development and Investments), where an infringement of Articles 1 (prohibited collusion), 2 (abuse of dominance) and 11 (regulation of sectors of the economy) of Greek Competition Act or Articles 101 and 102 of the TFEU is suspected and there is an urgent need to prevent an imminent risk of irreparable harm to the public interest. In case of failure to comply with the imposition of interim measures, the HCC has the power to impose a fine of up to €10,000 for each day of non-compliance with its interim decision. Interim decisions may be appealed before the Athens Administrative Court of Appeals. The HCC cannot adopt interim measures to safeguard individual interests, but said jurisdiction lies with civil courts.

4 According to Article 25 Paragraph 6 of the Greek Competition Act, the HCC may accept commitments if it considers, during relevant investigation carried out either at own initiative or following a request by the Minister of Finance or a complaint, that there is a likelihood of infringement of Articles 1 and 2 of the Greek Competition Act or Articles 101 and 102 of the TFEU.

5 OECD Peer Reviews of Competition Law and Policy, GREECE, 2018, p. 40.

6 HCC Decision 663/2018.

Procedurally-wise, the HCC ruled that the conditions for the imposition of interim measures, under applicable rules, were met since: (1) it was deemed probable that ELMIN's practices constituted an abuse of dominance under the Greek Competition Act and TFEU due to latter's unjustified refusal to sell to Mytilineos, combined with the indirect imposition of unfair sales terms and limitation to the production of bauxite, which could not have been objectively justified; and that (2) there was an urgent need to prevent an imminent danger of irreparable damage to the public interest, taking into account factors such as difficulty of finding alternative sources of supply, even from entities active in the downstream markets, and insecurity in ensuring required quantities, thus putting at risk both the activity of Mytilineos, as well as the smooth supply of the market.

In light of the above, the HCC ordered ELMIN to: (1) immediately supply Mytilineos with the required quantities of bauxite for 2019 as it did with respective bauxite quantities in 2018, in order to prevent the probable systemic risk in the relevant markets; and (2) to enter into negotiations with Mytilineos for concluding a bauxite supply agreement under specific conditions. Finally, the HCC also threatened ELMIN with a fine of €8,000 per day of non-compliance to its interim decision.

ARGOS⁷

Another interim measures ruling was issued by the HCC against the company ARGOS in the market of distribution of print press products following a request of the Minister of Finance (currently Minister of Development and Investments).

In particular, the HCC unanimously found that the infringement of abusive exploitation of dominant position was likely on behalf of ARGOS and constituted more precisely: (1) an unreasonable refusal to sell, by unilaterally imposing the terms of its new commercial policy, without informing and negotiating with the publishing companies on the above terms in a timely manner; (2) an indirect imposition of unreasonable trading conditions in the context of the enforcement of its new commercial policy; (3) a discriminatory treatment with respect to its policy for the return of the deducted insurance contributions, considering that it treated third companies that were not related to it differently as it did not return the entire amount of the deducted contributions to them, as opposed to other related publishing companies (i.e., its shareholders); and (4) an unreasonable refusal to sell, by refusing to distribute print press products.

Against that background, the HCC ordered ARGOS to: (1) revoke its new commercial policy for all publishing companies; (2) cease its unreasonable refusal to distribute the print press products to the publishing companies; (3) return the entire amount of the insurance contributions to all publishing companies; and (4) enter into negotiations with all publishing companies to form a new commercial/pricing policy. The HCC also threatened ARGOS with a fine of €5,000 for each day of non-compliance with its interim measures decision.

Meanwhile, the HCC issued earlier this year its Opinion 39/2019 on the functioning of competition in the national market of press distribution. The HCC highlighted the structural weaknesses of the print press distribution market, including: (1) decline of demand for the print press products; (2) legal requirement to distribute press products throughout Greek territory; (3) particular significance of the sale of publication, especially with respect to the overall cost of ARGOS; and (4) revenue and business methods of the publishing companies,

⁷ The HCC decision on the matter has not been issued at the time of writing; therefore, input on the case is based on publicly available information, such as the HCC's press release of 4 June 2019.

the sale of publications (in comparison to the revenue generated from digital advertising). In this context, the HCC concluded that the above weaknesses lead to the creation of a potential ‘natural monopoly’ or ‘essential facility’ in the market at hand. In this respect, the HCC analysed the pros and cons of various measures for dealing with the above problems, the measures relating to the legal form of the distribution agency, the enhancement of the negotiating position of publishing companies, the enactment of a Code of Conduct and the classification of press distribution services as services of general economic interest.

DIAGEO⁸

By virtue of its unanimous Decision 698/2019, the HCC accepted the commitments offered by DIAGEO Hellas SA (DIAGEO), which, according to authority’s preliminary analysis, was dominant in the markets of gin, scotch whisky and ReadyToDrink/Premix spirit drinks and, in particular, in the on-premises distribution channel in Greece.

The company’s alleged anticompetitive practices pertained to the provision of exclusivity of pouring services (concerning unbranded demand) and of marketing and visibility services (concerning branded demand), by on premise outlets to DIAGEO. According to the HCC, the above were capable of foreclosing potential or existing competitors from access to significant part of relevant markets through the incentivisation of exclusivity by DIAGEO, bolstered by the offering of financial incentives (lump sums or rebates, or both).

In order to accommodate the HCC’s concerns but without admitting infringement of competition law rules, DIAGEO proposed a set of commitments, aiming to lift exclusivity with regard to pouring (e.g., by undertaking not to enter into pouring agreements with existing or new strategically important on-premises outlets regarding a large portion of unbranded demand, nor to provide special incentives to on-premises outlets to pour brands or brand variants of DIAGEO, or both, with regard to particular types of beverages, etc.) and marketing services (e.g., undertaking that DIAGEO brands or cocktails be included in the outlet’s menu and on tables would not account for more than 50 per cent of all brands or cocktails listed in respective category of menu and of all tables designated for the service of drinks in the on-premises outlets, etc.), so that every strategically important outlet and on-premises outlet would be able to offer these services in parallel. The duration of the commitments was set to five years.

Summary

Summarised information about HCC’s decisions and pending cases is provided below.

Investigations of abuse of dominance pending at the HCC

Sector	Investigating authority	Conduct	Case opened
Citrus fruit sector (amidst covid-19)	HCC	Abuse of Dominance, unspecified	April 2020
Medical supplies (amidst covid-19)	HCC	Abuse of Dominance, unspecified	March 2020
Banking	HCC	Exclusionary practices in the context of provision of banking and payment services	November 2019

⁸ Only the HCC press release is available to date.

Sector	Investigating authority	Conduct	Case opened
Supply of fur animal food (Maviz SA)	HCC	Abuse of Dominance, unspecified	December 2019
Non-alcoholic beverages (Coca-Cola-3E Greece SA)	HCC	Abuse of Dominance, unspecified	September 2015

HCC decisions in the past year (2019) for abuse of dominance

Sector	Investigating authority	Conduct	Fine imposed
Bauxite production and trade	HCC	Refusal to sell, imposition of unfair trade conditions and restriction of production	(Decision in substance pending – only interim measures decision issued)
Printed-press distribution	HCC	Refusal to sell, imposition of unfair trade conditions and discriminatory treatment	(Decision in substance pending – only interim measures decision issued)
Gin, Scotch Whiskey and RTD/Premix spirit drinks	HCC	Exclusivity agreements	(Commitments decision not published yet – only press release)

ii Courts

In its long-awaited decision, the Council of State issued last year its decision⁹ in an abuse of dominance case between the EETT and OTE, the leading telecommunications provider in Greece.

In particular, the case which had been initially brought before the EETT, following a complaint by OTE's competitor (i.e., Tellas), involved restrictions imposed by OTE in the offering of its wholesale broadband access service, which according to the EETT constituted abuse of dominance, in the form of, inter alia, price squeeze.¹⁰ In this respect, the EETT imposed a fine of €20 million on OTE having found that OTE's offering in the wholesale broadband access sector, where the latter was dominant, did not allow its competitors to trade profitably in the downstream market of retail broadband internet access. In reaching the above conclusion, the EETT applied the reasonably efficient operator (REO) criterion.

Thereafter, OTE challenged the decision before the Athens Administrative Court of Appeals, which partially upheld the EETT's decision, insofar as it related to the price squeeze aspect of the case. The fine was also reduced by €10 million.¹¹ In substantiating the infringement of abusive price squeeze, the Court accepted the EETT's stance, namely that proof of existence of price squeeze is sufficient, without the need to also prove the existence of an anticompetitive effect.

The case was ultimately brought before the Council of State, where OTE claimed that the EETT had wrongfully applied the REO criterion, instead of the equally efficient operator (EEO) criterion (usually adopted by the European Commission). OTE supported, among others, that EETT failed to prove the company's intent to implement the alleged abusive pricing policy and to examine the effects of alleged abuse in the relevant market.

The Council of State upheld adoption of REO criterion by the EETT, ruling that EEO criterion could not have been applied due to OTE's refusal to provide the necessary information for this purpose to the EETT. But, referring to the *Deutsche Telekom*¹² case, the

⁹ Council of State Decision 860/2019.

¹⁰ EETT Decision 447/01/26.07.2007.

¹¹ Decision No. 2193/2009 of the Athens Administrative Court of Appeals.

¹² CJEU, case C-208/08P; judgment of 14 October 2010, paragraphs 250–251.

Council of State ruled that the mere existence of a pricing policy implemented by a dominant undertaking does not render such policy abusive under Article 102 TFEU, without evidence of an anticompetitive effect, which (proof), however, exists if the anticompetitive effect is related to possible barriers which pricing policy could have created for the growth of products on the retail market in end-user access services on the degree of competition in that market. The Council of State concluded that, in order to prove the abusive nature of such practice, an anticompetitive effect in the market must exist, without, however, this required to be specific. On the contrary, mere establishment of the potential existence of such anticompetitive effect, capable of excluding equally effective competitors, would appear sufficient.

In light of the above, the Council of State overturned OTE's application for cassation, insofar as it challenged the abuse of dominance aspect of the case.

III MARKET DEFINITION AND MARKET POWER

The Greek Competition Act does not provide for a definition of dominance. The HCC follows the notion of dominance, as this has been formulated by relevant European and Greek case law. Hence, high market shares (greater than 40 or 50 per cent) and an undertaking's ability to act independently of its competitors' costumers and ultimately consumers are factors that are taken into account. The structure of the market (such as competitors' market position, existence of barriers to entry and countervailing buyer power) is also decisive.

In addition, Article 2 of the Greek Competition Act, has been found by the HCC to apply in situations of collective dominance, whose existence presupposes, in accordance with the EU approach, the concurrence of the following two conditions: lack of competition between the dominant parties and absence of (substantial) outside competition.

Special rules apply in the mass media sector. In particular, pursuant to Article 3 of Law 3592/2007 on the Concentration and Licensing of Mass Media Enterprises and Other Provisions, as in force, a concentration that leads to the creation of a dominant position in the media sector is prohibited. The relevant market share criteria applicable for determining dominance are as follows:

- a* market share exceeding 35 per cent, where the company is active in only one media sector (television, radio, press and magazines);
- b* market share exceeding 35 per cent in each market and with respect to the specific geographical market covered in each sector, where the company is active in more than two media sectors;
- c* total market share exceeding 32 per cent in two sectors with the same geographical coverage;
- d* total market share exceeding 28 per cent in three sectors with the same geographical coverage; and
- e* total market share exceeding 25 per cent in four sectors with the same geographical coverage.

IV ABUSE

i Overview

Article 2 of Greek Competition Act, which essentially mirrors Article 102 TFEU, does not contain an exhaustive list of types of abuses. According to the HCC, the purpose behind the prohibition of abusive exploitation of a dominant position is the protection of the free

market system and of the economic freedom of third parties.¹³ In addition, while the finding of dominance is not per se unlawful, a dominant undertaking has a special responsibility to refrain from impairing, through its conduct, genuine undistorted competition on the market.¹⁴

It is settled HCC case law (following the footsteps of EU case law)¹⁵ that the concept of abuse is objective relating to the behaviour of an undertaking in a dominant position that 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 through recourse to methods that, unlike normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.¹⁶ Hence, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect.¹⁷

However, information witnessing intent of the dominant undertaking to exclude its competitors, especially when such evidence consists of internal documents, may be taken into account as direct evidence in assessing a dominant undertaking's commercial practices, in order to conclude whether these are geared towards the protection of its reasonable commercial interests or whether these were designed and implemented for the purpose of excluding competitors.¹⁸

ii Exclusionary abuses

Article 2 of Greek Competition Act does not distinguish between exclusionary and exploitative practices, hence both practices are deemed to be caught by the prohibition. To date, the HCC has dealt with a number of abusive practices; however, its most important cases involve rebates and exclusivity terms.

In the *Athenian Brewery case*,¹⁹ dating back in 2014, the HCC imposed a record fine of approximately €31 million against Athenian Brewery, the Greek subsidiary of Heineken NV, for abuse of its dominant position in the Greek beer production and distribution market, in breach of Article 2 of the Greek Competition Act and Article 102 TFEU. In particular, the HCC found that Athenian Brewery applied an exclusionary strategy in order to exclude its competitors from the on-trade consumption market (such as HORECA (hotel, restaurant and café) chains and other retail outlets) and to limit their growth possibilities for a period of 15 years. According to the authority, the company employed various commercial practices aimed at exclusivity, including significant payments conditional upon exclusivity or the foreclosure of competitive brands, loyalty and target rebates.

More recently,²⁰ the HCC imposed a fine of approximately €8.7 million against the company Elais-Unilever Hellas for abuse of dominance. The case involved, inter alia,

13 HCC Decision 590/2014, *Athenian Brewery*, paragraph 239.

14 HCC Decision 581/VII/2013, *Procter & Gamble Hellas*, paragraph 262.

15 CJEU Decisions C-85/76 *Hoffmann-La Roche v. Commission*, paragraph 91, C-322/81 *Michelin v. Commission*, paragraph 70 and C-62/86 *Akzo v. Commission* paragraph 69.

16 Decision 869/2013 of the Athens Administrative Court of Appeals, paragraph 35.

17 Athens Administrative Court of Appeals, Decision 2458/2017, paragraph 8.

18 HCC Decision 520/VI/2011, *Tasty Foods*, paragraph 174.

19 HCC Decision 590/2014, *Athenian Brewery*.

20 HCC Decision 663/2018.

the offering of target rebates to various supermarkets in the margarine market. The HCC stipulated that the rebate schemes that were offered in exchange for the client's undertaking to increase its purchases from Elais-Unilever, or to achieve a specific sales target, constituted abuse of dominance. The HCC based its findings on the following: (1) the rebates being conditional upon the achievement by the client of a quantitative target regarding products purchased by Elais-Unilever; (2) the target was determined at the beginning of each fiscal year, whereas rebates were paid at the end of this period (i.e., an excessive rebates period was applied); (3) the amount of the rebates depended on the purchased quantities during the above excessive period of reference compared to realised purchases during the previous reference period by same buyer (individual character of rebates scheme); and (4) the rebate was applied retroactively.

Another notable HCC decision involving a bundling practice includes that of *Nestle*,²¹ in which the HCC found that Nestle unlawfully imposed bundling arrangements on its clients in the instant coffee retail market. Nestle was also held liable for the enforcement of exclusive supply clauses in its agreements with its clients, as well as for offering loyalty rebates to the latter in the same market.

Finally, as regards authorities and courts' approach on price squeeze (see the case of wholesale broadband access service) and refusal to deal (see the *Bauxite* case), see Section II.

iii Discrimination

The HCC has also dealt with a few discriminatory treatment cases in the energy sector. In its *Gas Distribution Companies*²² case, the HCC found that the non-acceptance of the gas tube of the complaining company and the refusal to grant a licence for use in gas facilities, where the complaining company's steel tubes were used, constituted an unjustified discriminatory treatment by the Gas Distribution Companies of Thessaloniki and Thessaly and imposed against them a fine of approximately €620,000.

In addition, in 2015, the HCC rendered its decision²³ in the case of Public Power Corporation (PPC)/Aluminium SA, accepting commitments offered by PPC. According to the HCC investigation, PPC, the incumbent producer and supplier of electricity in Greece, had allegedly abused its dominant position by refusing to supply Aluminium SA and by imposing on it unfair and discriminatory trading conditions.

iv Exploitative abuses

Recently, the Athens Administrative Court of Appeals issued its decision in the *AEPI* (i.e., Greek Company for the Protection of Intellectual Property) case.²⁴ The case was originally brought before the HCC, following a complaint by various music creators for AEPI's alleged abuse of dominance in the market for the management of copyright of Greek and foreign composers of musical works, by setting unreasonable fees for said management.²⁵ The HCC compared fees charged by AEPI against fees charged by foreign collective management organisations (CMOs) (in particular by a Swiss CMO), concluding that the amount charged by AEPI, in relation to phonogram rights, was abusive.

21 HCC Decision 434/V/2009.

22 HCC Decision 516/VI/2011.

23 HCC Decision 621/2015.

24 Decisions 1102/2017 and 1103/2017 of the Athens Administrative Court of Appeals.

25 HCC Decision 245/III/2003.

The HCC decision was challenged by AEPI. Following a lengthy process before Greek courts, the Athens Administrative Court of Appeals issued its decision on the case, ruling essentially that the comparison method employed by the HCC was the most appropriate due to the same object pursued by AEPI and CMOs, and the specific characteristics of the market.

V REMEDIES AND SANCTIONS

The Greek Competition Act authorises the HCC to impose a series of sanctions, as well as behavioural or structural remedies, upon finding an infringement of Article 2 thereof and/or Article 102 TFEU.

i Sanctions

The Greek Competition Act provides that a fine will be imposed on undertakings or associations of undertakings for abuse of dominance or failure to fulfil commitments made by them and which are made binding by the HCC decision. The amount of the fine must not exceed 10 per cent of the aggregate turnover of the undertaking for the year in which the infringement ceased or, if it persists, the year preceding issuance of the HCC decision. In the case of groups of companies, the group's aggregate turnover is taken into account for calculating the fine. The calculation of the fine is also subject to factors such as the gravity, duration and geographic scope of the infringement, as well as the duration and nature of participation in the infringement by the undertaking and the economic benefit derived therefrom. If the economic benefit can be measured, the amount of the fine cannot be less than that (even if it exceeds the 10 per cent upper limit).

The HCC may impose on the infringing undertaking a fine of up to €10,000 per day of failure to comply with its decision.

Individuals who, due to their position in the company, are involved in the infringement are jointly liable with the company for payment of the HCC fine and may also be separately fined by an amount ranging from €200,000 to €2 million, as long as they participated in the organisation or commitment of the infringement. Their position in the company and the degree of their participation in the infringement shall be taken into account.

According to HCC Guidelines on the calculation of fines of 12 May 2006, as supplemented in 2009, HCC determines the basic amount of the fine which, depending on the gravity and duration of the infringement, shall not exceed 30 per cent of the undertaking's total gross revenues for each year of the infringement. This amount is then adjusted – upwards or downwards – depending on aggravating or mitigating factors that may exist. The overall amount of the fine, for all years of the infringement, should not, as a rule, exceed the 10 per cent cap set by the law.

Although it did not impose any fines for abuse of dominance in 2019, the HCC has dealt with relevant cases on several occasions over the past years and has imposed high fines. In its *Athenian Brewery*²⁶ case, involving the implementation of anticompetitive practices aiming to exclusivity, including significant payments conditional upon exclusivity and/or the foreclosure of competitive brands, loyalty and target rebates, in the beer market for a period of over 15 years, the HCC imposed a record-setting fine of approximately €31 million.

26 HCC Decision 590/2014.

Penal sanctions, in the form of a monetary penalty ranging from €30,000 to €300,000 may also be imposed in abuse of dominance cases. Penal sanctions are imposed by the competent criminal authority against an undertaking's legal representatives.

ii Behavioural remedies

The Greek Competition Act also provides for the imposition by the HCC of behavioural remedies, to the extent these are necessary and appropriate for the termination of the infringement, depending on its nature and gravity.

As already mentioned in Section II above, the HCC has imposed behavioural measures in the context of its interim measures decisions and has also accepted commitments of a behavioural nature by the infringing undertakings in 2019.

However, as would derive from the HCC's past practice, the authority usually proceeds to the imposition of a fine, together with an order to cease and desist.

iii Structural remedies

According to the Greek Commission Act, the HCC may impose structural measures only in cases where there are no equally effective behavioural measures, or the existing equally effective behavioural measures are more burdensome compared to the structural ones.

Contrary to its practice in merger control cases, the HCC does not seem to favour the imposition of structural measures in the context of abuse of dominance cases.

VI PROCEDURE

The HCC may initiate an investigation either acting *ex officio* or following receipt of a complaint or upon request of the Minister for Development and Investments. Investigations are most commonly triggered by complaints submitted to the HCC.

The case is assigned to the competent economic and legal services directorates of the Directorate-General for Competition (DGC) which proceed to a preliminary assessment of the case based on information requests to interested parties, as well as on-site investigations (dawn raids). The DGC has recently conducted dawn raids in the banking sector (November 2019) and, more recently, in the print press distribution market (May 2020). Failure to provide information requested by the HCC, as well as obstruction of the DGC's dawn raid, entail the imposition of a fine of €15,000 up to a maximum of 1 per cent of the turnover of the undertaking concerned (meaning group turnover, if applicable). Criminal penalties of at least six months' imprisonment may also be imposed in this case.

Upon completion of the DGC investigation, the case is assigned to a rapporteur (who is an HCC member). The rapporteur must submit his report to HCC within 120 days of assignment of the case. This deadline may be extended by 60 days maximum. The only exception is if, based on HCC Decision 696/2019 on the prioritisation of cases, the case does not match the prioritisation criteria and is filed away.

Following submission of the rapporteur's report, the case is heard by the HCC. The HCC is not bound by the report.

Interested parties are summoned to appear before the HCC at least 45 days before the hearing and are served with the rapporteur's report at the same time. Parties must submit their statements of objection 20 days prior to the hearing. In addition, they may submit their addenda-rebuttal 10 days before the hearing. After completion of the hearing and after notification to them of the minutes of the hearing, parties have a short deadline to submit

their final pleadings, before the HCC issues its ruling. According to the law, the HCC's decision must be taken within 12 months of assignment of the case to the rapporteur. This deadline may be extended for a maximum of two months.

The Greek Competition Act also provides for an interim measures procedure, where there is an emergency to prevent an imminent danger of irreparable damage to the public interest. Interim measures may be taken by the HCC either on its own initiative or following a request of the Minister for Development and Investments. In this case, HCC must reach a decision within 15 days from the submission of the request. In the context of these proceedings, the deadlines for the submission of statements of objections/addenda-rebuttal by the parties are determined by decision of the HCC chair.

Also, undertakings under investigation may offer commitments at any stage of the investigation and at the latest 20 days prior to the hearing (if they have been served with the rapporteur's report). The procedure for the acceptance of commitments by HCC is summarised as follows (HCC Decision 588/2014): (1) preparatory meetings with the DGC or the rapporteur handling the case, or both; (2) prioritisation and assignment of the case to a rapporteur, if not already done; (3) assessment of the intent of the offering undertaking, suitability of the case for the acceptance of commitments and adequacy of the commitments; (4) submission of commitments offer by the undertaking within 30 days of being invited to do so by the rapporteur; (5) market-testing (if considered appropriate); (6) drafting by the rapporteur of the report for the acceptance of the commitments offer; (7) service of the report to the interested parties (i.e., the undertakings under investigation and complainants) within three months of the submission of the commitments offer; (8) summoning of parties to the hearing, at least 45 days in advance; and (9) issuance of the HCC decision, by virtue of which the commitments are made binding.

HCC decisions may be challenged before the Athens Administrative Court of Appeals, within 60 days of their notification to the parties. The above deadline, as well as the filing of the appeal, do not have a suspensory effect; suspension of enforcement may, however, be granted by the Court upon request of the interested party. Decisions of the Athens Administrative Court of Appeals may be challenged by an application for cassation before the Council of State. As regards especially interim measures decisions, these are only subject to appeal before the Athens Administrative Court of Appeals.

VII PRIVATE ENFORCEMENT

Law 4529/2018 on transposing into Greek law Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union and other provisions (Law 4529/2018) governs private enforcement of competition law in Greece.

Like Directive 2014/104/EU, Law 4529/2018 introduces the right to full compensation of every natural or legal person that has suffered harm by an infringement of competition law. Compensation includes both actual loss and loss of profit, plus payment of interest (Article 3).

Law 4529/2018 does not, however, include a collective redress mechanism, despite the European Commission's relevant horizontal recommendation.²⁷ Thus, it may be expected that the general Greek legislation on the matter would apply (Article 74 of Greek Code of Civil Procedure). In addition, the possibility to bring a collective action for damages is provided for by Law 2251/1994 'on consumer protection'. However, in the absence of relevant case law, it is not absolutely clear whether these provisions would apply to private antitrust enforcement cases or whether these are limited to matters solely arising under the consumer protection legislation.

For the calculation of the damages, Law 4529/2018 stipulates that the court may estimate the amount of the damage inflicted to the claimant based on a probability standard, in cases where it is practically impossible or excessively difficult for the claimant to determine the precise amount of the harm suffered on the basis of the available evidence. To this end, the court should consider the nature and scope of the infringement, as well as the diligence that the claimant showed in collecting and using the relevant evidence. In this respect, we would expect the court to rely on relevant soft-law provisions of the European Commission.²⁸

As regards the evidence that may be used in the context of private competition litigation, Law 4529/2018 specifically mentions that the court is authorised to order the disclosure of evidence contained in the HCC/EETT's case-file. This possibility is, however, subject to certain restrictions. In particular, the Court may not order the disclosure of the following evidence until the HCC/EETT has terminated its proceedings: (1) documents and information drawn up by natural or legal persons specifically in the context of the proceedings before the HCC/EETT; (2) documents and information drawn up by the HCC/EETT and sent to the parties during their proceedings; and (3) withdrawn settlement submissions. Also, under no circumstance may the Court order the disclosure of (1) leniency statements; (2) settlement submissions; and (3) documents that quote, to an extent, parts of the documents under (1) and (2).

At the same time, the finding of a competition law infringement by virtue of a decision of the HCC, the EETT or the European Commission, that is not subject to appeal, as well as a final decision of the Greek and EU Courts, following appeal, is binding for the Civil Court ruling on a damages action. On the contrary, a final decision finding an infringement, which has been issued in another EU Member State and produced before the Greek Civil Court, constitutes conclusive proof of the infringement but is subject to rebuttal.

Third-party litigation funding is not specifically regulated by Greek law and it is not standard practice.

Law 4529/2018 provides for the formation of a special chamber within the Athens Courts of First Instance and Appeals (which are competent by law to hear damages actions) consisting of judges specialised in competition law; however, these are yet to be formed.

Finally, following enactment of Law 4529/2018, no relevant Court decision has yet been publicised. The greatest difficulty that the Greek Courts are expected to face in awarding damages under Law 4529/2018 is how quantify harm.

27 Commission Recommendation of 11 June 2013 'on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law'.

28 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' and the accompanying Practical Guide of 11 June 2013.

VIII FUTURE DEVELOPMENTS

The covid-19 crisis has not left competition law enforcement unaffected. The HCC has showed its vigilance in monitoring the functioning of competition in the context of the current situation. In particular, the HCC has formed a special task force, which is competent to issue guidelines addressed to undertakings and consumers on the application of competition law amidst the crisis, collect information on initiatives to be implemented by undertakings and their compatibility to competition law and to conduct investigations into potential breaches of competition rules, including abuse of dominance. Meanwhile, following numerous consumer complaints, in March 2020 the HCC sent information requests to many undertakings active in the medical supplies market and, even more recently, conducted dawn raids in the food sector.

Meanwhile, the HCC seems to have fully entered the digital era. It has recently launched sector inquiries into e-commerce and Fintech. These initiatives are indicative of HCC's intent to monitor more closely the application of competition law in the digital markets and ensure compliance in these dynamically evolving sectors.

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.

From 20 May 2009, the date Section 4 entered into effect, the Competition Commission of India (the Commission) has enjoyed exclusive jurisdiction for the enforcement of Section 4. Section 60 of the Act provides that the Act will have effect notwithstanding any inconsistent provision of any other law currently in force. In addition, Section 62 clarifies that the Act will operate in addition to other laws currently in force.

Under the Act, the Commission has wide powers of investigation and enforcement. For conducting investigations into alleged anticompetitive conduct, the Commission is assisted by the office of the Director General (DG). Appeals from the Commission's orders are filed with the National Company Law Appellate Tribunal (the Tribunal). The Supreme Court of India is the final appellate authority for all matters under the Act. Recently, the total strength of the Commission was reduced from seven members (comprising one chairperson and six members) to four members (comprising one chairperson and three members). In September 2018, the central government set up a committee to review the Act in view of the changing business environment and to suggest any amendments, if necessary. In July 2019, this committee submitted its report suggesting certain amendments to the Act. Based on this report, the central government published the draft Competition (Amendment) Bill, 2020 (the Draft Amendment Bill) inviting public comments. Notably, no major changes are envisaged to the abuse of dominance provisions of the Act except an exemption for the reasonable exercise of intellectual property rights, which currently is available only for anticompetitive agreements under Section 3.

Since no formal policy statements in respect of the application of Section 4 have been made by the Commission to date, the Commission's decisions continue to provide the only guidance. The period 2019–20 has witnessed the Commission adopting a highly interventionist regulatory posture. Investigations have been launched into technology markets such as e-commerce and online travel agencies (OTAs), marking a significant departure from recent trends in competition law enforcement.

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II YEAR IN REVIEW

From the beginning of 2019 to April 2020, the Commission has issued only two decisions under Section 27 of the Act penalising enterprises for abuse of dominant position: Association of Man-Made Fibre Industry of India (AMMFI) and Jaiprakash Associates Limited (Jaypee).

In *AMMFI*, Grasim Industries Limited (Grasim) was held liable for abusing its dominant position in the market for the supply of viscose staple fibre (VSF) to spinners in the Indian textile industry by engaging in discriminatory pricing and imposing supplementary obligations not connected with the sale of VSF. In *Jaypee*, a fine was imposed on Jaiprakash Associates Private Limited (Jaypee) for the imposition of unfair/discriminatory conditions on home buyers of independent residential units (villas and estate homes), which was found to be an abuse of dominance.

During the same period, the Commission issued eight prima facie orders under Section 26(1) of the Act, directing investigations into allegations of infringement of Section 4. Some of the prominent cases in which investigations were ordered include: *Asian Paints*² (against Asian Paints in the market for the manufacture and sale of decorative paints by the organised sector in India), *MakeMyTrip*³ (against MakeMyTrip in the market of online intermediation services for booking of hotels in India and franchising services for budget hotels in India), *Intel*⁴ (against Intel in the markets for boxed microprocessors for desktop PCs and laptop PCs in the territory of India) and *Google*⁵ (against Google in the markets for licensable smart mobile device operating systems in India, app stores for android mobile operating systems and online general web search service).

On the other hand, the Commission dismissed complaints alleging abuse of dominant position at the prima facie stage in nine cases. The Commission decided against launching an investigation in respect of the allegations raised against the National Stock Exchange (NSE)⁶ because the dispute was already pending before the securities regulator, the Securities and Exchange Board of India (SEBI). The grievance of the informant in this case was that NSE was giving preferential treatment to some of its trading members in respect of co-location services with the result that the other customers had been denied market access by NSE. The Commission noted that the issues raised by the informant in the 'NSE Co-location' case were similar to those being investigated by SEBI. While the Commission reiterated in this case that it had the jurisdiction to investigate abusive conduct, it observed that the allegations made against NSE were yet to be established in appropriate proceedings and sufficient information about the role of NSE in the matter was not available. Therefore, the Commission could not form a prima facie view about an abuse of dominant position by NSE. In passing this order, the Commission followed the Supreme Court ruling in *CCI v. Bharti Airtel*,⁷ in which the Supreme Court held that when jurisdictional issues are pending determination before a sector specific regulator, the Commission should await the outcome of such determination before commencing its own investigation.

² Case No. 36 of 2019, *In Re: JSW Paints Private Limited (JSW) v. Asian Paints Limited*.

³ Case No. 14 of 2019, *In Re: Federation of Hotel & Restaurant Associations of India v. MakeMyTrip Private Limited and others*; and case No. 01 of 2020, *In Re: Rubrub Solutions Private Limited v. MakeMyTrip Private Limited and others*.

⁴ Case No. 05 of 2019, *In Re: Matrix Info Systems Private Limited v. Intel Corporation and others*.

⁵ Case No. 39 of 2018, *In Re: Umar Javeed and others v. Google LLC and others*.

⁶ Case No. 47 of 2018, *In Re: Advocate Jitesh Maheshwari v. National Stock Exchange of India Limited*.

⁷ (2019)2 SCC 521

The Commission passed orders, under Section 26(6) of the Act, directing the closure of investigation after the submission of the DG's investigation report in three cases: *Meet Shah*,⁸ *InPhase*⁹ and *INSA*.¹⁰

In *Meet Shah*, the informants were aggrieved by the pricing practices adopted in the sale of e-tickets on the website of the Indian Railway Catering and Tourism Corporation (IRCTC), the state-run e-ticketing agent of the Indian Railways. The total fare for a ticket booked on the website comprises, amongst others, a base fare, which in turn has two components, namely actual base fare and total base fare. The informants alleged exploitative abuse based, inter alia, on the actual base fare being rounded off to the next higher multiple of five in order to arrive at the total base fare. The Commission noted that this pricing practice had been implemented pursuant to a policy decision of the Union of India. Importantly, such pricing was implemented uniformly in respect of all passengers without any discrimination. The Commission found that the practice of rounding-off had efficiency parameters and improved the quality of the Railways' services for its passengers, in addition to saving a substantial amount of time and effort in terms of logistics and infrastructure. The IRCTC's contention that the rounding off policy was, in part, aimed at recouping the losses accruing from operating in the passenger segment was accepted as valid justification by the Commission. In the Commission's view, no case for abuse of dominant position had been made out on the facts and circumstances of the case.

The decisions in *InPhase* and *INSA* are discussed in later sections of this chapter.

During 2019-20, the Tribunal rendered eight judgments in competition law cases concerning Section 4 of the Act: *AIOVA*,¹¹ *HPCL*,¹² *BMW*,¹³ *Piyush Joshi*,¹⁴ *Verifone*,¹⁵ *Asmi Metal*,¹⁶ *Adani*,¹⁷ and *ISWAI*.¹⁸

In *AIOVA*, the Tribunal set aside an order of the Commission under Section 26(2) of the Act. The Commission's order had dismissed allegations of abuse of dominance against Flipkart India Private Limited and Flipkart Internet Private Limited. The Tribunal ordered the Commission to direct the DG to initiate an investigation into the matter. The informant alleged that Flipkart India Private Limited, being a B2B wholesaler, sold goods to companies

8 Case No. 30 of 2018, *In Re: Mr. Meet Shah and Mr. Anand Ranpara v. Union of India, Ministry of Railways and Indian Railway Catering and Tourism Corporation Ltd.* (IRCTC).

9 Case No. 12 of 2016, *In Re InPhase Power Technologies Private Limited and ABB Limited.*

10 Case No. 01 of 2018, *In Re: Indian National Shipowners Association (INSA) v. Oil and Natural Gas Corporation Limited (ONGC).*

11 TA(AT) (COMPETITION) No. 16 of 2019, *All India Online Vendors Association v. Competition Commission of India and others.*

12 TA(AT) (COMPETITION) No. 69 of 2018, *Hindustan Petroleum Corporation Limited v. Competition Commission of India and others.*

13 TA(AT) (COMPETITION) No. 52 of 2018, *Parsoli Motor Works Private Limited v. BMW India Private Limited and others.*

14 TA(AT) (COMPETITION) No. 32 of 2017, *Mr. Piyush Joshi v. Competition Commission of India.*

15 TA(AT) (COMPETITION) No. 01 of 2017, *Verifone India Sales Private Limited v. Competition Commission of India and Atos Worldline India Private Limited.*

16 TA(AT) (COMPETITION) No. 27 of 2018, *Asmi Metal Products Private Limited v. SKF India Limited and another.*

17 TA(AT) (COMPETITION) No. 33 of 2017, *Adani Gas Limited v. Competition Commission of India and others.*

18 TA(AT) (COMPETITION) No. 84 of 2018, *Uttarakhand Agricultural Produce Marketing Board v. Competition Commission of India and others.*

like WS Retail Services Private Limited (owned by founders of Flipkart Internet Services Private Limited till 2012) at discounted prices and, in turn, these were sold by sellers like WS Retail on the online marketplace operated by Flipkart Internet Private Limited at heavily discounted prices. The Tribunal relied on observations made by the tax authority (i.e., the Income Tax Appellate Tribunal (ITAT)) in a tax proceeding against Flipkart that the Flipkart entities were according preferential treatment to certain entities operating on its platform at the expense of other entities and were engaging in predatory pricing. The Tribunal observed that the Commission could not ignore findings by another judicial authority (i.e., the ITAT) and that the findings would be sufficient to constitute a prima facie case under the Act.

In *Piyush Joshi*, the informant sought to challenge, as an abuse of dominance, the acquisition of 'BG Group Plc' by 'Royal Dutch Shell Plc' after the Commission had already assessed and approved the transaction under the merger control provisions. The Commission declined to entertain the Information filed by the informant on the ground that the transaction had already been assessed and approved under the merger control rules of the Act. While upholding the Commission's decision, the Tribunal observed that the abuse of dominance provision (section 4) was distinct from the merger control provisions (Sections 5 and 6) and merger control proceedings would not be the appropriate stage for assessing abuse of dominance.

In *Verifone and Adani*, the Tribunal upheld final orders of the Commission imposing penalties on Verifone and Adani for abuse of dominance in their respective relevant markets by imposing unfair and discriminatory terms and conditions on their customers. In *Adani*, the penalty was reduced as Adani had removed the offending terms from its agreements during the investigation.

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.

i Relevant market

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 in the Act as a market comprising an area in which the conditions of competition for the supply of goods or provision of services or the demand for goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas. Notably, the Draft Amendment Bill seeks to introduce the concept of supply side substitutability into the definition in the Act¹⁹ of the relevant product market by regarding as part of the relevant market, all products and services that are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between these products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and

19 The Commission had already introduced and adopted supply-side substitutability in its practice 10 years earlier while defining relevant markets in case No. 13/2009, *MCX/NSE*, the first predatory pricing case before the Commission. The Draft Amendment Bill seeks to formalise the concept of supply-side substitutability by including it in the statute.

permanent changes in relative prices. The notion of '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 markets. In Section 19, the Act also identifies factors that the Commission must take into account in defining the relevant market.

In *AMMFI*, the Commission defined the relevant product market as 'the market for supply of VSF to spinners'. The Commission noted that natural fibres and man-made fibres differ in terms of characteristics, such as composition, resiliency and capability to absorb moisture, and are, therefore, considered as two separate product categories by manufacturers of yarn. The Commission further found that within man-made fibres, VSF, a cellulosic based fibre, has different characteristics to other kinds of man-made fibres. For instance, VSF can be readily dyed and blends easily with other fibres. The Commission took note of the observations made by the Directorate General of Anti-Dumping & Allied Duties in Order: No. 1416/2009-DGAD distinguishing VSF from other fibres. The Commission also observed that during the investigation period, the price of VSF had been 40 to 60 per cent more than cotton and polyester staple fibre (PSF). PSF/cotton could be blended with VSF and vice versa on account of the differences in their characteristics. The Commission found that the correlation and regression analyses submitted by the opposite party (i.e., Grasim) did not conclusively establish substitutability between VSF and PSF and cotton and VSF. The Commission concluded that from the perspective of the spinners, VSF was not substitutable with other fibres. The relevant geographic market was defined as the 'whole of the geographical area of India' since the demand for VSF emanates from spinning mills located across the country.

In *Jaypee*, the Commission defined the relevant product market as the 'market for the provision of services for development and sale of independent residential units such as villas, estate homes, town homes and row-houses in integrated townships'. The Commission found that residential units in an integrated township are not substitutable with residential units in a cooperative society, or a group housing scheme or any other residential unit in a standalone building/housing project on account of the enhanced facilities that a residential unit in an integrated township offers to its occupants. The Commission also found that multi-storey apartments, villas, estate homes, town homes and residential plots situated in an integrated township are substitutable and interchangeable with each other because, in contrast to multi-storey buildings, residential plots offer more space, freedom and opportunity to make modifications to the property. In addition, residential plots have their own space and provide privacy and exclusivity to their occupants. Residential plots are considered more premium than multi-storey apartments and are generally more expensive. The relevant geographic market was defined by the Commission as 'Noida and Greater Noida regions'. It was observed that the Delhi region could not be included in the relevant geographic market on account of significant differences in the price of the properties located in these regions. According to the Commission, Noida and Greater Noida had acquired a brand image of their own and have become an important hub for the real estate sector.

In *InPhase*, the relevant product market was defined as the 'market for manufacture and sale of IGBT based PQS for less than 1kV usage'. Based on the material available on record, the Commission found that the purpose of power quality products is to resolve issues relating to power quality. Both the informant and ABB (the opposite party) had admitted to customising their power quality products, to suit the on-site requirements of customers. A 'one size fits all' approach to power quality solutions (PQS) was found to be inappropriate. In this

backdrop, the Commission noted that there was no need to delineate distinct heterogeneous product markets in respect of different types of insulated-gate bipolar transistor (IGBT)-based PQS. The Commission stated that it is not bound by the determination of the relevant market in a prima facie order as such a finding is only tentative in nature. The Commission is well within its powers to reach a different finding on the issue of relevant market based on the facts and evidence that surfaces during the investigation and inquiry. For purposes of defining the relevant geographic market, the Commission noted that, since the conditions of competition were homogeneous throughout India, the relevant geographic market was the territory of India.

In *Adani*, the Tribunal considered whether there was a 'gaseous substitute' for natural gas from the perspective of industrial consumers who were procuring natural gas from Adani. Based on the material on record, it was concluded that natural gas competes with most of the fuels available in the market, such as furnace oils, electricity, diesel and coal, and customers possess the ability to switch to alternate fuels without incurring high costs. Industrial customers can switch to solid fuels (coal and lignite) and liquid fuels (furnace oil) as well as grid electricity. The Tribunal held that Liquefied Petroleum Gas (LPG) is not substitutable with natural gas as far as industrial consumers are concerned even though the two products may be substitutable from the standpoint of other kinds of customers. The Tribunal observed that members of the informant were dependent solely on Adani for the supply of natural gas and, during the relevant period, no gaseous substitute for natural gas was available to members of the informant in the district of Faridabad. The Tribunal upheld the Commission's definition of the relevant market (i.e., market of supply and distribution of natural gas to industrial consumers in the district of Faridabad).

These 2019–20 decisions demonstrate that the Commission has continued to define product markets based on the facts and circumstances of each case, but more narrowly in certain abuse cases to facilitate a finding of dominance.

ii Dominance

In assessing dominance and market power in the relevant market, the Commission is required by Section 19 of the Act to assess dominance in the context of a broad range of non-exhaustive factors, including market share, size and resources of the enterprise, 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 varies depending upon the facts of each case and the alleged theory of harm, but in its decisions, the Commission will assess dominance of the allegedly dominant enterprise under each of the Section 19 factors. Generally, market share and the size and resources of the enterprise will be the most important criteria in the Commission's assessment of dominance.

In *AMMFI*, the Commission found that Grasim was dominant in the relevant market. Grasim was the sole producer of VSF in the country and from 2011–2016, it enjoyed a market share of 87 per cent. Spinners did not find the prospect of importing VSF to be commercially viable on account of the anti-dumping duty imposed on imported VSF during the period of the investigation. Grasim was a flagship company of the Aditya Birla Group and had a controlling stake in many large and small companies. The group companies of Grasim had witnessed significant growth in recent years in terms of revenue and assets, and the revenues earned by Grasim from the sale of VSF had also seen a substantial increase. The Commission also found that the manufacturing process of VSF was highly capital intensive and involved a complex technological process that required the incurring of huge

investments. Moreover, the industry was subject to stringent environmental regulation and the production process required a large amount of water, which operated as significant entry barriers for potential entrants.

In *Jaypee*, the Commission held that Jaypee was dominant in the relevant market. It had the largest market share in terms of number of units launched/sold of independent residential units, such as villas, estate homes, town homes and row-house in integrated townships in Noida and Greater Noida, in the period spanning financial years 2009–10 to 2011–12. The Commission noted that while Jaypee had launched 255 independent residential units during this period, its competitors had launched no such residential units in the same period, And, unlike its competitors, the Jaypee group had large land reserves in Noida and Greater Noida, which could be used for further residential development.

In *InPhase*, the Commission observed that approximately 54 per cent of the relevant market of IGBT based PQS for less than 1 KV was enjoyed by reputed manufacturers, while the unorganised sector accounted for the remaining 46 per cent. During financial year 2013–14 and financial year 2014–15, ABB was not even in the top three positions in terms of turnover generated from the sale of IGBT based PQS. The Commission noted that the market was competitive as it was marked by the presence of a large number of competitors. No enterprise could function independently of market forces on account of the presence of significant competitive constraints. The Commission took note of the DG's finding that the entry of the informant and P2Power into the market evidenced the absence of entry barriers. IGBT was easily available in the market and PQS based IGBT could be developed by any technical person. The Commission also observed that the process of manufacturing IGBT based power quality solutions was not capital-intensive in nature. In addition, several credible market research reports had concluded that the market for IGBT based PQS was still emerging and the entry of new market players could result in significant benefits to the consumers. Based on these findings, ABB was found not to be dominant in this relevant market.

In *INSA*, ONGC was held to be dominant in the market for charter hire of offshore support vessels (OSVs) in the Indian Exclusive Economic Zone (EEZ). The Commission observed that ONGC operated 45 out of 48 contractually committed/operational offshore drilling rigs in the Indian EEZ and enjoyed a market share of 82 per cent in the market for charter hire of OSVs. ONGC was the largest buyer of OSV services and OSV service providers were highly dependent on ONGC. As a result, ONGC had significant bargaining power. Being a public sector undertaking, ONGC had the first mover advantage in the industry and was able to win 121 out of 235 blocks in the eight rounds of bidding under the National Exploration Licensing Policy of the Government of India. ONGC also enjoyed a considerable market share in the upstream market. The Commission found that OSV providers had insufficient countervailing power to be able to counteract the ability of ONGC to operate independently of market forces. The Commission also found that the market was highly regulated, demanded high capital investment and was characterised by significant entry barriers.

In *Adani*, the Tribunal held that since Adani was the only enterprise providing natural gas to industrial consumers in the district of Faridabad and there was no substitute available to natural gas in Faridabad at the relevant time, Adani was dominant in the relevant market. The Tribunal observed that the fact that the pipeline structure installed by Adani could be used by its competitors to distribute CNG did not have any impact on the finding that Adani was dominant.

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:
 - production of goods or provision of services or markets therefor; or
 - 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 Treaty on the Functioning of the European Union (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 explicitly fall within any of the other categories in Section 4(2).

It is notable that, unlike Article 102 of the TFEU as interpreted by the EU courts, the Act does not provide for objective justifications as defences to the anticompetitive conduct of dominant enterprises. Under the Act, the only defence recognised for abusive conduct of a dominant enterprise is the ‘meeting competition’ defence. To date, the Commission has not provided any published guidance, including in its decisions, on the scope of this defence. As previously noted, the Draft Amendment Bill seeks to exempt the reasonable exercise of intellectual property rights from Section 4.

ii Exploitative abuses

In *AMMFI*, the Commission held that Grasim had abused its dominance by charging different prices to similarly placed domestic consumers. In addition, Grasim had adopted a non-transparent and discriminatory discounting policy in the market. The Commission observed that a dominant firm bore the responsibility to not engage in discrimination against similarly placed customers as well as to adopt a transparent pricing policy towards its customers.

In *Jaypee*, the informant had booked a villa in a residential project being developed by Jaypee. The Commission found that the Provisional Allotment Letter (PAL) issued to the informant contained various unfair and one-sided terms and conditions, which were designed to unilaterally favour the developer at the expense of the buyers. The Commission observed that Jaypee had been collecting money from the buyers without delivering the

residential units on time. Jaypee had also amended the initial layout plans and imposed various kinds of charges on the buyers. The PAL empowered the developer to charge the allottee an interest on delayed payments that was disproportionately higher than what the developer was required to pay in the event of a delay in handing over the residential property to an allottee. Another provision conferred the right and sole discretion on the developer to create an equitable mortgage, charge or hypothecation on leased land and construction in favour of financial institutions notwithstanding the payment of a substantial sum by the allottee, without engaging in any consultation with the allottee. The Commission found that these contractual stipulations were tantamount to imposition of unfair terms and conditions and a manifestation of the misuse of the developer's market power.

In *Verifone*, the opposite party (Verifone) was engaged in the business of supplying point-of-sale (POS) terminals along with core POS terminal applications and software development kits (SDK). These products were sold to customers like the informant, who acted on behalf of the acquiring banks and provided value added services to develop and integrate applications into POS terminals. The informant alleged that in January 2012, Verifone asked it to sign a draft SDK agreement containing several onerous and one-sided clauses without any scope for negotiation. On its part, the informant made several attempts to engage in a constructive discussion with Verifone regarding the unfair nature of the provisions of the SDK agreement, which were largely ignored. The Tribunal observed that the terms of the SDK agreement deviated from standard industry practice and were non-negotiable, in violation of Section 4(2)(a)(i) of the Act.

The Tribunal found *Adani Gas Limited (Adani)* to have abused its dominant position in the market for supply and distribution of natural gas in Faridabad, in contravention of Section 4(2)(a)(i) of the Act. The informants were supplied natural gas by Adani to meet their fuel requirements under a Gas Supply Agreement (GSA). It was alleged that the terms of the GSA were biased in favour of Adani: for example, clause 16.3 of the GSA vested in Adani the sole discretion of accepting or rejecting requests of the consumers in respect of *force majeure*, while clauses 17.2 and 17.4 vested in Adani the right to terminate the agreement in the event of a buyer's failure to take 50 per cent or more of the cumulative daily contracted quantity (DCQ) during a period of 45 consecutive days. The Tribunal upheld the finding of the Commission that several terms of the GSA were in violation of Section 4(2)(a)(i) of the Act.

INSA involved allegations of abuse of dominant position against ONGC in the market for charter hire of Offshore Support Vehicles (OSVs) in the Indian Exclusive Economic Zone (EEZ). In order to procure the services of the OSVs, ONGC would float international competitive bidding tenders (IBC), which contained, among other documents, a model contract comprising of General Conditions of Contract (GCC) and Special Conditions of Contract (SCC) (collectively Charter Hire Agreement (CHA)). The informant alleged that Clause 14.2 of the SCC, which gave a unilateral right to ONGC to terminate the agreement, was unfair, onerous and abusive in nature. ONGC had invoked this clause to issue de-hiring notices to twenty-seven vessels in 2016. The Commission observed that the two primary issues in the case were as follows: (1) whether the mere existence of clause 14.2 of the SCC amounted to an abuse of dominant position; and (2) whether the use of this clause by ONGC violated Section 4 of the Act. The Commission observed that determining whether a dominant enterprise has engaged in exploitative conduct involving the imposition of unfair terms and conditions in a B2B transaction, in violation of Section 4(2)(a)(i) of the Act, entails undertaking a fairness or reasonability test, which requires assessing how the condition in question affects the trading partners of the dominant enterprise and whether there is an

objective or legitimate necessity behind the imposition of such a condition. After analysing the legal positions in the US, UK and India, the Commission concluded that a clause concerning termination for convenience is fairly common and, in general, must not be construed as unfair or abusive unless it is used in an unfair manner without meeting the legal tests of 'good faith' and 'change in circumstances'. Although this clause granted a unilateral right in favour of ONGC without creating any reciprocal right in favour of OSVs, the desirability and feasibility of a reciprocal right was contingent on the balance of convenience between the parties, in the backdrop of the risks assumed by them. In the Commission's view, the risks borne by ONGC in its operations, such as geological and commercial risks, meant that the mere existence of a right of termination did not amount to a violation of Section 4(2)(a)(i) of the Act. Insofar as the use of the termination clause is concerned, the Commission found that the clause was invoked for the first time in 2016 in response to the changing dynamics in global oil markets, which had a huge impact on the market for OSVs. The intent behind the invocation of the clause had been to take advantage of the prevailing market situation and hire vessels at current market rates, which were substantially lower than the contracted rates. The Commission also took note of the fact that ONGC did not issue termination notices at the first instance of a reduction in oil prices (in 2014), but rather waited for a reasonable time till the expiry of the period stipulated in clause 14.2, and ONGC's conduct was not motivated by malice or an intent to injure any OSV. Given that ONGC is required to adhere to government regulations, continuing with agreements at higher rates than the prevailing market rates could have had negative consequences. Based on these findings, the Commission concluded that ONGC had not abused a dominant position.

The Commission's enthusiasm to review the content of contracts and to second-guess commercial decisions, beyond pricing, to support a finding of an exploitative abuse of dominance is disturbing. While the Commission has stepped back from its earlier approach in *DLF* to rewrite contracts on behalf of independent, commercially savvy parties (including the arbitration clause in the dispute resolution provisions of the contract), the approach of the Commission and the Tribunal in *Adani* demonstrates the extent to which competition law is being used to intrude into freely negotiated contracts between commercially independent parties and to opportunistically change a negotiated agreement. In contrast, *INSA* reflects the reluctance of the Commission to engage in a similar intrusive exercise for government-owned entities and their contracting position. The past year also saw a continuation of the unfortunate trend of the Commission focusing more on exploitative abuse cases rather than exclusionary abuse cases, highlighting the fact that complainants (informants) prefer the faster proceedings and decision process of the Commission over the protracted civil proceedings for contractual breach in a court of law, and the Commission's willingness to entertain these allegations with alacrity.

iii Exclusionary abuses

In *AMMFI*, Grasim's practice of requiring customers to furnish documentation of their production and export details to avail of its discounts was regarded by the Commission as *ex facie* unfair and a manifestation of its market power as it enabled Grasim to prevent resale and trading of its products, thereby restricting an alternative source of supply. In its defence, Grasim contended that the terms of the discounts offered to various customers were drawn up by mutual consent of the parties and were necessary to calculate the discounts. The Commission found that Grasim was unable to establish why seeking production and export details from the customers was necessary to calculate discounts. The Commission

acknowledged that although the quantum of discounts to be offered to a customer could have a nexus with its volume production, there was no reason for Grasim to demand granular details of production and exports from its customers. Being a dominant enterprise, Grasim could not take the defence that a contractual term that otherwise violated the provisions of the Act was agreed upon by mutual consent of the parties. In addition, such a practice also amounted to an imposition of supplementary conditions in violation of Section 4(2)(d) of the Act.

In *InPhase*, the parties were involved in the manufacture of power quality and power conversion products. The informant alleged that since it had developed a product that was superior to the products of ABB India Limited (ABB), which was gaining traction among the consumers, the latter was devising ways to 'suppress technological innovation/development and competition posed by the product of the Informant'. To this end, ABB had instituted civil and criminal suits against the informant with *mala fide* intent. The Commission found that ABB had leveraged the significant customer dependence created in its favour as a result of its large product portfolio to compel them to stop dealing with the informant. Based on an analysis of the evidence on record, however, the Commission concluded that ABB was not dominant in the relevant market, and therefore, directed the closure of the case, without going into the merits of the allegations of abuse of dominance.

In *HPCL*, an appeal was filed with the Tribunal against the decision of the Commission under Section 27 of the Act finding South Asia LPG Company Private Limited (SALPG) to have abused its dominant position in not allowing bypassing of its cavern facility. The informant alleged that SALPG's insistence that the informant receive its supply of gas through SALPG's cavern made the informant's business economically unviable, thereby forcing its customers to switch to SALPG for securing 'terminalling services'. According to SALPG, its actions were motivated by a need to enhance safety measures at its facilities. The Tribunal held that SALPG only wanted to secure its commercial interests through these measures, and the justifications offered for such conduct were merely an afterthought. SALPG was found to have unreasonably restricted the business of the informant and, thereby, to have infringed Section 4(2)(c) of the Act.

V REMEDIES AND SANCTIONS

Pending final determination of a case by the Commission, the Commission may issue interim orders restraining the parties from engaging in anticompetitive activities during the course of investigation.

If an enterprise or group is found to have abused its dominant position, in terms of Section 27 of the Act, 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. Keeping in view the principles of proportionality, while deciding the amount of penalty, the Commission takes into account the aggravating or mitigating factors based on the facts and circumstances of each case. In addition, the Commission may pass a cease-and-desist order together with any other orders or directions as the Commission may deem fit. The Commission has not yet issued any guidelines on penalties.

The Supreme Court has clarified that, for determining the amount of penalty, the Commission must take into account the relevant turnover generated from products and services affected by the infringing conduct, as opposed to total turnover. The Supreme Court

noted that any penal law imposing punishment is made for the general good of society and emphasised the principle of proportionality, which requires that the penalties imposed must not exceed what is appropriate and necessary for attaining the objective pursued.

In the 2019–20 period, the Commission passed two orders under Section 27 of the Act in respect of abuse of dominant position: *AMMFI* and *Jaypee*. In *AMMFI*, the Commission observed that Grasim had not pleaded any mitigating factors in respect of the imposition of penalty. The Commission imposed a penalty of 3.016 billion rupees on Grasim (5 per cent of the average relevant turnover generated by Grasim in the market for sale of VSF to spinners in India during financial years 2014–15 to 2016–17).

In *Jaypee*, the Commission decided to levy a penalty of 130.82 million rupees (5 per cent of the average relevant turnover of Jaiprakash Associates Private Limited from the sale of independent units in integrated township located in Noida and Greater Noida during the financial years from 2009–10 to 2011–12) after considering all the aggravating and mitigating factors.

In *Adani*, the Tribunal reduced the penalty levied on Adani from 4 per cent of the turnover for the relevant three years to 1 per cent after considering the mitigating factors in favour of Adani. The Tribunal observed that during the investigation, Adani had voluntarily revised the terms of the GSA to make them more consumer friendly. These revisions made to the terms of the GSA eliminated the discrimination against industrial customers, including members of the informant.

The Commission is empowered to proceed against company officials under the provisions of Section 48 of the Act. The High Court of Delhi,²⁰ in exercise of concurrent writ jurisdiction, has clarified that the Commission can simultaneously proceed against the company for infringing the Act, and company officials under Section 48 of the Act.

VI PROCEDURE

i Proceedings before the Commission

The Act provides the procedure for filing of the information (i.e., the complaint), the investigation process, inquiry by the Commission and the procedure for appeal.

Any person may file a complaint with the Commission, in the prescribed format together with requisite fees, 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 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.

20 Letters Patent Appeal No. 637 of 2018 before the Delhi High Court, *Mahyco Monsanto Biotech (India) Pvt Ltd & Anr v. Competition Commission of India & Ors.*

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.

ii Appellate procedure

An appeal against the final order of the Commission may be made to the Tribunal within 60 days of the date of receipt of the final order by the party. An appeal against the order of the Tribunal may be made to the Supreme Court of India within 60 days of the date of receipt of the Tribunal's order.

Interim measures are available to parties before the Commission, the Tribunal and the Supreme Court of India. Frequently, parties also file writ petitions before the high courts if they believe that principles of natural justice are being violated or their legitimate legal rights are being ignored by the Commission.

VII PRIVATE ENFORCEMENT

Although the 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 Tribunal for compensation from the dominant enterprise based on the findings of the Commission or the orders of the Tribunal.

VIII FUTURE DEVELOPMENTS

i Principles of natural justice

The Competition Appellate Tribunal and the High Court of Delhi (in exercise of concurrent writ jurisdiction) have been very critical of the Commission for procedural irregularities and have clarified some of the important rules of procedure. For example, an order of the Commission must be signed by those members of the Commission who have heard the parties. As a result, any order of the Commission signed by a member who has not attended the hearing will be set aside. Also, a party (being investigated) must be provided with all the materials and evidence that are being used against it. The affected parties must also be given notice if the Commission decides to differ from the findings recorded by the DG in the investigation report. In addition, the right to conduct cross-examinations has been recognised.

On the question of the DG's investigative powers, the Supreme Court has clarified that it is well within the DG's powers to expand the scope of investigation and has noted that the Commission's order directing the investigation, in terms of Section 26(1) of the Act, is merely the starting point for the DG.

ii Dawn raid powers

For conducting investigations into anticompetitive practices, the DG's office has been conferred with wide-ranging investigative powers for collecting evidence, including the powers of a civil court under the Indian Code of Civil Procedure 1908. The DG is also vested with the power to use dawn raids or unannounced search and seizures to inquire into allegations of anticompetitive conduct (including abuse of dominance), and the parties being raided have an obligation to cooperate during the search. Dawn raids may also be carried out by any person appointed by the DG in this regard. While conducting the raid, the DG or any person authorised by him or her for this purpose has been granted the power to enter any premises, conduct a search at the premises and seize books, papers and electronic media that he or she considers necessary for the purpose of the investigation. These raids generally occur without any warning and are usually conducted at times when least expected, often in the early hours of the morning, and may even occur over a weekend. The search and seizure operations are conducted in a covert manner leaving no scope for the party under investigation to scuttle the search in any manner or to 'sanitise' the records. If a company has several offices, it is possible that simultaneous raids will be conducted at more than one office. Dawn raids are regarded as an effective tool for inquiry into anticompetitive practices and are authorised by the Chief Metropolitan Magistrate, New Delhi, through a warrant.

These dawn raid powers are now being used more frequently and, as of November 2019, there have been six instances of dawn raids in India, one of which relates to an abuse of dominance enquiry and the remaining relate to cartel investigations. In the raid relating to the abuse of dominance matter, the Supreme Court has recently clarified that an authorisation for search alone would not be sufficient for purposes of the investigation; the authorisation must extend to both search and seizure.

iii Overlapping jurisdiction

In the *Ericsson* writ petition, the High Court of Delhi upheld the Commission's jurisdiction to examine issues covered by the Act, and held that areas covered under the Act do not fall within the domain of the patent enforcement authorities under the Indian Patents Act 1971. This decision is presently under appeal before a division bench of two judges in the High Court of Delhi.

In the *Jio* writ petition, the High Court of Bombay held that, in matters relating to the telecoms sector, regulated, controlled and developed by the authorities under the Telegraph Act and the Telecom Regulatory Authority of India Act (the TRAI Act), the Commission must await the decision of the telecoms sector authorities because the telecoms sector authorities were best placed to decide the jurisdictional facts before them. This decision of the High Court of Bombay was challenged by the Commission before the Supreme Court. The Supreme Court observed that, while the Commission was entrusted with the duty to enforce the Act against several types of anticompetitive practices that may have an adverse effect on competition, the Telecom Regulatory Authority of India (TRAI) was assigned the role of overseeing the growth of the telecommunications infrastructure by ensuring technical compatibility and effective interrelationship between different service providers. The Supreme Court then upheld the judgment of the Bombay High Court and held that, since the matter related to the telecoms sector, which is regulated by the TRAI Act, it would be appropriate for TRAI (the market regulator) in the first instance to decide on the jurisdictional aspects. Subsequently, if the findings of TRAI *prima facie* indicate that the provisions of the Act have been contravened, the Commission's jurisdiction may be invoked to investigate the matter.

On the facts of the *Jio* case, the outcome was non-controversial, and it remains to be seen whether this approach will apply in all cases of overlapping jurisdiction where the sector is regulated by a sectoral regulator. This approach raises several practical difficulties, such as the possibility of the matter before the sector regulator pending for several years with further appeals to the courts. Essentially, this means that the Commission would have to wait until the matter before the sector regulator is finally decided by the Supreme Court, which could take several years.

Following this case, the Commission arrived at a similar conclusion in *NSE*,²¹ where the Commission, while dealing with the issue of co-location, stated that the case was under adjudication by the Securities Exchange Board of India (SEBI) as a result of a whistle-blower letter to SEBI alleging that NSE gave preferential access to a few high-frequency traders and brokers in respect of the exchange's trading platform. The Commission closed the file after concluding that SEBI was investigating issues similar to those alleged by the informant. The Commission noted that while

discriminatory and abusive conduct which falls foul of the provisions of the Act falls within the jurisdiction of the Commission and can be independently examined by the Commission based on cogent facts and evidence . . . , the allegations against the [NSE] are yet to be established in an appropriate proceeding and also there is not sufficient information and data before the Commission about the role attributable to [NSE], in the provision of discriminatory co-location services qua certain trading members, as alleged in the Information to arrive at a prima facie view. Thus, it may not be apposite for the Commission to delve into the allegations contained in the Information at present.

iv Constitutionality of certain provisions of the Act

Recently, the High Court of Delhi struck down the provisions of Section 22(3) of the Act but not the proviso that provides for a quorum of three members for meetings of the Commission.²² Section 22(3) of the Act provides that a decision must be taken by a majority of the members of the Commission, present and voting, and in the event of equality of votes, the chairperson would have a second or casting vote. The Court observed that the second or casting vote in an adjudicatory process is anathema to the rule of law and principle of collegiality. The Court upheld the remaining provisions of the Act, while directing the Commission to issue guidelines in respect of several matters to ensure procedural fairness and respect for the rules of natural justice, including the principle that 'one who hears must decide'.

21 Case No. 47/2018, *In Re: Jitesh Maheshwari v. National Stock Exchange of India Ltd.*

22 WP (C) 11467/2018, CM Appl 44376-44378/2018, *Mahindra Electric Mobility Limited and Another v. Competition Commission of India and Others.*

ITALY

*Matteo Beretta, Gianluca Faella and Natalia Latronico*¹

I INTRODUCTION

Abuse of dominance within the Italian market, or in a substantial part of it, is prohibited by Article 3 of the Competition Act,² 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.³

According to Article 1(2) of the Competition Act and Article 3(1) of Regulation (EC) No. 1/2003, if the Italian Competition Authority (ICA) applies Article 3 to abuses that affect intra-EU trade, it must also apply Article 102 TFEU. Furthermore, pursuant to Article 1(4) of the Competition Act, Article 3 must be interpreted in accordance with well-established EU principles.

The ICA has not issued formal guidance on abuses of dominance. However, the Commission Guidance on exclusionary abuses (Guidance) may provide useful indications on the interpretation of Article 3.⁴

Article 3 also applies 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.⁵

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2 Law No. 287 of 10 October 1990.

3 In particular, it is prohibited to (1) directly or indirectly impose unjustifiable burdensome purchase or selling prices or other contractual conditions; (2) limit or restrict production, market outlets or market access, investment, technical development or technological progress; (3) apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; and (4) 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.

4 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.

5 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. This provision applies regardless of the market position of the subsidiary.

II YEAR IN REVIEW

In 2019, the ICA closed five investigations regarding abuse of dominance. In two cases, it found an abuse and imposed a fine.⁶ In one case, it accepted commitments offered by the dominant firm and closed the proceedings without establishing the alleged infringement.⁷ In one case, concerning a possible failure to comply with behavioural measures imposed by a previous decision, the ICA eventually closed the proceedings without finding an infringement.⁸ In another case, the ICA contested a failure to comply with the commitments accepted and made binding by a previous decision as well as an abuse of dominance.⁹

In 2019, the ICA also conducted two further proceedings relating to previous abuse of dominance cases: in one case, the ICA revoked a previous commitments decision, in light of changes in the competitive scenario;¹⁰ in another case, the ICA recalculated the fine previously imposed on a dominant firm, following a judgment issued by the Regional Administrative Tribunal of Latium (TAR).¹¹ Furthermore, in three cases, the ICA resolved on the adoption of interim measures in pending investigations.¹²

At the beginning of 2020, the ICA issued two additional decisions: a decision accepting and making binding the commitments offered by the investigated firm,¹³ and an infringement decision.¹⁴

In 2019 and the first months of 2020, administrative courts also adopted several decisions. In particular, in 2019 the TAR partially annulled three decisions adopted by the ICA in 2018,¹⁵ upheld an appeal lodged against another decision issued in 2018,¹⁶ and rejected in full the appeals against two more decisions of the same year.¹⁷ Moreover, in January 2020,

6 Decisions of 10 April 2019, No. 27635, A516, *Gara affidamento servizi TPL Bolzano*; 31 July 2019, No. 27878, A519, *Affidamento diretto del servizio di trasporto pubblico ferroviario nel Veneto*.

7 Decision of 7 March 2019, No. 27582, A505, *Monte Titoli/Servizi di post-trading*.

8 Decision of 20 February 2019, No. 27568, A493B, *Poste Italiane/Prezzi recapito*.

9 Decision of 8 October 2019, No. 27947, A378E, *Federazione italiana sport equestri*.

10 Decision of 27 March 2019, No. 27609, A490C, *Software processo civile telematico-Valutazione istanza revoca impegni*.

11 Decision of 27 November 2019, No. 28001, A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*.

12 In two cases, the ICA did not adopt any interim measure, because it did not find evidence that the contested conduct could jeopardise the continuation of the activities of a competitor pending the investigation on the merits of the case (decision of 7 March 2019, No. 27581, A523, *Ticketone/Condotte escludenti nella prevendita dei biglietti*), or the firms concerned had ceased the contested conduct (decision of 30 April 2019, No. 27666, A527, *Comune di Genova/Distribuzione gas naturale*). In another case, the ICA issued interim measures to prevent the possible exit of the only competitor from the market: see decision of 29 October 2019, No. 27961, A531, *Riciclo imballaggi primari/Condotte abusive COREPLA*.

13 Decision of 14 January 2020, No. 28082, A527, *Comune di Genova/Distribuzione gas naturale*.

14 Decision of 25 February 2020, No. 28162, A514, *Condotte fibra Telecom Italia*.

15 TAR, 4 June 2019, No. 7175; TAR, 1 August 2019, No. 9140 and 9141;

TAR, 17 October 2019, No. 11954 and 11958.

16 TAR, 17 October 2019, No. 11960 and 11976.

17 TAR, 7 June 2019, No. 7463; TAR, 26 September 2019, No. 11330.

the TAR upheld an appeal against a decision adopted by the ICA in 2017.¹⁸ At the beginning of 2020, the Council of State annulled two decisions adopted by the ICA in 2012 and 2018, respectively,¹⁹ and rejected an appeal against a judgment delivered by the TAR in 2017.²⁰

The abuse cases in the period under review concerned many different practices, including excessive pricing and unfair trading terms, margin squeeze, refusal to deal, exclusive dealing and discriminatory practices.

i Antitrust investigations

In February 2019, the ICA closed an investigation concerning the possible failure to comply with a 2017 infringement decision by Poste Italiane (PI), the incumbent in the postal sector in Italy, without finding any infringement.²¹ In an infringement decision issued in 2017, the ICA had imposed a fine of around €20 million on PI for alleged anticompetitive practices, and had ordered PI to desist immediately from the contested conduct and refrain from carrying out analogous practices in the future.²² According to the ICA, PI was dominant in the market for bulk mail services, and continued to be the only operator covering the entire national territory, including extra-urban areas. By contrast, competitors had more limited territorial coverage and needed to purchase intermediate bulk mail services from PI to cover certain extra-urban areas. In the ICA's view, starting from 2014, PI squeezed competitors' margins in extra-urban areas by providing rivals only with the basic bulk mail service in the intermediate market (i.e., the market for mail services offered by PI to competitors), and offering a value-added service (the certified date delivery service called *Posta Time*) at lower prices to business customers in the downstream market. In addition, competitors could not replicate PI's technical conditions, as the certified date delivery service was superior to the basic bulk mail service made available to competitors by the incumbent. Furthermore, PI entered into exclusive dealing agreements and offered selective and retroactive loyalty discounts and rebates to customers that purchased all their bulk mail requirements, or a substantial part of them, from the dominant company.

In the investigation concerning a possible failure to comply with the 2017 infringement decision by PI, the ICA concluded that the incumbent had not committed any violation. In particular, the ICA found that PI had offered competitors a value-added service equivalent to *Posta Time*, by extending its coverage to geographic areas in which it is the only operator. Moreover, it had modified contracts with customers in line with the 2017 infringement decision (in particular, by eliminating the clauses providing for exclusivity and retroactive loyalty rebates).

In the same month, the ICA accepted the commitments offered by Monte Titoli, a subsidiary of Borsa Italiana active in the post-trading sector, to address the ICA's concerns that Monte Titoli could have abused its dominant position in the securities trading settlement market to squeeze competitors' margins in the custody services market.²³ Monte Titoli holds a monopoly in Italy's post-trade settlement market, given that, in its capacity as central security depository issuer (CSD) (i.e., the entity where all the securities in Italy are stored), it

18 TAR, 16 January 2020, No. 503.

19 Council of State, 13 January 2020, No. 310 and 315; Council of State, 3 March 2020, No. 1547.

20 Council of State, 13 March 2020, No. 1832.

21 Decision of 20 February 2019, No. 27568, A493B, *Poste Italiane/Prezzi recapito*.

22 Decision of 13 December 2017, No. 26900, A493, *Poste italiane/Prezzi recapito*.

23 Decision of 7 March 2019, No. 27582, A505, *Monte Titoli/Servizi di post-trading*.

is the only company allowed to complete the settlement of securities. Therefore, companies active in the auxiliary market for security custody services must purchase settlement services from Monte Titoli. Furthermore, Monte Titoli is also active in the downstream market for secondary settlement services and other auxiliary services, together with custodians.

According to the ICA's preliminary concerns, Monte Titoli charged its customers €0.50 per transaction for its settlement and custody services combined, while it charged competing custody providers a price ranging from €0.47 to €0.48 for its settlement services. This conduct could have left competitors with a margin that did not allow them to replicate Monte Titoli's retail offers. Moreover, the ICA was concerned that Monte Titoli could have applied more favourable settlement commissions to foreign CSDs than to national custodians.

In order to address the ICA's concerns, Monte Titoli committed to: (1) use the same pricing structure for all its customers; (2) provide Consob (the authority responsible for regulating the Italian securities market) and the Bank of Italy with detailed information on the total costs for the provision of services to different categories of customers; (3) discontinue the rebates offered to its new customers; and (4) establish, within one month of the acceptance of Monte Titoli's commitments (i.e., earlier than required by the law), the users' committee envisaged by the CSD Regulation (a body having the task of issuing a reasoned opinion on CSD pricing structures).

In April 2019, the ICA levied a fine of €1.1 million on SAD – Trasporto Locale (SAD), a company entrusted by the Autonomous Province of Bolzano (APB) with the provision of suburban public passenger land transport services in the Bolzano area.²⁴ In the Bolzano area, local public passenger transport services are carried out by several companies, including SAD, on the basis of concessions granted by the APB. In the 60s, SAD was entrusted by the APB with the provision of public passenger land transport services with respect to certain suburban lines, where it enjoyed a legal monopoly. In view of the forthcoming expiration of the concessions, the APB decided to implement a new territorial organisation of local public transport services, by splitting the Alto Adige region into four geographic areas and issuing a public tender procedure to assign the right to provide local public transport services in each of these geographic areas.

In January 2018, following a complaint submitted by the APB, the ICA opened an investigation to verify whether SAD had unlawfully refused to provide information that was essential to prepare the supporting documentation required to carry out the public tender procedure regarding suburban public passenger land transport services in the Bolzano area. Following the investigation, the ICA concluded that SAD had abused its dominant position, by delaying and ultimately refusing to provide the APB with updated information regarding certain production factors used for the provision of the transport services (e.g., the list of vehicles used and logistics, such as storage and parking spaces) as well as the personnel employed. In the ICA's view, this delay had the effect of foreclosing the entry of potential competitors on the relevant market, to the detriment of consumers.

In July 2019, the ICA imposed a symbolic fine of €1,000 on Ferrovie dello Stato Italiane (FS), Rete Ferroviaria Italiana (RFI) and Trenitalia for having abused their dominant position in the markets for rail infrastructure management and regional rail passenger transportation services in Veneto.²⁵

24 Decision of 10 April 2019, No. 27635, A516, *Gara affidamento servizi TPL Bolzano*.

25 Decision of 31 July 2019, No. 27878, A519, *Affidamento diretto del servizio di trasporto pubblico ferroviario nel Veneto*.

FS, a company fully owned by the Italian Ministry of Economics and Finance, is the holding of the FS Group and controls both RFI, which operates the Italian rail network in a monopoly regime, and Trenitalia, which is the main service provider for public rail transport in Italy. In 2014, the Veneto Region launched an invitation to tender for the provision of regional railway services, but withdrew the invitation two years later, when it decided to directly entrust Trenitalia with the provision of regional rail services from 2018 to 2032. Following a complaint by Arriva Italia Rail, alleging that the Veneto Region had entrusted Trenitalia with the provision of railway services only because, in exchange, RFI had promised to invest in infrastructure modernisation in Veneto, the ICA opened an investigation into the contested practice.

In the ICA's view, the parties implemented a single and complex anticompetitive strategy, aimed at leveraging on RFI's legal monopoly in the upstream market for the management, maintenance and development of the rail network, in order to induce the Veneto Region to grant Trenitalia exclusive rights for the provision of regional rail services in Veneto (i.e., the downstream market, on which Trenitalia holds a dominant position). According to the ICA, the anticompetitive strategy relied on RFI's allegedly wide discretionary powers in planning railway infrastructure interventions and allocating economic resources for their implementation. Moreover, in the ICA's view, Trenitalia unlawfully participated in the decision-making process concerning the modernisation of the railway infrastructure in Veneto and, accordingly, gained a competitive advantage compared to other railway service providers by exploiting confidential information when negotiating its commercial offer with the Veneto Region. Notwithstanding the above, the ICA imposed a mere symbolic fine, taking into account the fact that the contested practices would ultimately lead to improvements and innovation in the railway infrastructure.

In October 2019, the ICA fined the Italian Federation of Equestrian Sports (FISE) around €451,000.00 for failure to comply with a previous commitments decision and abusive conduct.²⁶ In particular, the ICA found that FISE had breached the commitments made binding by the ICA in the context of a previous investigation, aimed at avoiding the situation where FISE could limit the performance of equestrian activities and events by abusing its regulatory powers.²⁷ According to the ICA, FISE breached the commitments by unlawfully using its regulatory powers to restrict the activities of amateur operators, inter alia by introducing restrictive regulations and sending letters of formal notice to operators active in the relevant market that did not comply with the newly-introduced regulatory measures. The ICA held that the contested conduct also amounted to an exclusionary abuse, in that it prevented third parties from having access to the market for the organisation of equestrian events.

In the first three months of 2020, the ICA adopted two additional decisions.

In January 2020, the ICA closed an investigation into three distinct possible abusive practices implemented by Ireti, Italgas Reti and 2i Rete Gas (i.e., the incumbent gas distribution operators in several municipalities of the Province of Genoa), by accepting and making binding the commitments offered by the three firms concerned.²⁸ In its preliminary assessment, the ICA had found that the incumbents could have individually infringed Article 102 TFEU by abusing their dominant position as current exclusive concessionaires of

26 Decision of 8 October 2019, No. 27947, A378E, *Federazione italiana sport equestri*.

27 Decision of 8 June 2011, No. 22503, A378C, *Federitalia/Federazione Italiana Sport Equestri (FISE)*.

28 Decision of 14 January 2020, No. 28082, A527, *Comune di Genova/Distribuzione gas naturale*.

gas distribution in the local markets included in the area of ATEM Genova 1 (i.e., the territorial district including 24 municipalities adjacent to Genoa), in the context of the organisation by the Genoa Municipality of a tender procedure for awarding the rights to distribute gas in the above-mentioned municipalities. In particular, according to the Genoa Municipality, the incumbents delayed the transmission of technical information essential for organising the tender procedure and, ultimately, responded only in part to its repeated requests.

The commitments offered by the parties were aimed at preventing the reoccurrence of analogous situations in the context of future tender procedures in areas where the three firms were the exclusive concessionaires. To this end, the companies committed to send the full set of technical information required within 60 days of any requests received from the relevant contracting authorities.

In February 2020, the ICA imposed a fine of over €100 million on the incumbent in the electronic communications sector, Telecom Italia (TIM), for having abused its dominant position in the wholesale and retail markets for broadband and ultra-broadband electronic communications services in Italy.²⁹

The case relates to the initiatives undertaken at the national level to promote the development of ultra-broadband networks. In March 2015, in line with the Europe 2020 Agenda, the Italian Government approved the Italian Strategy for High-Speed Broadband, intended to cover most of the Italian territory with infrastructure capable of offering high speed electronic communications services. The implementation of the Strategy was entrusted to Infratel Italia, an in-house company owned by the Italian Ministry of Economic Development. Infratel was in charge of periodically carrying out a public consultation to: (1) update the map of available high-speed broadband connectivity offered by telecommunications operators; (2) identify geographical areas where operators have not intervened so far with their own infrastructure programs and do not have an interest in doing so in the next three years; on this basis; and (3) determine the most disadvantaged areas of the national territory, eligible for public intervention through aid measures (i.e., ‘market failure’ or ‘white’ areas, in which, in the absence of public subsidies, private investment in innovative infrastructure would not take place).

In 2016, Infratel launched the first two tenders for the construction of an ultra-broadband network in the white areas, based on the FTTH (fibre-to-the-home) technology. In the first tender, TIM submitted a bid, but ranked second to Open Fiber, a joint venture established by Enel and Cassa Depositi e Prestiti Equity to build fibre infrastructures in white areas with the support of public subsidies. TIM was also admitted to participate in the second tender, but eventually it did not submit any offer. Indeed, the incumbent changed its investment policy in white areas and announced an autonomous coverage plan, based on a less costly (but lower performance) technology (fibre-to-the-cabinet).

In June 2017, following complaints by Infratel, Enel and Open Fiber, the ICA started an investigation into TIM’s behaviour, allegedly aimed at delaying fibre roll-out by other operators. The investigation was subsequently extended to TIM’s offers in the wholesale market for broadband and ultra-broadband access services, as well as the alleged use of privileged network information regarding other operators’ customers to contact them and increase sales in the retail market for broadband and ultra-broadband communication services.

In the final decision, the ICA stated that TIM had engaged in different anticompetitive practices, which were allegedly parts of a complex exclusionary strategy. In particular, in

29 Decision of 25 February 2020, No. 28162, A514, *Condotta fibra Telecom Italia*.

the ICA's view, TIM obstructed the implementation of the tenders launched by Infratel to promote the entry of new infrastructure operators in the most disadvantageous areas. To this end, TIM allegedly decided to make an unprofitable change to its investment plans during the tender procedure, in order to cover white areas with its own ultra-broadband network. At the same time, TIM started a series of legal actions and initiatives aimed at delaying the tenders. Moreover, according to the ICA, TIM offered exclusionary prices for ultra-broadband access services, with a view to pre-empting the contestable demand at the wholesale level in the entire national territory. Finally, in the retail market for electronic communication services, TIM allegedly offered conditions capable of tying customers for a long period.

In the ICA's view, TIM's alleged exclusionary strategy was implemented through initiatives that were legitimate in principle (such as infrastructure investments and legal actions to defend its interests), but allegedly pursued an aim not worthy of protection, i.e., limiting the development of competition in a market considered strategic for the country.

On the other hand, the ICA found no evidence that TIM had used privileged network information concerning other operators' customers to contact them through call centres and increase its sales in the retail market. This malpractice was not attributable to TIM, which showed instead a strong concern with respect to such phenomenon and implemented a series of initiatives to prevent any inappropriate use of network information.

ii Administrative courts' rulings

In 2019, Italian administrative courts adopted some important rulings in abuse cases. In June 2019, the TAR partially annulled an infringement decision addressed to maritime carriers Moby and CIN, which was issued by the ICA in 2018.³⁰ In the decision, the ICA stated that Moby and its wholly-owned subsidiary CIN had abused their dominant position on certain maritime freight transport routes connecting Sardinia and North-Central Italy, by engaging in exclusionary strategy targeting certain competitors. In particular, Moby and CIN allegedly boycotted logistics operators that had entered into business relations with rival ferry operators, through the simultaneous application of (1) retaliatory measures and unfavourable economic and commercial conditions to disloyal logistics operators (direct boycott), and (2) more favourable economic and commercial conditions to other logistics operators (indirect boycott). As a consequence, the ICA imposed on Moby and CIN, jointly and severally, a fine of around €29 million.

On appeal, the TAR dismissed the parties' grounds concerning the definition of the relevant market, the dominant position and the direct boycott. However, the court annulled the parts of the decision relating to the indirect boycott and the anticompetitive effects of the contested conduct.

With respect to the indirect boycott, the TAR held that the contested practice amounted to the grant of fidelity rebates. In line with the principles established by the Court of Justice of the European Union (CJEU) in *Intel*,³¹ the TAR stated that the ICA was required to analyse the conditions, duration and amount of the rebates, and to assess the possible existence of a strategy aiming at excluding as efficient competitors from the market. In the TAR's view, the ICA failed to assess whether the rebates were defensive in nature and could

30 TAR, 4 June 2019, No. 7175; decision of 28 February 2018, No. 27053, A487, *Compagnia Italiana di Navigazione-Trasporto Marittimo delle Merci dalper la Sardegna*.

31 Case C-413/14 P, *Intel*, ECLI:EU:C:2017:632, section 139.

be replicated by rivals. The TAR concluded that, without this factual analysis, the ICA could not substantiate its allegations on the contested exclusionary strategy merely by reference to its own interpretation of certain documents.

In the same vein, according to the TAR, the ICA failed to carry out an adequate investigation and to provide convincing reasons for its conclusion that the unlawful conduct affected logistics operators and Grendi, a competing maritime freight carrier. According to the TAR, the ICA did not:

- a* properly rebut the fact that disloyal logistics operators increased their combined profits more than loyal logistics companies; and
- b* carry out any empirical analysis to demonstrate that Grendi's poor economic performance was caused by the contested conduct.

In September 2019, the TAR rejected the appeal submitted by Società Italiana degli Autori ed Editori (SIAE) – the Italian copyright collecting society – against the ICA's decision to impose a symbolic fine of €1,000 for having abused its dominant position in the markets for the provision of copyright management services.³²

In the fining decision, issued in 2018, the ICA found that SIAE had engaged in a complex abusive strategy aimed at excluding other copyright management firms and preventing the entry and development of innovative market players. In the ICA's view, SIAE attempted to strengthen its market position and extend it outside the scope of the statutory monopoly granted by Article 180 of Law No. 633 of 22 April 1941 (Copyright Law), through practices such as the inclusion of exclusivity clauses in management contracts and bundling of different copyright management services. In addition, SIAE allegedly applied to TV broadcasters and concert organisers flat rates based on their revenues, regardless of whether they related to the use of SIAE's or other collecting organisations' works, with a view to discouraging broadcasters and concert organisers from using works not included in SIAE's database.

On appeal, the TAR dismissed all the grounds raised by SIAE. By its first ground of appeal, SIAE argued that, as it constitutes a public administration, the ICA should have addressed a reasoned opinion to SIAE to highlight the alleged violations and indicate any adequate remedies, instead of launching an antitrust investigation. The TAR rejected the applicant's claim, on the grounds that: (1) regardless of its formal nature of public administration, SIAE carried out an economic activity in a competitive market; (2) SIAE was dominant in the relevant markets for the provision of copyright management services; (3) the investigation did not concern the exercise of SIAE's public functions, but the application of antitrust rules to practices falling within their scope; (4) a theoretically lawful conduct, involving the exercise of powers and prerogatives provided for by law, may turn out to be anticompetitive in certain cases.

SIAE also argued that the ICA had erroneously applied competition rules to a public entity that provides services of general economic interest. In SIAE's view, the ICA had mistakenly held that the copyright management activities could not be considered services of general economic interest under the principles laid down in the CJEU's *OSA* preliminary judgment.³³ However, the TAR dismissed also this ground of appeals. The court noted that

32 TAR, 26 September 2019, No. 11330; decision of 25 September 2018, No. 27359, A508, *Siae/Servizi Intermediazione Diritti d'Autore*.

33 Case C-351/12, *OSA*, ECLI:EU:C:2014:110.

what matters is the conduct, rather than the abstract structure of the entity concerned. Moreover, under EU case law, Article 102 TFEU may apply in case of exercise of special or exclusive rights granted by law, unless the relevant conduct is strictly linked to the fulfilment of the specific general economic interest tasks the entity is entrusted with.

Finally, the TAR confirmed the ICA's finding of abuse. In the court's view, SIAE's practices were not covered by the exclusivity set forth by Article 180 of the Copyright Act. Moreover, the TAR rejected the 'atomistic' evaluation of each conduct separately from the others, suggested by SIAE, and held that a violation of Article 102 TFEU could be established on the basis of all of SIAE's actions in their combination, which in the ICA's view prevented or hindered the development of competitive dynamics in the copyright management sector.

In October 2019, the TAR reviewed the ICA's decisions fining Enel and Acea for abuse of dominance in the local markets for retail electricity supply.³⁴ The two firms are active in both the provision of the enhanced protection service (EPS) and the market for the retail supply of electricity at market prices. The EPS is a regulated service, reserved to domestic clients and small businesses that do not opt for offers at market prices. In Italy, the EPS was initially scheduled to end in July 2019, following full liberalisation of the electricity market, but the deadline was recently postponed to 2022.

In the ICA's view, Enel and Acea leveraged on their position of vertically integrated operators, active in both the distribution and the retail supply of electricity in their respective local markets, to exclude competitors active in the provision of deregulated services at market prices. In particular, Enel and Acea collected from their EPS customers the privacy consent to be contacted for commercial purposes, and used these lists of customers to formulate targeted offers in the deregulated segment of the market. In addition, in defining its commercial strategies, Acea used privileged and detailed information on the evolution of market shares and the positioning of competitors in the areas in which the Acea group provides the distribution service through a subsidiary. According to the ICA, the contested practices were aimed at inducing Enel and Acea's respective EPS customers to switch to the incumbents' offers in the deregulated segment of the market, so as to avoid losing those customers to competitors following the full liberalisation of the market.

In the *Acea* judgment, the TAR held that the ICA's decision did not meet the standards set by the CJEU in the *Intel* case.³⁵ First, the TAR stated that the ICA had not adequately taken into account the arguments submitted by Acea in relation to the collection of EPS customers' contact details and the use of such contact details in its commercial activities on the market for deregulated services. In the TAR's view, there was no discriminatory commercial policy specifically targeted to EPS customers, given that, inter alia, Acea contacted these clients with standardised offers, designed for its entire customer base, instead of ad hoc offers. Second, the TAR annulled the decision in the part concerning the alleged use by Acea of sensitive information on the market positioning and performance of its main competitors (exclusively available to its branch active in the downstream market of electricity distribution) to better target its marketing strategy and monitor its effectiveness. In this respect, the TAR held that the ICA had failed to clarify how aggregated data on competitors' market positioning could

34 TAR, 17 October 2019, Nos. 11960 and 11976; decision of 20 December 2018, No. 27496, A513, *Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*. TAR, 17 October 2019, Nos. 11954 and 11958; decision of 20 December 2018, No. 27494, A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*.

35 Case C-413/14 P, *Intel*, ECLI:EU:C:2017:632.

be used by Acea to orient (or monitor the effectiveness of) its business strategy of ‘retention’ of customers in the regulated market. The ICA’s reasoning was based on mere presumptions and did not adequately demonstrate an anticompetitive conduct.

In the *Enel* judgment, the TAR rejected the grounds of appeal concerning the alleged abuse. In particular, the TAR upheld the ICA’s finding that, compared to the lists of contact details other firms could collect on the market, the contact details collected by Enel provided additional strategic information, namely the fact that the customers belonged to its EPS activities, which allegedly allowed Enel’s subsidiary active on the deregulated market to address targeted offers to such customers. With respect to the analysis of the effects of the alleged abuse, the TAR limited itself to reiterating the traditional view that, once it is established that a conduct is capable of excluding competitors, it is not necessary for an antitrust authority to assess its actual effects. In this respect, the TAR seemed to depart from the position taken in the *Acea* judgment. However, the TAR upheld the grounds of appeal concerning the quantification of the fine, with respect to: (1) the duration of the alleged abuse, which in the TAR’s view amounted to one year and nine months (instead of more than five years); and (2) the turnover used by the ICA as a basis to calculate the fine (i.e., the turnover generated by Enel in 2017, notwithstanding that the last full year of the alleged infringement was 2016).

In the first three months of 2020, the Italian administrative courts adopted four additional rulings in abuse cases.

In January 2020, the Council of State annulled a decision issued by the ICA in 2012, in a case raising novel and complex issues.³⁶ The contested decision imposed a fine of €276,132 on *Estra* for having abused its legal monopoly in the market for gas distribution in the Municipality of Prato, by initially refusing, and then delaying, the provision to the contracting authority of the information required for the launch of a public tender for gas distribution services.³⁷

In August 2019, the TAR partially upheld the appeal lodged by *Estra* against the decision.³⁸ The TAR dismissed *Estra*’s argument that its conduct was lawful in light of a judgment delivered in 2010 by the TAR of Tuscany, which had rejected the appeal brought by the Municipality of Prato against *Estra*’s refusal to provide the requested information. The TAR relied on the established principle according to which the fact that a conduct is compatible with sector-specific regulation does not necessarily make it legitimate under competition law.

On appeal, the Council of State quashed the ICA decision. First, the Council of State recalled that, pursuant to settled case law, abuse of dominance may constitute a form of abuse of right (i.e., distorted use of a right by its holder to pursue objectives that differ from those indicated by law). The Council of State then stated that – in the context of the judicial scrutiny of an antitrust decision – the judiciary must not only establish whether the evidence put forward by the ICA is factually accurate, reliable and consistent, but also determine whether that evidence is capable of substantiating the conclusions drawn from it. In this respect, the

36 Council of State, 13 January 2020, No. 310 and 315.

37 Decision of 25 January 2012, No. 23243, A435, *Comune di Prato-Estra Reti Gas*.

38 TAR, 1 August 2019, No. 9140 and 9141.

benefit of doubt must be given to the firm under investigation, particularly when a decision imposes fines, in light of the presumption of innocence established by Article 6(2) of the European Convention on Human Rights (ECHR).³⁹

In the case at issue, the Council of State concluded that the ICA's reasoning did not allow it to 'ascertain with reassuring certainty' an abuse of dominance. Estra's conduct could be considered a lawful defence of one's property (as demonstrated by the fact that Estra challenged the municipality's decision to launch a tender before the TAR of Tuscany, but complied with the municipality's request following the final ruling issued on the matter by the Council of State). Moreover, according to the Council of State, the ICA failed to adequately prove that acknowledging the municipality's right to receive the information required for the tender procedure, regardless of Estra's doubts on the lawfulness of the procedure, would result in greater efficiency to the benefit of consumers.

In January 2020, the TAR annulled an ICA decision finding an alleged abuse committed by Società Iniziative Editoriali (SIE), the publisher of the main daily newspaper in the area of Trento (*L'Adige*), on the daily newspaper market, by refusing to license the editorial contents of its newspaper to companies providing daily press reviews in the above-mentioned area.⁴⁰ The ICA's investigation originated from a complaint by Euregio, a company active in the downstream local market for daily media monitoring services, which provided customers with a customised press review of selected news. Following the investigation, the ICA imposed a fine of approximately €1,000 on SIE and ordered it to license the right to use the content of its newspaper on fair, reasonable and non-discriminatory (FRAND) terms to any operator requesting it.

Based on established principles on refusal to license intellectual property rights,⁴¹ the TAR held that the ICA had not adequately established two of the conditions required by EU case law, namely the essential nature of the input requested and the competitor's intent to use it to launch a new product. In relation to the first condition, the ICA focused on the 'special usefulness' of the content of *L'Adige* for the production of local press reviews, without verifying the absolute indispensability and non-duplicability of the input, as required under the essential facilities doctrine. As to the second condition, the ICA failed to verify whether Euregio's press review could be considered a new product, as it did not clarify to what extent such review would have been ground-breaking compared to similar products already available on the market.

In March 2020, the Council of State upheld the appeal filed by Società Cooperativa Taxi Torino (Taxi Torino), the firm managing radio taxi services in Turin, against a judgment issued by the TAR in June 2019,⁴² which had confirmed a decision imposing interim measures.⁴³

The contested decision was issued by the ICA in 2018, in an investigation into a possible abuse in the market for taxi demand management services in Turin. A clause of Taxi Torino's by-laws imposed a non-compete obligation on taxi drivers participating in its network. According to the ICA, the clause hindered entry by open platforms (such as the

39 Case T-336/07, *Telefónica and Telefónica de España v Commission*, ECLI:EU:T:2012:172, sections 72–73.

40 TAR, 16 January 2020, No. 503; decision of 12 December 2017, No. 26907, A503, *Società iniziative editoriali/Servizi di rassegna stampa nella provincia di Trento*.

41 Case C-418/01, *IMS Health*, ECLI:EU:C:2004:257, section 52.

42 Council of State, 3 March 2020, No. 1547; TAR, 7 June 2019, No. 7463.

43 Decision of 29 November 2018, No. 27434, A521, *Attività di intermediazione della domanda di servizi taxi nel comune di Torino*.

MyTaxi app) on the relevant market, and was neither indispensable for the functioning of Taxi Torino's network nor proportionate. The ICA considered that the conditions for the adoption of interim measures were met and ordered Taxi Torino to cease the application of the non-compete clause pending a final decision on the alleged abuse.

In June 2019, the TAR confirmed the interim measures. The administrative court first clarified the legal standard for the judicial review of interim measures. When reviewing these measures, a court does not have to assess whether the ICA gathered conclusive evidence on the infringement of competition law, but must rather limit its assessment to verifying whether there are elements from which it can be inferred, with a sufficient degree of reliability, that anticompetitive conduct is taking place. On the merits, the TAR Lazio held that: (1) taxi demand management services offered through apps, phone or radio constitute a single relevant market from an antitrust perspective; (2) the non-compete obligation imposed on taxi drivers participating in Taxi Torino's network was aimed at limiting competition; and (3) the interim measures issued by the ICA were reasonable and well grounded.

On appeal, the Council of State quashed the interim decision. The supreme administrative court held that, also in light of EU principles, the ICA may anticipate the exercise of its powers through interim measures, under Article 14 *bis* of the Competition Act, only when the theory of harm is already sufficiently clear. The market definition adopted by the ICA, encompassing taxi demand management services offered through apps, phone and radio, did not meet the required legal standard, as the ICA failed to provide empirical data showing that the services based on these different platforms were valid substitutes for consumers.

As to the necessity and proportionality of the interim measure, the Council of State did not agree with the ICA's assessment. According to the Council of State, the non-compete clause was just an application of the duty of loyalty of members towards cooperatives provided for by Article 2527(2) of the Italian Civil Code, which prevents members from exercising an economic activity in competition with the cooperative. Further, the clause at stake was introduced by Taxi Torino to prevent potential unfair competition acts, following its entry in the market for taxi demand management services offered through apps. The Council of State also considered that, contrary to the ICA's finding, the low number of taxi drivers adopting the Mytaxi platform was due to the commercial policy of the competitor, rather than to the non-compete clause introduced by Taxi Torino.

In March 2020, the Council of State rejected the appeal lodged by Aspen against a judgment issued by the TAR in July 2017,⁴⁴ which had confirmed the ICA's decision to fine Aspen over €5 million for excessive prices under Article 102(a) TFEU.⁴⁵ In the decision, adopted in September 2016, the ICA found that, through an aggressive negotiation strategy vis-à-vis the Italian Medicines Agency (AIFA), Aspen had obtained price increases between 300 per cent and 1500 per cent for certain oncological drugs (known as 'Cosmos'). Both the TAR and the Council of State upheld the ICA's findings.

With regard to market definition, the Council of State clarified that, even though the Anatomical Therapeutic Chemical (ATC) classification system provides a useful benchmark and is commonly used by antitrust authorities to define relevant markets in the pharmaceutical sector, the ICA is not bound to use it. In the case at hand, it was justified to depart from the ATC classification system because, due to their specific characteristics, Cosmos drugs could

⁴⁴ Council of State, 13 March 2020, No. 1832; TAR Lazio, 26 July 2017, No. 8945.

⁴⁵ Decision of 29 September 2016, No. 26185, A480, *Incremento prezzo farmaci Aspen*.

not be substituted with other drugs for the treatment of certain diseases and some categories of patients (children and elderly people). Accordingly, they could be considered separate relevant markets for antitrust purposes. Moreover, the Council of State confirmed the ICA's finding of dominance, on the grounds that Aspen virtually holds a 100 per cent share and does not face any effective actual or potential competition, also due to the barriers to entry that characterise the relevant markets.

The Council of State also upheld the assessment of Aspen's negotiation strategy by the ICA. According to the Council of State, Aspen's acts and initiatives had to be analysed not separately, but as a whole. Overall, Aspen's negotiation strategy was aimed at achieving extremely high prices for the Cosmos drugs. Aspen abused its right to renegotiate the prices of the Cosmos drugs, by leveraging on their essential character and engaging in an aggressive negotiation strategy, also through a credible threat to withdraw the products concerned from the market.

Finally, the Council of State considered that the ICA had correctly applied the two limbs of the test elaborated by the CJEU in *United Brands* to assess excessive prices.⁴⁶ First, the ICA had carried out a price-cost comparison based on two parameters: (1) the difference between prices and costs, measured through the gross contribution margin; and (2) the difference between revenues and a 'cost plus' benchmark, including direct costs, the share of indirect costs allocated to the products concerned and a profit margin. Both methodologies led to the conclusion that Aspen's prices were well above production costs. Second, the ICA had verified whether the prices were unfair, taking into account all relevant circumstances. In particular, the ICA had considered the new prices charged by Aspen and those applied in the past and found that there were no plausible economic or non-economic justifications for the substantial price increases imposed by Aspen. Accordingly, the ICA had correctly concluded that the prices charged by Aspen were unfair.

iii Civil courts' rulings

In 2019 and the first months of 2020, the Italian civil courts also dealt with a number of abuse cases that address several aspects of damages actions, including the assessment of the relevant market, burden of proof and limitation period.

Some cases concerned alleged abuses committed by the company managing the Milan Malpensa and Linate airports, Società Esercizi Aeroportuali (SEA).

In January 2019, the Court of Milan partially upheld the damages claims lodged by three cargo ground-handling service providers (Cad Leo Antelli, Agility Logistic and Latasped) against SEA.⁴⁷ The parties alleged that SEA, as a legal monopolist in the handling of airport infrastructures within the above-mentioned airports, had carried out an abusive and discriminatory pricing practice and claimed both contractual and non-contractual damages. The allegations were based on a decision issued by the ICA in 2008, according to which, between 2002 and 2008, SEA had charged unfair and excessive prices for the provision of airport facilities to operators active in the supply of cargo handling services. According to the ICA's findings, the fees charged by SEA for sub-letting airport space and infrastructure to cargo handlers were significantly higher than those determined by the Italian Civil Aviation Authority (ENAC).

⁴⁶ Case C-27/76, *United Brands*, ECLI:EU:C:1978:22.

⁴⁷ Court of Milan, 14 January 2019, No. 290.

The case fell outside the scope of the new regime introduced with Legislative Decree No. 3/2017 (implementing Directive 2014/104/EU), providing for the binding effect of antitrust decisions in civil proceedings. Accordingly, the Court of Milan made reference to the traditional view that the findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of a dominant position, an infringement and a competitive harm. In principle, the presumption is rebuttable, but the nature of privileged evidence of the ICA's findings prevents defendants from arguing against the very same facts and grounds the ICA relied upon to find an antitrust infringement. In the case at hand, SEA did not provide any alternative explanation, as it only tried to rebut the same facts on the same grounds submitted during the investigation.

While part of the non-contractual claim was time-barred, the damage claims based on the contracts between the plaintiffs and SEA were not. In this respect, the Court of Milan stated that the excessive sub-concession charges provided for by the contracts with SEA were void, as they were incompatible with mandatory rules. As a consequence, under Italian civil law, the excessive charges agreed by the parties were automatically substituted by those set by ENAC, and the plaintiffs were entitled to recover the amounts overpaid.

In July 2019, the Italian Supreme Court confirmed a judgment of the Milan Court of Appeal concerning the same alleged infringement committed by SEA between 2002 and 2008.⁴⁸ The Supreme Court confirmed that the findings in a decision of the ICA (or a final ruling of administrative courts) constitute privileged evidence, from which a civil court may legitimately infer the existence of a dominant position and an antitrust infringement. The Supreme Court also confirmed that the limitation period starts to run when the claimant perceives, or can reasonably be expected to perceive, the information needed to start a civil action, including the contested behaviour and the fact that it constitutes an infringement of competition law. This analysis must be carried out on a case-by-case basis, in light of all relevant circumstances. In the case at issue, the Supreme Court confirmed the decision of the Court of Appeal, according to which the limitation period started to run from the date of the complaint that led to the ICA's investigation, since from that moment it was reasonably possible for the plaintiff to be aware of the possible abuse.

In the same month, the Milan Court of Appeal fully upheld a ruling of the Milan Court finding that SEA and Aeroporti di Roma (ADR) had put in place several anticompetitive practices in violation of Articles 101 and 102 TFEU.⁴⁹ Inter alia, the Court of Appeal found that SEA and ADR were dominant in the markets for the management of goods and spaces necessary to provide commercial services in (1) the airports of Milan Malpensa and Linate, and (2) the airport of Rome Fiumicino, respectively. The Court of Appeal also confirmed that SEA and ADR had abused their dominant position because they had directly entrusted Truestar with exclusive rights to provide luggage wrapping services in their airports instead of organising a competitive tender, notwithstanding the fact that there was no specific obligation to do so. However, the Court dismissed the damages claim lodged by Safe Bag (i.e., Truestar's main competitor), on the ground that the plaintiff had not proven, to the required legal standard, that it would have had a reasonably high chance of winning the exclusive rights, had SEA and ADR organised competitive tenders.

In May 2019, the Court of Milan rejected a claim brought by Dipharma Francis, a company active in the market for the production and sale of urso-deoxycholic acid (UDCA, an

48 Supreme Court, 5 July 2019, No. 18176.

49 Court of Appeal of Milan, 30 July 2019, No. 3362.

ingredient used for the production of drugs for the treatment of serious liver diseases), against Industria Chimica Emiliana and Prodotti Chimici Alimentari, two leading pharmaceutical companies active in the market for the production and sale of colic acid, a raw material used for the production of UDCA.⁵⁰ On the basis of a commitments decision issued by the ICA in 2015, the plaintiff claimed damages caused by a complex abuse of dominance, consisting in refusal to deal, excessive prices, price discrimination and margin squeeze.

The Court of Milan held that the findings of a commitments decision constitute evidence from which courts may legitimately infer the existence of a dominant position and an abuse. In the court's view, commitments decisions are issued after a complex investigation carried out by a public authority and, thus, should have evidentiary value in private antitrust litigation. Nonetheless, the Court rejected the idea that commitments can be compared to an out-of-court confession. As a consequence, courts cannot infer the existence of an abuse from a commitments decision, but should assess its evidentiary value on a case-by-case basis, in light of the principles established by the Italian Civil Procedure Code. In the case at hand, the Court of Milan held that the plaintiff had not provided sufficient evidence to support its allegations.

In November 2019, the Supreme Court set aside two judgments of the Milan Court of Appeal for failure to carry out a proper assessment of the relevant market.⁵¹ The case concerned the private actions brought by two online travel agencies against Ryanair for having refused to grant the right to sell tickets for its flights. The Milan Court upheld the plaintiffs' claims, but the ruling was annulled by the Court of Appeal. On appeal, the Supreme Court held that the Court of Appeal had mistakenly defined the relevant upstream market on which Ryanair was active as the market for intra-Union flights, instead of relying on the traditional definition, according to which each city (or airport) pairs constitute a separate relevant market. Moreover, according to the Supreme Court, the Court of Appeal did not adequately take into account the link between the upstream market for air transport flights and the downstream market for travel agency services.

In December 2019, the Court of Milan dismissed an action for damages brought by Enter against Telecom Italia (TIM) in follow-on litigation for an alleged abuse of dominance in the provision of wholesale access services, established and fined by the ICA in 2013.⁵² In the infringement decision, the ICA found that, in the period 2009-2011, TIM had abused its dominant position by communicating an unjustifiably high number of refusals to activate wholesale access services (KOs) to other authorised operators (such as Enter), which needed to access TIM's fixed network to provide electronic communications services to final consumers. In particular, the ICA found that the procedures for the provision of wholesale access services to competitors and to TIM's commercial divisions did not coincide, resulting *de facto* in higher percentages of KOs for competitors compared to TIM's commercial divisions. According to the ICA, the contested conduct was aimed at hindering the expansion of competitors in the markets for voice phone services and broadband internet access.

In the civil proceedings, the Court of Milan acknowledged that, based on settled case law, the decisions of the ICA constitute 'privileged evidence' of the nature and scope of the infringement. However, the claimant continues to bear the burden of proving, inter alia, that:

50 Court of Milan, 30 May 2019, No. 5122.

51 Supreme Court, 12 November 2019, No. 29237 and 29238.

52 Court of Milan, 18 December 2019, No. 11772; decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*.

(1) it was actually affected by the contested conduct; (2) it suffered damage; and (3) there was a causal link between the conduct and the alleged damage, on the basis of ordinary rules on burden of proof, with some adjustments to take into account the particular nature of private antitrust enforcement.

In the case at hand, according to the court, the claimant had not adequately established that it was actually harmed by the conduct fined by the ICA and that there was a causal link between such conduct and the alleged harm. In particular, the Court found that, in civil proceedings, the statistical analysis of the percentage incidence of the refusals to activate communicated to Enter – which in any case did not provide clear indications of discriminatory treatment – was not sufficient to demonstrate the alleged wrongdoing, as it could only constitute circumstantial evidence or reinforce further evidence. The available evidence showed that Enter regularly checked whether the refusals to activate communicated by TIM were actually justified by the circumstances provided for by sector-specific regulation. As the plaintiff had not specified which refusals to activate were in its view unjustified or excessive, the Court fully rejected its claims.

By contrast, in another follow-on action based on the ICA's decision in the A428 case, a non-final judgment issued by the Court of Rome in February 2020 found that the plaintiff (Siportal) had actually been harmed by the contested conduct.⁵³ According to the Court, the available evidence, combined with the ICA's decision (which constituted 'privileged evidence' of the existence, nature and scope of the infringement), demonstrated that Siportal had been affected by TIM's alleged abuse.

On the other hand, the Court of Rome held that the independent technical expert's opinion on the quantification of damages was not reliable, as it did not identify an appropriate counterfactual scenario to estimate the percentage of KOs that could be considered excessive and the ensuing damages. The expert had assumed that all KOs were unjustified, notwithstanding that a refusal to activate may be due to several factors provided for by sector-specific regulation. Accordingly, the Court called for a new technical expert report to determine the amount of the alleged damages. Moreover, pursuant to Article 14(3) of Legislative Decree No. 3/2017 (implementing Article 17(3) of Directive 2014/104/EU), the Court asked the ICA to provide its guidance on the appropriate temporal and geographical benchmarks to estimate the alleged antitrust damages.

In the above-mentioned *Siportal/TIM* case, the Court rejected TIM's objection that Siportal's claim was time-barred, on the ground that the five-year limitation period had started running only from the publication of the ICA's final decision (i.e., May 2013). As Siportal started the proceedings against TIM in 2016, its action was not time-barred.

A different solution was adopted by the Supreme Court in another recent case, concerning a damages action brought by Uno Communications against Vodafone Italia.⁵⁴ The case originated from the proceedings initiated by the ICA against Telecom Italia Mobile, Wind Telecomunicazioni and Vodafone for alleged abuse of dominance in the market for fixed-to-mobile calls. In May 2007, the ICA closed proceedings vis-à-vis Vodafone by accepting and making binding the commitments submitted by this company.⁵⁵ By contrast,

53 Court of Rome, 26 February 2020, No. 4222; decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*.

54 Supreme Court, 27 February 2020, No. 5381; Court of Appeal of Milan, 20 July 2016, No. 3052.

55 Decision of 24 May 2007, No. 16871, A357, *Tele 2/TIM-Vodafone-Wind*.

in August 2007, the ICA fined the two other investigated firms.⁵⁶ In February 2012, UNO brought an action for damages against Vodafone, seeking compensation for the damage caused by alleged abuse of dominance and unfair competition acts, in connection with the facts investigated by the ICA. However, the Court of Milan ruled that UNO's claim was time-barred, due to the expiry of the five-year limitation period, which had started to run from the opening of the ICA's investigation.⁵⁷ The judgment was later confirmed by the Milan Court of Appeal.⁵⁸

In February 2020, the Supreme Court confirmed the ruling of the Court of Appeal. The Supreme Court analysed the case based on the legal framework that was applicable before the entry into force of Legislative Decree No. 3/2017, implementing Directive 2014/104/EU.

With respect to the limitation period, the Supreme Court argued that it is reasonable to assume that, while consumers may discover the existence of a cartel only when the ICA publishes an infringement decision, in exclusionary abuse cases, where claimants are usually competitors, market participants may become aware of the anticompetitive conduct even before the ICA publishes an infringement decision. In this scenario, the court has to carry out a case-by-case assessment aimed at evaluating the degree of competence and actual awareness of the person that suffered the alleged damage. In the case at hand, the Supreme Court emphasized that UNO was a competitor of Vodafone, operating in the same sector, and should have known about the alleged anticompetitive conduct since 2005, when the ICA opened the proceedings (and there was consequent wide media coverage of it) or, at the latest, since August 2007, when the ICA adopted the commitment decision with respect to Vodafone. Accordingly, the application of a five-year limitation period starting from the day the ICA opened the proceedings did not infringe the EU principle of effective judicial protection, according to which national procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law.

The Supreme Court also ruled on the evidentiary value of commitment decisions in follow-on cases. According to the Supreme Court, commitment decisions cannot have the same evidentiary value as infringement decisions (namely they do not constitute 'privileged evidence', based on principles applicable *ratione temporis*). However, commitment decisions cannot also have the same evidentiary value as decisions finding no infringement because they are usually adopted to remove the preliminary competition concerns raised by the ICA in the decision to open the proceedings. Moreover, in the specific case, the ICA accepted Vodafone's commitments after having issued a statement of objections. In the Court's view, this showed that, up to a very advanced stage in the proceedings, the ICA believed that Vodafone's conduct was unlawful. Therefore, the Supreme Court held that, in these cases, commitment decisions may give rise to a rebuttable presumption of unlawfulness of the contested conduct.

56 Decision of 3 August 2007, No. 11731, A357, *Tele 2/TIM-Vodafone-Wind*.

57 Court of Milan, 3 April 2014, No. 4587.

58 Supreme Court, 27 February 2020, No. 5381; Court of Appeal of Milan, 20 July 2016, No. 3052.

III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market.⁵⁹ The ICA's general approach to market definition is consistent with the Commission's practice (in particular, the ICA typically focuses on demand-side⁶⁰ and supply-side substitutability).⁶¹ Similarly, the ICA follows the EU notion of dominance.⁶²

Market shares are a key factor in the assessment of dominance.⁶³ 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 highly fragmented.⁶⁴ The stability of market shares is also important,⁶⁵ but the fact that the market share is decreasing does not necessarily preclude a finding of dominance.⁶⁶ In the assessment of dominance, the ICA and national courts may consider a number of additional factors that give the firm concerned a competitive advantage or raise barriers to entry.⁶⁷

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.⁶⁸

Abuse of economic dependence in a 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 a 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.⁶⁹

59 See, for example, Supreme Court, 18 April 2018, No. 9579. See also Council of State, 3 March 2020, No. 1547, holding that an accurate definition of the relevant market is also necessary before adopting interim measures, in order to adequately assess possible competition concerns.

60 See, for example, decision of 28 June 2011, No. 22558, A415, *Sapex Agro/Bayer-Helm*; Council of State, 13 March 2020, No. 1832.

61 See, for example, decision of 17 December 1998, No. 6697, A 209, *Goriziane/Fiat Ferroviaria*.

62 See, for example, 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*.

63 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.

64 See, for example, decision of 27 November 2003, No. 12634, A333, *Enel Trade-Clienti Idonei*.

65 See, for example, decision of 30 June 2010, No. 21297, A383, *Mercato del cartongesso*.

66 See, for example, decision of 9 February 1995, No. 2793, A76, *Tekall/Italcementi*.

67 See, for instance, Council of State, 13 March 2020, No. 1832.

68 See decision of 3 August 2007, No. 17131, A357, *Tele2/Tim-Vodafone-Wind*.

69 Pursuant to Article 9, Paragraph 3 *bis*, of Law No. 192/1998, in the case of widespread and repeated violations of the rules on payment terms provided for by Legislative Decree No. 231/2002, in contractual relationships with firms (in particular small and medium-sized undertakings), an abuse may be found even in the absence of economic dependence. See decision of 23 November 2016, No. 26251, RP1, *Hera-affidamenti gruppi misura gas/termini di pagamento*.

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.⁷⁰ 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.

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.⁷¹

Abuse is an objective concept. An anticompetitive intent is not a prerequisite for a finding of abuse.⁷² 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.⁷³ 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.⁷⁴

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.⁷⁵

70 See, for example, 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; TAR, 31 May 2018, No. 6080.

71 See, for example, Council of State, 15 May 2015, No. 2479; TAR, 30 August 2006, No. 7807; 20 October 2006, No. 10678; TAR, 31 May 2018, No. 6080; TAR, 17 October 2019, Nos. 11954 and 11958.

72 See, for example, Council of State, 19 July 2002, No. 4001; TAR, 26 September 2019, No. 11330.

73 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*; 25 February 2020, No. 28162, A514, *Condotte fibra Telecom Italia*.

74 See Council of State, 12 February 2014, No. 693; 8 April 2014, No. 1673; TAR, 27 March 2014, No. 3398.

75 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*.

ii Exclusionary abuses

Exclusionary pricing

The ICA issued its first decision on predatory pricing in 1995 in *Tekal/Italcementi*.⁷⁶ In accordance with EU case law,⁷⁷ the ICA held that prices below the average variable cost (AVC) must be presumed unlawful, while prices between AVC and the 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 CJEU,⁷⁸ and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.⁷⁹

In *Caronte*,⁸⁰ the ICA used different cost benchmarks. Instead of relying on the AVC and ATC, the ICA focused on the short-run average incremental cost (SRAIC) and long-run average incremental cost (LRAIC). According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least 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 the AVC) and the ATC.⁸¹

More recently, in *TNT/Poste Italiane*,⁸² 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 the LRAIC. The latter was considered essentially equal to the average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR,⁸³ whose judgment was upheld by the Council of State.⁸⁴

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,⁸⁵ or the dominant firm uses privileged information that it holds because of its status of incumbent and vertically integrated operator but that is not available to rivals,

76 Decision of 9 February 1995, No. 2793, A76, *Tekal/Italcementi*.

77 Case C-62/86, *AKZO/Commission*, 1991 ECR I-3359.

78 Case C-334/96, *Tetra Pak/Commission*, 1996 ECR I-5951.

79 *Brook Group v. Brown & Williamson Tobacco*, 509 US 940 (1993).

80 Decision of 17 April 2002, No. 10650, A267, *Diano/Tourist Ferry Boat-Caronte Shipping-Navigazione Generale Italiana*.

81 Decision of 24 October 2007, No. 17522, A372, *Mercato del calcestruzzo cellulare autoclavato*.

82 Decision of 14 December 2011, No. 23065, A413, *TNT Post Italia/Poste Italiane*.

83 TAR, 25 June 2012, No. 5769.

84 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.

85 Decision of 7 December 1999, No. 7804, A224, *Pepsico Foods and Beverages International-IBG Sudl Coca-Cola Italia*; Court of Appeal of Milan, 16 May 2006.

to implement win-back or retention policies.⁸⁶ 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.⁸⁷

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.⁸⁸ For instance, in *Telecom*, the ICA held that the Italian incumbent in the electronic communications sector abused its dominant position by charging competitors more than it charged its commercial divisions for the relevant inputs, thus reducing rivals' margins and excluding equally efficient firms.⁸⁹ A price squeeze may also be the result of discounts offered to retail customers.⁹⁰

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*,⁹¹ the ICA found that Mediaset, the main Italian TV operator, violated Article 102 of the TFEU by abusing its dominant position on the national market for TV advertising. 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 may also find an abuse when a dominant firm imposes *de facto* exclusivity through the threat of retaliation and other measures,⁹² or uses contractual clauses that lead

86 Decision of 12 November 2008, No. 19249, A375, *Sfruttamento di informazioni commerciali privilegiate*, Court of Appeal of Milan, 16 May 2006.

87 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.

88 See, for example, decision of 13 December 2017, No. 26900, A493, *Poste Italiane/Prezzi recapito*; 13 December 2017, No. 26901, A500A, *Vodafone – SMS informativi aziendali*; 13 December 2017, No. 26902, A500B, *Telecom Italia – SMS informativi aziendali*; 13 December 2017, No. 26900, A493, *Poste italiane/Prezzi recapito*; 7 March 2019, No. 27582, A505, *Monte Titoli/Servizi di post-trading*.

89 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*.

90 See, for example, 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.

91 Decision of 28 June 2006, No. 15632, A362, *Diritti calcistici*.

92 See, for example, decision of 25 July 2017, No. 26704, A499, *Assicurazioni agricole/Comportamenti escludenti Codipra*.

to an exclusive commercial relationship,⁹³ especially within the framework of a broader exclusionary strategy that includes other practices aimed at limiting competitors' access to suppliers, distribution channels or customers.

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 purchasers' freedom to choose their supply sources, thus hindering rivals' access to the market or development.⁹⁴ The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.

Furthermore, according to the ICA, loyalty discounts may be anticompetitive because they imply discrimination between customers.⁹⁵

Traditionally, the treatment of loyalty discounts reflected the formalistic approach adopted in the past by EU institutions. Based on this approach, the ICA does not consider it necessary to apply a price-cost test to establish whether a loyalty discount scheme is capable of excluding an AEC, especially when the contested conduct is part of a broader exclusionary strategy.⁹⁶ However, in a judgment delivered in 2019, in line with the principles recently established by the CJEU in *Intel*,⁹⁷ the TAR stated that the ICA must analyse the conditions, duration and amount of loyalty rebates, as well as the possible existence of a strategy aimed at excluding as efficient competitors from the market.⁹⁸

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*,⁹⁹ 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

93 See decision of 31 October 2017, No. 26822, A484, *Unilever/Distribuzione gelati* (confirmed by TAR, 31 May 2018, No. 6080), concerning, inter alia, a commitment to provide retailers with freezer cabinets without any charge, on the condition that retailers would not stock competitors' ice creams in the freezer (freezer exclusivity).

94 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*; 31 October 2017, No. 26822, A484, *Unilever/Distribuzione gelati*; 13 December 2017, No. 26900, A493, *Poste italiane/Prezzi recapito*; 25 February 2020, No. 28162, A514, *Condote fibra Telecom Italia*.

95 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*.

96 See decisions of 13 December 2017, No. 26900, A493, *Poste italiane/Prezzi recapito*; 31 October 2017, No. 26822, A484, *Unilever/Distribuzione gelati*; TAR, 31 May 2018, No. 6080.

97 Case C-413/14 P, *Intel*, ECLI:EU:C:2017:632.

98 TAR, 4 June 2019, No. 7175.

99 Decision of 29 May 1997, No. 5034, A156, *Albacom Servizio Executive*; see also decisions of 25 July 2017, No. 26704, A499, *Assicurazioni agricole/Comportamenti escludenti Codipra*; 20 September 2000, No. 8692, A247, *Aeroporti di Roma-Tariffe del Groundhandling*; 10 April 1992, No. 453, A13, *Marinzulich/Tirrenia*.

service. In SIAE, the ICA held that the collective management organisation holding a legal monopoly had abused its dominant position by imposing on the authors it represented contractual clauses tying the provision of copyright management services covered by the legal monopoly to other management services open to competition.¹⁰⁰

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.¹⁰¹ 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,¹⁰² dilatory strategies¹⁰³ and other forms of constructive refusal to deal¹⁰⁴ 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.¹⁰⁵

The ICA defines the notion of essential facility in accordance with principles established by EU case law.¹⁰⁶ Intellectual property rights and information required to carry out an economic activity may also be considered essential facilities.¹⁰⁷

100 Decision of 25 September 2018, No. 27359, A508, *SIAE/Servizi intermediazione diritti d'autore*. This decision was upheld by TAR, 26 September 2019, No. 11330.

101 See, for example, decision of 14 March 2018, No. 27089, A507, *Servizio rifornimento carburante avio*.

102 See decision of 6 November 1997, No. 5446, A129, *Infocamerel/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.

103 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. See also decision of 25 January 2012, No. 23243, A435, *Comune di Prato-Estra Reti Gas*, which was annulled by Council of State, 13 January 2020, Nos. 310 and 315.

104 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.

105 id.

106 See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*.

107 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; decision of 6 September 2016, No. 26167, A486, *Enel Distribuzione-Rimozione coatta dispositivi smart metering*; 20 December 2017, No. 26907, A4503, *Società Iniziative Editoriali/Servizi di rassegna stampa nella provincia di Trento*, which was annulled by TAR, 16 January 2020, No. 503.

The ICA has applied the principles on refusal to deal and essential facilities in a number of cases, especially in liberalised sectors.¹⁰⁸ 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 strict requirements set by the CJEU's case law,¹⁰⁹ which in some recent cases has been criticised by the TAR.¹¹⁰

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.¹¹¹

In principle, lack of capacity on a facility (capacity saturation) should constitute an objective justification.¹¹² In exceptional circumstances, however, a dominant firm may be obliged to invest in the development of the facility. Indeed, in *Eni-TTPC*,¹¹³ 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 investment decisions. In a similar case,¹¹⁴ 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.

108 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, *Telystem/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*; 22 March 2017, No. 26497, A489, *Nuovo Inmaie-Condotte anticoncorrenziali*.

109 See, for example, decision of 15 June 2005, No. 14388, A364, *Merck-Principi attivi*; TAR, 3 March 2006, No. 341.

110 TAR, 16 January 2020, No. 503.

111 See, for example, decision of 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*.

112 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 Italtroli*; 2 March 1995, No. 2854, A61, *De Montis Catering Roma/Aeroporti di Roma*.

113 Decision of 15 February 2006, No. 15174, A358, *Eni-Trans Tunisian Pipeline*.

114 Commission decision of 29 September 2010, case COMP/39.315, *ENI*.

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.¹¹⁵ For instance, charging lower prices to customers that purchase a larger amount of products, based on objective parameters, may be justified.¹¹⁶

In many cases, the ICA has 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,¹¹⁷ or applying discriminatory conditions.¹¹⁸ Non-price discrimination may also amount to an abuse of dominance.¹¹⁹ Furthermore, discriminatory practices may be prohibited when they aim at penalising customers that also deal with other operators in order to prevent the entry or limit the growth of competitors.¹²⁰

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.¹²¹ If this analysis cannot be carried out or is inconclusive, the ICA may compare the prices imposed by the dominant firm with

115 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*.

116 Court of Appeal of Milan, 7 November 2017.

117 See, for example, decisions of 27 February 2014, No. 24819, A444, *Akron-Gestione rifiuti urbani a base cellulosica*; 8 January 2017, No. 26350, A490, *Net Service-Software processo civile telematico*; 20 December 2018, No. 27494, A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*; 20 December 2018, No. 27496, A513, *Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*, subsequently annulled by TAR, 17 October 2019, Nos. 11960 and 11976.

118 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-Assogestiva/Ferrovie dello Stato*.

119 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*.

120 See, for example, decision of 28 February 2018, No. 27503, A487, *Compagnia Italiana di Navigazione – Trasporto marittimo delle merci dalper la Sardegna*.

121 See, for example, decisions of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*; 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*.

those charged by the same firm or competitors for the same product or service in other markets¹²² or in the past.¹²³ In some cases, the ICA applied both the aforementioned tests in the assessment of prices charged by the dominant firm.¹²⁴

In 2016, in *Aspen*, the ICA applied a two-stage test to determine whether the prices charged by the dominant firm were excessive and unfair: first, it considered the disproportion between prices and costs; then it took into account a number of additional factors that confirmed the unfairness of the prices (including the historical prices for the products concerned, the lack of economic justifications for the price increases, the absence of any non-economic benefits for final users, the nature of the products, the characteristics of the dominant firm and the harm caused by the practice).¹²⁵

In some cases, the ICA has fined a dominant company for having charged prices remunerating activities or services that were not rendered.¹²⁶ In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.¹²⁷

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 in its 2014 fining guidelines.¹²⁸

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.

122 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 28 July 1995, No. 3195, A48, *SILB/SLAE*.

123 See, for example, decision of 4 May 2017, No. 26562, A498A, *Enel – Prezzi servizi di dispacciamento area Brindisi*.

124 See, for example, decisions of 15 November 2001, No. 10115, A306, *Alitalia/Veraldi*; 10 April 1992, No. 452, A4, *Anciel/Cerved*.

125 Decision of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*, upheld by TAR, 26 July 2017, No. 8945, and by Council of State, 13 March 2020, No. 1832.

126 See, for example, decision of 23 May 2002, No. 10763, A299, *International mail express/Poste Italiane*.

127 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, *Anciel/Cerved*), the refusal by a dominant firm providing toll payment services to reimburse cards not used, or only partially used, after their expiry (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 progressive*; 21 August 2008, No. 18692, A398, *Telecom-Morosità progressive*).

128 See Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of the Competition Act, ICA's resolution of 22 October 2014, No. 25152.

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 companies 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.

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.¹²⁹

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.¹³⁰

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 on its website, contains the essential elements of an 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.

¹²⁹ See, for example, decision of 29 November 2018, No. 27434, A521, *Attività di intermediazione della domanda di servizi taxi nel comune di Torino*. This decision was annulled by Council of State, 3 March 2020, No. 1547, on the grounds that the ICA did not meet the legal standard for the adoption of interim measures. According to the Council of State, if it is interpreted in compliance with the relevant EU law provisions, Article 14 *bis* of the Competition Act requires that the ICA adopts interim measures, consisting in an anticipation of the exercise of its powers, only when its theory of harm is already clear.

¹³⁰ See, in particular, TAR, 27 February 2007, No. 1745; 15 January 2007, No. 203.

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 companies' legal representatives;
- d* image computer hard drives by using forensic IT tools;
- 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.

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 that the infringement be put an end 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.¹³¹

The ICA's decisions are subject to judicial review by the TAR. The parties may file an appeal within 60 days of receipt of the notifications of the decision. The parties can ask the

¹³¹ Commitments may be revoked if the ICA finds that, given the changes in market conditions and the competitive scenario, they are no longer justified: see decision of 27 March 2019, No. 27609, A490C, *Software processo civile telematico-Valutazione istanza revoca impegni*.

TAR for a stay of execution of the ICA's decision. Hearings for interim measures are usually granted within a short time after 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.

The 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.¹³²

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 facts and supported its decision on adequate and coherent grounds.¹³³ 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.¹³⁴ However, when complex assessments carried out by the ICA remain questionable, the administrative court cannot substitute its own assessment for that of the ICA.¹³⁵ The limits of judicial reviews of antitrust decisions were confirmed by Article 7(1) of Legislative Decree of 19 January 2017, No. 3 (Legislative Decree 3/2017), implementing Directive No. 2014/104/EU on actions for antitrust damages.¹³⁶

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).¹³⁷

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.¹³⁸

132 See Council of State, 2 March 2009, No. 1190.

133 See Council of State, 19 July 2002, No. 4001 and, more recently, TAR, 10 March 2003, No. 1790.

134 See, for example, Council of State, 6 May 2014, No. 2302; 20 February 2008, No. 597; 8 February 2007, No. 515. See also Council of State, 13 January 2020, No. 310 and 315.

135 See, for example, Council of State, 6 May 2014, No. 2302; 24 September 2012, No. 5067.

136 Legislative Decree 3/2017, implementing in Italy Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014, OJ L 349/1.

137 ECHR, case No. 43509/08, *A Menarini Diagnostics/Italy*.

138 Supreme Court, 4 February 2005, No. 2207.

A collective action system has been introduced in the Italian legal system.¹³⁹ Pursuant to Article 140 *bis* of the Consumer Code, in cases 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.¹⁴⁰ 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.¹⁴¹ 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.

In April 2019, the Italian collective action system was reformed by Law No. 31 of 12 April 2019. The new rules, which will enter into force in November 2020,¹⁴² significantly amend the current procedure. The new regime will only apply to practices carried out after its entry into force.

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.¹⁴³

The calculation of damages based on loss of income is especially difficult when the injured company could not enter the market due to abusive conduct. In *Telesystem*,¹⁴⁴ 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 also considered 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 Appeal of Milan stated that the clauses provided for by a gas supply

139 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.

140 A collective action can be rejected by a 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 adequately protect the class's interests.

141 Individuals can decide not to join the class and file a separate lawsuit on their own.

142 See Article 8(5) of Law Decree No. 162 of 30 December 2019, converted into Law No. 8 of 28 February 2020.

143 Court of Appeal of Naples, 28 June 2007, No. 2513.

144 Court of Appeal of Milan, 18 July 1995 and 24 December 1996.

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.¹⁴⁵

As a matter of principle, civil courts do not have the power to permanently enjoin a defendant from repeating an 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.

According to Legislative Decree 3/2017, ICA decisions which are no longer subject to judicial review constitute legal proof of antitrust infringements.¹⁴⁶ Nevertheless, a claimant still has to prove the other requirements for civil liability, including the causal link between the conduct and the damage. Commitment decisions may also have evidentiary value, as they imply that an abuse was considered likely on the basis of an investigation carried out by the ICA.¹⁴⁷

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.¹⁴⁸ 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.

On 3 February 2017, Legislative Decree 3/2017, implementing Directive 2014/104/EU on actions for antitrust damages, entered into force. The Decree introduced a number of substantive and procedural provisions to facilitate damages claims by victims of antitrust infringements. It follows the EU Directive, with some minor procedural adjustments. The new procedural rules apply to damages actions brought after 26 December 2014.

Inter alia, the Decree strengthens the rules on disclosure of evidence. Upon motivated request, national courts can order the parties to civil proceedings or third parties to disclose relevant evidence in their possession. Courts have to specifically indicate the evidence to be disclosed and, in the case of confidential information, they must adopt the necessary measures to protect it (e.g., by redacting sensitive information). If a piece of evidence cannot

145 Court of Appeal of Milan, 16 September 2006; Court of Milan, 15 March 2018, No. 3011; 27 July 2018, No. 8374. See also Court of Milan, 14 January 2019, No. 290.

146 Based on the principles established by Italian case law, ICA's decisions adopted before the entry into force of the Decree are not binding in civil proceedings, but constitute privileged evidence, from which a court can legitimately infer the existence of the alleged infringement. See, among others, Supreme Court, 5 July 2019, No. 18176; Court of Milan, 14 January 2019, No. 290; Court of Milan, 18 December 2019, No. 11772; Court of Rome, 26 February 2020, No. 4222.

147 Supreme Court, 27 February 2020, No. 5381. See also Court of Milan, 28 July 2015, No. 9109, and Court of Milan, 30 May 2019, No. 5122.

148 Supreme Court, 4 June 2015, No. 11564; see also Supreme Court, 1 April 2016, No. 6366; Supreme Court, 12 November 2019, Nos. 29237 and 29238.

be produced by the parties or any third party, courts can order the exhibition of the documents in the case file of a national competition authority – apart from leniency statements and settlement submissions – provided that certain conditions are met.

Civil courts may also ask the ICA to provide guidance on the appropriate benchmarks and criteria to estimate the alleged antitrust damages, pursuant to Article 14(3) of the Decree.¹⁴⁹

Damages claims based on antitrust infringements are time-barred after five years. However, the limitation period is stayed during ICA proceedings, and for an additional year from the moment the infringement decision becomes final or the proceedings otherwise terminate.¹⁵⁰

The Decree confirms the principle that victims of antitrust infringements are entitled to full compensation, but overcompensation should be avoided. The alleged infringer may claim that the claimant has passed on all or part of the overcharge to its customers (passing-on defence). In this case, the burden of proof lies with the defendant, which may also ask for a judicial order of disclosure of evidence from the claimant or third parties.

The parties to a cartel are jointly and severally liable for the damage caused, but this principle does not apply when the cartel is a small or medium-sized enterprise; or the cartel received full immunity in the context of leniency applications.

The Decree attributes exclusive competence over actions for antitrust damages to the specialised business divisions of the courts of Milan, Rome and Naples, which are competent for Northern, Central and Southern Italy, respectively.

VIII FUTURE DEVELOPMENTS

Public enforcement in Italy continues to be vibrant, thanks to the proactive stance taken by the ICA, whose decisions continue to largely reflect well-established EU principles. Likewise, private enforcement is expanding, also in abuse of dominance cases, also as a result of the introduction of Legislative Decree No. 3/2017 (implementing Directive 2014/104/EU).

On the other hand, it could be argued that Italian decision practice and case law is not always fully consistent with economic analysis insights. In many cases, the ICA and the administrative courts have considered it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects, without carrying out a comprehensive economic assessment of the impact of the practice. This approach seems to be confirmed by the recent *Unilever* and *Poste* cases on loyalty discounts and rebates,¹⁵¹ in

149 See Court of Rome, 26 February 2020, No. 4222.

150 Italian civil courts have ruled in many instances on the issue of the starting point of the limitation period in cases that are not subject to the Decree *ratione temporis*. In principle, the limitation period starts to run when the claimant perceives, or can reasonably be expected to perceive, all the information needed to start a civil action, including the contested behaviour, the fact that it constitutes an antitrust infringement, the damage and the causal link. See, e.g., Supreme Court, 5 July 2019, No. 18176. This analysis must be carried out on a case-by-case basis, in light of all relevant circumstances. In practice, civil courts have adopted different solutions, which are not always consistent. For instance, in case of civil actions brought by competitors, Italian courts have considered that the limitation period started to run from the date of the complaint leading to the ICA's proceedings (see, e.g., Supreme Court, 5 July 2019, No. 18176), the publication of the ICA's decision to start proceedings (see, e.g., Supreme Court, 27 February 2020, No. 5381), or the publication of the ICA's final decision (see, e.g., Court of Rome, 26 February 2020, No. 4222).

151 Decision of 31 October 2017, No. 26822, A484, *Unilever/Distribuzione gelati*, confirmed by TAR, 31 May 2018, No. 6080; 13 December 2017, No. 26900, A493, *Poste Italiane/Prezzi recapito*.

which the ICA (and the TAR in the appeal against the *Unilever* decision) did not consider it necessary to run a price-cost analysis aimed at establishing the concrete risk of exclusion of equally efficient competitors, despite the novel approach outlined in the *Intel* judgment.¹⁵²

The transition towards an effects-based approach would require a stronger and more penetrating judicial review by administrative courts. Indicative of this role of the Italian judiciary is the recent *CIN* judgment, where the TAR made explicit reference to the *Intel* judgment and required the ICA to carry out an adequate economic analysis of loyalty-inducing schemes, taking into account the conditions, duration and amount of the rebates, as well as the possible existence of a strategy aiming at excluding as efficient competitors.¹⁵³

A 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*.¹⁵⁴ In this respect, unfortunately, Legislative Decree No. 3/2017, implementing Directive 2014/104/EU, confirmed that the judicial review of antitrust decisions does not extend to complex assessments carried out by the ICA when these assessments are disputable. The entry into force of the binding effect of the ICA's findings of infringement in private damages actions, pursuant to Article 7 of Legislative Decree No. 3/2017, increases the tension between antitrust proceedings and the protection of fundamental rights. In fact, the binding effect of antitrust decisions in damages actions is difficult to reconcile with the protection of fundamental rights if findings of infringements are not subject to full and unlimited review by an independent court (including with regard to complex economic assessments).

That being said, a review of the judgments adopted by administrative courts in 2019 and in the first months of 2020 shows a high percentage of ICA's decision (partially or totally) annulled, signalling a low deferential attitude of the administrative judges towards the national competition authority and, possibly, a desire to review more extensively and appraisingly its determinations.

Many cases recently decided by the ICA and national courts have concerned highly regulated sectors. The interaction between competition law and sector-specific 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 the administrative courts. A recent example is the *Snam* judgment, in which the Council of State criticised the ICA for having overstepped the boundaries of its competences, by impinging on the regulatory framework of the gas sector and by seeking to impose an outright liberalisation of the sector despite the gradual approach adopted by EU and national legislation.

In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations. The fact that a given practice is compatible with sector-specific regulation is not sufficient to exclude a possible antitrust

152 Case C-413/14 P, *Intel*, ECLI:EU:C:2017:632. See also, in this respect, decision of 20 December 2018, No. 27494, A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*, confirmed by TAR, 17 October 2019, No. 11954 and 11958, in which the TAR reiterated the view by which, in analysing an alleged abuse, 'object and effect tend to be indistinguishable'.

153 TAR, 4 June 2019, No. 7175.

154 Judgment of 27 September 2011, *A Menarini Diagnostics SRL v. Italy*, application No. 43509/08.

infringement, as recently confirmed by the *Aspen* case.¹⁵⁵ Another example of this intersection is provided by the *Enel* and *Acea* cases,¹⁵⁶ where the ICA found that – on the verge of the full liberalisation of the electricity sector – the incumbents had a special responsibility not to jeopardise the liberalisation process. The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation raises delicate and complex issues as to the interplay between the two sets of rules.

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 law¹⁵⁷ – 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.*¹⁵⁸

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 sole purpose of excluding a competitor.¹⁵⁹

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 broader exclusionary strategy also implemented through other anticompetitive practices.¹⁶⁰ 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 recent decision of the ICA in the *Telecom Italia* case seems to confirm the risk that the abuse of right doctrine, combined with an excessive reliance on the alleged intent, may result in adverse consequences, such as limiting the ability of a dominant firm to invest in infrastructure development to defend its commercial interests and market position, or restricting the exercise of the right of defence

155 Decision of 29 September 2016, No. 26185, A480, *Aspen-Incremento prezzi farmaci*, upheld by Council of State, 13 March 2020, No. 1832.

156 Decisions of 20 December 2018, No. 27494, A511, *Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*; 20 December 2018, No. 27496, A513, *Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica*.

157 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.

158 Council of State, 12 February 2014, No. 693.

159 Decision of 25 March 2015, No. 25397, A474, *SEA/Convenzione ATA*; TAR, 23 January 2017, No. 1188.

160 See, for example, decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.

before courts and administrative authorities.¹⁶¹ Overall, the boundaries between legitimate exercise and abuse of right remain at least unclear and need to be clarified by competent authorities and courts in the future.

As to the enforcement policy, in the past 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. Between 2017 and 2019, the ICA issued commitment decisions in only six (out of 20) cases. In 2020, so far, the ICA has adopted one commitment decision out of two cases. Compared to past practice, 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 civil courts tend to consider that commitment decisions may also have significant evidentiary value may reduce the incentive of firms to offer voluntary remedies.¹⁶² Nonetheless, negotiated enforcement continues to play a very important role in antitrust decision-making practice. This may have both positive and negative effects. Commitment decisions may reduce risks for firms, and enable the ICA to address more rapidly the issues raised by potentially anticompetitive practices. On the other hand, an extensive use of commitment decisions may negatively affect the development of case law on abuse of dominance, as these decisions do not contain a complete and detailed analysis of the alleged infringement, and the robustness of their reasoning and interpretative choices is normally not tested before courts.

161 Decision of 25 February 2020, No. 28162, A514, *Condotta fibra Telecom Italia*.

162 Supreme Court, 27 February 2020, No. 5381. See also Court of Milan, 28 July 2015, No. 9109, and Court of Milan, 30 May 2019, No. 5122.

JAPAN

*Yusuke Kashiwagi*¹

I INTRODUCTION

i Characteristics of the regulations on private monopolisation and unfair business practices

The Japanese regulations on dominance and monopolies come in two forms: prohibition on private monopolisation and prohibition on unfair business practices.²

Private monopolisation

The concept of ‘private monopolisation’ is derived from Article 2 of the US Sherman Act, and was enacted at the time of the establishment of the Antimonopoly Act (AMA) in 1947, which is based on US judicial precedents on monopolisation. Two types of conduct are prescribed – ‘exclusionary conduct’ and ‘controlling conduct’, with ‘controlling conduct’ being unique to Japanese competition law. There are also regulations on such conduct being committed by multiple enterprises simultaneously, although there are few actual examples of this. Private monopolisation is defined in the provisions of the AMA as follows:

*The term ‘private monopolisation’ as used in this Act means such business activities by which any enterprise, individually or by combination, in conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.*³

In actual practice, the provisions against controlling-type conduct are rarely applied, and seven of the eight private monopolisation cases that have taken place since 2000 have been exclusionary-type cases. While the title ‘private monopolisation’ is used, there is also no requirement for the subject of the conduct to be monopolising the market in the economic sense of the term (that is, having only one seller or one buyer).

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2 While the Japan Fair Trade Commission (JFTC) translates the Japanese term *fukōsei na torihiki hōhō* as ‘unfair trade practices’, the term ‘business’ suits the reality of what is being referred to, and accordingly this translation is used in the chapter.

3 AMA, Article 2, Paragraph 5. While ‘any particular field of trade’ is the JFTC’s English translation, this has the same meaning as the term ‘relevant market’, which is generally used globally.

Unfair business practices

While ‘unfair business practice’ means a conduct that has a likelihood of impeding fair competition, and is derived from Article 5 of the US Federal Trade Commission Act, a notable feature of the provisions on such practices is that they prescribe various types of conduct.⁴ Essentially, while an unfair business practice is the same as private monopolisation in that the AMA regulates against anticompetitive conduct impeding the function of competition in the relevant market, it differs from private monopolisation in that the AMA also prohibits unfair business practices that have a ‘likelihood’ of having such an effect. There are debates over what constitutes such a likelihood, as described below.⁵

Unfair business practices is defined in the provisions of the AMA as follows:

The term ‘unfair trade practices’ ‘as used in this Act means an act falling under any of the following items:

- (i) *engaging, without justifiable grounds, in any of the following acts, in concert with a competitor:*
 - (a) *refusing to supply to a certain enterprise or restricting the quantity or substance of goods or services supplied to a certain enterprise*
 - (b) *causing another enterprise to refuse to supply a certain enterprise, or to restrict the quantity or substance of goods or services supplied to a certain enterprise*
- (ii) *unjustly and continually supplying goods or services at a price applied differentially between regions or between parties, thereby tending to cause difficulties to the business activities of other enterprise*
- (iii) *without justifiable grounds, continuously supplying goods or services at a price far below the cost incurred to supply them, thereby tending to cause difficulties to the business activities of other enterprises*
- (iv) *supplying goods to another party who purchases the relevant goods from oneself while imposing, without justifiable grounds, one of the restrictive terms listed below:*
 - (a) *causing the party to maintain the selling price of the goods that one has determined, or otherwise restricting the party’s free decision on selling price of the goods*
 - (b) *having the party cause an enterprise that purchases the goods from the party maintain the selling price of the goods that one has determined, or otherwise causing the party to restrict the relevant enterprise’s free decision on the selling price of the goods.*

⁴ Conduct is designated as unfair business practices by the AMA or the JFTC (AMA, Article 2, Paragraph 9, Items 1–6; JFTC General Designations (GD), Paragraphs 1–16). The JFTC is authorised to designate additional prohibited practices by the AMA and there are two types of JFTC designations; one is a general designation, which is applicable across sectors; the other is a specific designation, which is applied to a specific sector. Three specific designations, applicable to newspapers, freight transportation and retail businesses, are enacted currently.

⁵ A likelihood of impeding fair competition was theoretically categorised as three ‘forms’ in the 1982 AMA study group report: (1) lessening free competition; (2) use of unfair methods of competition; or (3) infringing the foundation of free competition. Form 1 is a core impediment, since it has essentially the same meaning as impeding the function of competition in the relevant market; form 2 relates to a substantially supplemental act of the AMA (the Act against unjustifiable premiums and misleading representations, which is enforced by the Consumer Affairs Agency. The Consumer Affairs Agency and the JFTC sometimes cooperate in handling misleading cases); and form 3 mainly relates to abuse of superior bargaining position (exploitative abuse). Additionally, the JFTC considers that the use of unfair methods of competition (form 2) must be prevalent to find a likelihood of impeding fair competition.

⁶ In this excerpt, ‘unfair business practices’ is used.

- (v) *engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices:*
 - (a) *causing the counterparty in continuous transactions (including a party with whom one newly intends to engage in continuous transactions; the same applies in (b) below) to purchase goods or services other than those to which the relevant transactions pertain*
 - (b) *causing the counterparty in continuous transactions to provide money, services or other economic benefits*
 - (c) *refusing to receive goods in transactions with the counterparty, causing the counterparty to take back such goods after receiving them from the counterparty, delaying payment to the counterparty or reducing the amount of payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty*
- (vi) *any act falling under any of the following items, which tends to impede fair competition⁷ and which is designated by the Fair Trade Commission, other than the acts listed in the preceding items:*
 - (a) *unjustly treating other enterprise in a discriminatory manner*
 - (b) *engaging in transactions at an unjust price*
 - (c) *unjustly inducing or coercing the customers of a competitor to deal with one*
 - (d) *dealing with another party on such conditions that will unjustly restrict the business activities of the counterparty*
 - (e) *dealing with the counterparty by making use of one's superior bargaining position unjustly*
 - (f) *unjustly interfering with a transaction between an enterprise in competition with one in Japan or a corporation of which one is a shareholder or an officer and another transaction counterparty; or, if such enterprise is a corporation, unjustly inducing, instigating or coercing a shareholder or officer of such corporation to act against the corporation's interests.⁸*

Based on Article 2, Paragraph 9(vi), the regulation named 'JFTC General Designations, Paragraphs 1–16' also exist.⁹ The regulations regarding 'unfair business practices' are quite complicated as detailed later.

Market share

While with private monopolisation there are no provisions imposing requirements on a company's market share, under the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act¹⁰ enacted by the JFTC (Private Monopolisation Guidelines), companies with a share of approximately over 50 per cent are subject to the regulations, and in actual cases to which private monopolisation has applied, the share of companies in the relevant market has been high.

For instance, from a general overview of cases since 2000, we see examples including a share of approximately 85 per cent in *NIPRO*,¹¹ 70 per cent and above in *NTT East*¹² (NTT's

7 'A likelihood of impeding fair competition' has the same meaning as 'which tends to impede fair competition'.

8 AMA, Article 2, Paragraph 9.

9 https://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html.

10 www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/guidelines_exclusionary.pdf.

11 JFTC hearing decision, 5 June 2006.

12 Supreme Court judgment, 17 December 2010.

share of fibre-optic lines in the east Japan region), 72 per cent in *USEN Corporation*¹³ (up from 68 per cent owing to an implementation of exclusionary conduct), 89 per cent in *Intel*¹⁴ (up from 76 per cent, again owing to the implementation of exclusionary conduct) and approximately 99 per cent in *JASRAC* (managing operator for music copyright). These cases are described in more detail in Sections II and IV.

In this way, all cases of private monopolisation since 2000 have identified exclusionary conduct by companies with a market share of over 50 per cent as a violation of the prohibitions thereon. However, even companies that do not have a market share of 50 per cent or more are regulated by the rules against unfair business practices.

Exclusionary conduct and controlling conduct

In recent years, there have been a series of important Supreme Court judgments concerning exclusionary conduct, in which the concept of ‘excluding the business activities of other enterprises’ was defined as ‘causing a clear obstruction to the business activities of a competitor, or significantly making it difficult for a competitor to enter the market, in each case through practices of an artificial nature that deviate from normal competitive methods’.¹⁵ While this definition has become generally accepted, views are divided when it comes to the actual finding of exclusionary conduct. However, there is no disputing the fact that there is no need for a company to completely expel a competitor from the market, or to bar it completely from entering it, for such conduct to be considered exclusionary. In addition, in the same judgment, a ‘substantial restraint of competition’ is defined as ‘creating, maintaining or strengthening market power’, and so is consistent with actual practice to date.

On the other hand, controlling conduct is generally defined (albeit not in a Supreme Court judgment) as ‘conduct which imposes restrictions on another enterprise’s decision-making concerning their business activities, and so causes them to comply with one’s own wishes’.

Other matters

While a company that creates market power is essentially free to raise prices, discriminatory price raises, etc., of a kind that prevent competitors from entering the market may be caught by the regulations on private monopolisation.

There are provisions that enable measures to be taken where a market is in a situation whereby it is monopolised by a large company¹⁶ to remove such a situation; however, these have not actually been used in practice, and it is extremely unlikely that they will be in the future, either.

13 JFTC recommendation decision, 13 October 2004.

14 JFTC recommendation decision, 13 April 2005.

15 Judgment of the Supreme Court in the *NTT East* case: Supreme Court decision, 17 December 2010, *Minshu* Vol. 64, No. 8, p. 2,067.

16 AMA, Article 8-4.

ii Relationship between private monopolisation and unfair business practices

It might be difficult for readers in countries that do not have a system of dual regulations to understand the relationship between private monopolisation and unfair business practices. While the enactment of regulations on unfair business practices was (as previously mentioned) influenced by the US Federal Trade Commission Act,¹⁷ the AMA is distinct from this Act in that it has provisions on a diverse range of different types of conduct, such as:

- a* concerted refusal to supply;¹⁸
- b* discriminatory price;¹⁹
- c* unjust low prices;²⁰
- d* resale price maintenance (RPM);²¹ and
- e* abuse of superior bargaining position.²²

Except for RPM, the conducts above are dually regulated in the AMA and JFTC General Designations (GD), with slight differences between the regulations.²³ The main types of conduct, dealt with only in the GD and often applied by the JFTC, are as follows:

- a* refusal to deal;²⁴
- b* tie-in sales;²⁵
- c* trading on exclusive terms;²⁶
- d* trading on restrictive terms;²⁷ and
- e* interferences with a competitor's transaction.²⁸

The major difference from private monopolisation is in the extent to which there is an anticompetitive effect on the market, and for private monopolisation to be realised, there must be a 'substantial restraint of competition' in the 'relevant market'.

On the other hand, it is enough for there to be a 'likelihood of impeding fair competition' for unfair business practices. The question of to what extent a 'likelihood' there should be to satisfy this requirement is, in some cases, the most contested issue. While it also depends on

17 Although in Japan, the only enforcing body is the JFTC.

18 AMA, Article 2(9)(i); GD, Paragraph 1.

19 AMA, Article 2(9)(ii); GD, Paragraph 3.

20 AMA, Article 2(9)(iii); GD, Paragraph 6.

21 AMA, Article 2(9)(iv). Since RPM is not treated as unilateral conduct in general competition law, it is excluded from this capture.

22 AMA, Article 2(9)(v); GD, Paragraph 13.

23 For example, 'unjust low price' is defined in Article 2(9)(iii) of the AMA as follows: 'without justifiable grounds, continuously supplying goods or services at a price far below the cost incurred to supply them, thereby tending to cause difficulties to the business activities of other enterprises.' On the other hand, it is defined in Paragraph 6 of the GD as follows: 'in addition to any act falling under the provisions of Article 2, Paragraph (9), Item (iii) of the Act, unjustly supplying goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other entrepreneurs'.

24 GD, Paragraph 2.

25 GD, Paragraph 10.

26 GD, Paragraph 11.

27 GD, Paragraph 12.

28 GD, Paragraph 14.

the case in question, the JFTC often sets a low bar in cases to ensure that it wins, while on the other hand companies tend to set a high bar in a way that is substantially the same as a 'substantial restraint of competition'.

On this point, while the JFTC ruled in the administrative hearing decision for the *Microsoft* case²⁹ that 'the quantitative or substantive effect on competition of the relevant conduct should be determined on a case-by-case basis', this became the largest point of argument in the actual case.

In many cases, if private monopolisation applies, it will also constitute one of the types of unfair business practice. On the other hand, the relationship between them is such that conduct does not necessarily constitute private monopolisation just because it is an unfair business practice.

II YEAR IN REVIEW

As the JFTC has tended to enforce the regulations on private monopolisation in waves, it is worth looking back at previous events to understand the current situation in Japan. There were no such cases between 1972 and 1996, and prior to 1972, there were only a few. During this period, conduct that met the requirements for private monopolisation was regulated as an unfair business practice, as they were generally understood to be at the time, for which the evidential burden was low.

From 1996 to 2009, private monopolisation was actively enforced, with one case a year on average. However, the JFTC lost the *JASRAC* case. JASRAC, which was the monopolistic managing operator for music copyright in Japan, was initially determined by the JFTC in 2009³⁰ to have committed a violation of private monopolisation by adopting a blanket collection method for broadcaster licensing fees, whereby it charged a fee by applying its prescribed rate to broadcasters' broadcasting business revenue as a comprehensive licence for all music managed by JASRAC, regardless of the number of times that music was actually used.

JASRAC contested the cease-and-desist order in the hearing procedure³¹ held by the JFTC, which resulted in the JFTC taking the highly unusual step of revoking its own cease-and-desist order of violation.³²

While it seemed the matter would then be concluded, an action for revocation of administrative disposition was subsequently brought against the JFTC by JASRAC's competitor, e-License, which claimed that it was excluded by JASRAC. The Tokyo High Court and the Supreme Court both determined that exclusionary conduct had taken place, and the case was referred back to the JFTC.³³

In 2016, the case finally came to a close, with the withdrawal of JASRAC's petition for redress, and during the period from 2009 to 2016, shackled as it was by its ongoing conflict

29 16 September 2008.

30 JFTC case-and-desist order, 27 February 2009.

31 The practice of which has since been abolished.

32 JFTC hearing decision, 12 June 2012.

33 Supreme Court decision, 28 April 2015, Minshu, Vol. 69, No. 3, p. 518. The ruling was as follows:

A collection method which does not take into account the amount of broadcast usage when calculating broadcasting licence fees will cause the overall amount of music usage fees borne by broadcasters to increase where they are paying music usage fees to other managing operators. Accordingly, coupled with the fact that the broadcasting usage of music is essentially interchangeable in nature, this has the effect of suppressing the usage by broadcasters of music which is managed by other managing operators, and when one takes into account that the

with JASRAC, the JFTC did not expose any cases of private monopolisation, with the exception of one small and local case of a controlling-type private monopolisation. However, in recent years, the JFTC has become more active again. It has exposed a string of cases that are fascinating from a competition law standpoint, each described later.

On 12 December 2017, the Supreme Court, albeit in an international cartel case, indicated that even where cartel agreements are reached outside Japan, the AMA will apply where these infringe Japan's free competitive economic order. Although this is self-evident in actual practice, it makes sense that this was made explicitly clear, and it is surmised that this is also applicable to private monopolisation and unfair business practices.

On 15 March 2018, according to press reports, the JFTC conducted an on-site inspection (dawn raid) of Amazon Japan's offices on suspicion of the unfair business practice, 'abuse of superior bargaining position'. It seems that the investigation will look into Amazon Japan's conduct in demanding that its supplier companies pay the cost of a discount provided to consumers as a form of support money. It seems this case was closed, but it is not clear how this case was settled.

On 22 May 2018, according to press reports, the JFTC conducted an on-site inspection of Mainami Kuko Service, a company providing aviation refuelling services, on suspicion of private monopolisation (of the exclusionary type). It seems that the investigation will look into Mainami's conduct of allegedly trying to restrict the entry of competitors into the market by asking airlines it has long-term partnerships with not to use refuelling facilities provided by competitors. It seems this case is still ongoing.

On 13 June 2018, according to press reports, the JFTC conducted an on-site inspection of Nihon Medi-Physics Co, a dominant company providing cancer examination test drugs for positron emission tomography, which is effective in early detection of cancer, on suspicion of private monopolisation (of the exclusionary type). Nihon Medi-Physics Co is suspected of disrupting the entry of new entrants into the market by putting pressure on the administration developer and manufacture not to use competitors' test drugs. On 12 March 2020, the JFTC approved the commitment plan submitted by Nihon Medi-Physics Co. See Section V.

On 11 July 2018, the JFTC announced it closed the investigation against Apple on the suspected violation of the AMA regarding its agreement with mobile operators. See Section IV.

On 30 December 2018, in accordance with the enactment of the Act on the Development of Related Legislation Following the Conclusion of the Trans-Pacific Partnership Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, a scheme to resolve suspected violations against the AMA voluntarily by consent between the JFTC and the enterprise (commitment procedures) has been introduced into the AMA. See Section V.

On 15 March 2019, after hearing procedures that took almost 10 years, the JFTC revoked its own cease-and-desist order against Qualcomm, which was issued in 2009. This was a highly unusual step, as in the *JASRAC* case mentioned above. On 28 September 2009, Qualcomm was determined by the JFTC to have committed violation of unfair business practices (trading on restrictive terms) by forcing a 'royalty-free clause' and 'non-assertion provisions clause' to mobile terminal manufacturers in the licence agreements of code-division multiple access (CDMA) intellectual property rights it owned. The JFTC evaluated in its

scope of such suppression extends to almost all broadcasters, and that the continuation period thereof extends over a considerably long period of time, one should say that this method clearly has the effect of making it difficult for other managing operators to enter this market.

cease-and-desist order in 2009, that the manufacturers would, as a result of these clauses, lose the desire to research and develop technologies related to CDMA, etc., and, accordingly, their positions would be weakened; while on the other hand, Qualcomm would strengthen its position. However, the JFTC hearing examiner ruled that the clauses had a property similar to cross-licence agreements, and finally found that the claimants had failed to show evidence to support the existence of violation. The JFTC commissioners approved the hearing decision.

On 10 April 2019, according to press reports, the JFTC conducted on-site inspections of Rakuten Travel Co, Booking.com Japan and Expedia Japan, companies providing online hotel booking websites, on suspicion of unfair business practices (forcing most-favoured nation (MFN) clauses on hotels). On 25 October 2019, the JFTC approved the commitment plan submitted by Rakuten. See Section V.

On 10 April 2019, according to press reports, Amazon Japan made public that it would withdraw its measure of service point reduction system returning to consumers over 1 per cent of the purchase amount of all items at the seller's expense. After Amazon Japan initially made this measure public in February 2019, the JFTC started investigations on suspicion of abuse of superior bargaining position.

On 17 December 2019, the JFTC released the 'Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.'. See Section IV at 'Exploitative abuse (abuse of superior bargaining position)'.

On 28 February 2020, the JFTC filed a petition for an urgent injunction to the Tokyo District Court in accordance with the provision of Article 70-4, Paragraph 1 of the AMA, seeking an urgent injunction against shipping inclusive programme measures proposed by Rakuten, Inc (Rakuten), by which all the merchants of 'Rakuten Ichiba (market)' would be prevented from receiving delivery fees from purchasers.

The JFTC alleges that Rakuten's conduct violates Article 19 (Article 2(9)(v) 'Abuse of Superior Bargaining Position') of the AMA. Recognising that Rakuten stated that, in consideration of influences of covid-19 on merchant staff resources, etc., it allowed the merchants to decide whether or not to participate in the measures, the JFTC withdrew its petition for an urgent injunction on 10 March 2020. However, the JFTC continues its investigation on Rakuten's measures.³⁴

On 2 June 2020, the JFTC closed the investigation on the suspected violation of the AMA against Osaka Gas Co, Ltd (Osaka Gas).

The JFTC has investigated Osaka Gas, in accordance with the provisions of the AMA. Osaka Gas has been suspected³⁵ of unjustly excluding competitors in the relevant market, where gas retailers supply gas to LCPs (large consumption points subject to an annual gas contract of not less than a hundred thousand cubic metres) in the area of distribution network of Osaka gas, by the following:

- a unjustly supplying gas for a low price, or supplying gas for a lower price only after Osaka Gas encounters a competition;

34 <https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html>.

35 Suspected violation of the Article 3 (Private Monopolization) or the Article 19 (Unfair Business Practices stipulated in the Article 2, Paragraph (9), Item (ii) [Discriminatory Price] or Item (iii) [Unjust Low Price Sales] of the AMA, or Paragraph 3 [Discriminatory Price], Paragraph 6 [Unjust Low Price Sales], Paragraph 12 [Trading on Restrictive Terms] or Paragraph 14 [Interference with a Competitor's Transactions] of GD.

- b* concluding a contract to discount gas prices under the condition of supplying gas to two or more LCPs (hereinafter ‘multipoint contract’) with the stipulation that the total amount of the discounts should be reimbursed to Osaka Gas if any of the individual gas contracts on the LCPs subject to the multipoint contract would be cancelled during the contracted period, and
- c* concluding a gas supply contract with the stipulation that the customer should pay a cancellation charge to Osaka Gas if the customer cancelled the contract during the contracted period.

The JFTC has decided to close the investigation in light of the facts including:

- a* it has not found a violation against the AMA on (a) above, and
- b* Osaka Gas voluntarily offered the JFTC revision of the stipulations of the multipoint contract and gas supply contract mentioned in (b) and (c) above to reduce customers’ payment accompanying a change of a gas supplier from Osaka Gas to a competitor.

Enactment of the Act to Amend the AMA

The amendments mainly only to cartels and bid rigging, not to unilateral conduct, but are very important.

On 19 June 2019, the bill to amend the AMA, which was submitted to the National Diet on 12 March 2019, was approved by the House of Councillors and enacted. The purpose of the amended Act is to deter ‘unreasonable restraint of trade’ effectively, invigorate the economy and enhance consumer interests by fair and free competition, through increasing incentives for enterprises to cooperate in the JFTC’s investigation and imposing an appropriate amount of surcharges according to the nature and extent of the violation. Outlines of the Enacted Act are as follows:

- a* amendment of leniency programme:
 - the introduction of a system that allows the JFTC to reduce the amount of surcharges when enterprises submit information and documents that contribute to the fact-finding of the case, in addition to the reduction according to the order of application; and
 - abolishing the current limit on the number of applicants in the leniency programme;
- b* revision of the calculation methods – addition of, inter alia, the basis of calculation of surcharges and extension of the calculation term;
- c* revision of Penal Provisions – raising the limit of the amount of criminal fine for a juridical person charged with the offence of obstructing an investigation; and
- d* making other necessary revisions.

The amendment shall come into effect on the date specified by Cabinet order within a period not exceeding one and a half years from the date of the promulgation of the Bill (with a few exceptions).

As an approach to attorney–client privilege, rules pursuant to the provisions of Article 76 of AMA, and guidelines shall be established by the effective date of the Bill from the perspective of making the new leniency programme more effective, inter alia,

protecting confidential communication regarding legal advice, between an enterprise and independent attorneys substantially and ensuring the appropriateness of administrative investigation procedures.³⁶

Enactment of the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms

On 27 May 2020, the bill for the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms, which was submitted to the National Diet on 18 February 2020,³⁷ was approved by the House of Councillors and enacted. It is anticipated that this Act will regulate GAFA, Yahoo and Rakuten, among others.

Purpose of the Act

In recent years, digital platforms have dramatically improved users' access to markets and have become ever more important. Meanwhile, concerns are emerging, such as: low transparency in trading as seen in changes in terms and conditions and no provision of reasons for refusal to deal; and insufficient procedures and systems for addressing rational requests of platform users providing goods and services.

In light of this situation, the Ministry of Economy, Trade and Industry (METI) will take necessary measures to improve transparency and fairness in trading on digital platforms, such as those for requiring digital platform providers to: disclose terms and conditions of trading and other information, secure fairness in operating digital platforms, submit a report on the current situation of business operation and conduct self-assessment of the report as well as those for requiring the government to publicise the results of its assessment of the report and to take other actions.

In addition, the Act is to require the government, when implementing these measures, to encourage digital platform providers and platform users providing goods and services to establish mutual understanding in terms of trading relationships on the basis of digital platform providers making voluntary and proactive efforts with minimal involvement by the government.

Outline of the Act

The major measures to be taken under the Act are as follows:

Measures targeting specified digital platform providers

The Act is to designate digital platform businesses whose transparency and fairness in trading should be improved as 'specified digital platform providers' under cabinet order and, thereby, such specified providers, whether they are domestic or overseas businesses, are to be subject to the following rules:

- a requiring specified digital platform providers to disclose their information (e.g., terms and conditions of trading). The Act is to require specified digital platform providers to disclose terms and conditions and give prior notices of any change thereof to the platform users;

36 <https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/19061907.html>.

37 https://www.meti.go.jp/english/press/2020/0218_002.html.

- b requesting these providers to develop procedures and systems in a voluntary manner: The Act is to request such providers to develop procedures and systems in accordance with the guidelines specified by the Minister of Economy, Trade and Industry; and
- c requiring these providers to submit a report on the results of self-assessment and requiring the METI Minister to assess the report.³⁸

The Act is to require such providers to submit a report, every fiscal year, on their current situations of items (a) and (b) above with the results of self-assessment on such situations to the METI Minister, and then the Minister to assess the situations of business operation based on the report and publicise the assessment results.

Collaborating with the JFTC

The Act is to require METI to establish a system in which METI should request the JFTC to exercise certain measures under the AMA if METI finds any cases which are suspected of violating the AMA.

III MARKET DEFINITION AND MARKET POWER

i Market definition

A market is defined in terms of its product scope and geographical scope. However, markets are sometimes defined very narrowly when compared to merger control, such as in terms of specific areas, services or customers.

The most noteworthy case regarding market definition is *NTT East*. The JFTC defined the market somewhat narrowly as 'FTTH [fibre to the home] services for detached residential properties in the East Japan region'. While the company naturally countered that the market should be defined as the broadband services market (including asymmetric digital subscriber line (ADSL) services), the Supreme Court affirmed the JFTC's decision.³⁹

Markets have been defined as:

- a 'the field of supply for glass tubes in the West Japan region for which the consumers are ampoule processing companies with headquarters in the same region and the suppliers are NIPRO and processing companies', in the later *NIPRO* case;
- b the 'transmission of music to retail shops in Japan' in the *USEN Corporation* case;
- c 'the market for the sale of CPUs to computer manufacturers in Japan' in the Intel case; and
- d 'the Molybdenum-99 market in Japan' in the *Nordion* case.

There is also debate as to whether market definition is required for unfair business practices, and the JFTC's position is to define markets as necessary on a case-by-case basis. That is to say, its basic position is that this is not necessary. However, in *Microsoft*, the JFTC did

³⁸ The categories and sizes of businesses are to be stipulated under cabinet order.

³⁹ The Court stated that:

given it is clear that there actually existed consumers who prefer FTTH services in terms of the communications side, etc., regardless of the price difference with other broadband services such as ADSL, and so it can be understood that for such persons there was almost no demand substitutability as regards other broadband services, so the FTTH services market can be assessed independently as being the 'relevant market' for the purposes of Article 2, Paragraph 5 of the AMA.

not shy away from defining the market, but instead defined it as the computer audiovisual technology trading market. Even for unfair business practices, it is not possible to consider the anticompetitive effect if the market is not defined, and so there are many situations where companies and the JFTC contest the point.

ii Market power

As mentioned previously, under the Private Monopolisation Guidelines a company is required to have a share of approximately over 50 per cent in the relevant market for private monopolisation to apply.

Private monopolisation is established where these companies 'create, maintain or strengthen their market power' through either exclusionary conduct or controlling conduct. There are many cases where private monopolisation is committed by companies that already have market power, and in doing so maintain or strengthen that power. While in this sense it is rare for such companies to create market power, there are cases where, for instance, an enterprise that already has market power in another market uses that position to create new market power in another separate market; that is to say it makes use of its leverage.

In the case of unfair business practices, there is no need for the company committing the conduct to have market power, and it is enough for them to have a strong position within that market. The Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act⁴⁰ contain safe harbour provisions whereby an enterprise is not considered to have a strong position where it has a share of 20 per cent or less in respect of some types of conduct. Whether the safe harbour provisions apply varies depending on the type of conduct that is alleged to be an unfair business practice, and the aforementioned Guidelines should be consulted accordingly.

For instance, safe harbour provisions are not available in the case of restrictions on resale prices or abuse of a superior bargaining position, and so may be violated even where the JFTC considers the company in question to have a market share of only 10 per cent. Further, the market share is dependent on the market definition, so it is important to be mindful of the fact that a company's relative market share will increase where the market is narrowly defined.

IV ABUSE

i Overview

While conduct constituting private monopolisation may be either exclusionary conduct or controlling conduct, the former is at the heart of such conduct, and one should also be mindful of the following: it is highly likely that the JFTC makes its decisions regarding private monopolisation not only by paying attention to the anticompetitive nature of each such conduct, but also by considering overall the strength and weakness of factors such as: (1) the company's power in the market; (2) the anticompetitive nature of the conduct in question; and (3) the effect on the relevant market, as well as the causal relationship between the three, and further, taking into account the existence or absence of any pro-competitive effects, and the extent thereof.

40 www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/DistributionSystemsAndBusinessPractices.pdf.

For point (1), the JFTC takes into account not only the company's market share itself, but also the characteristics of the market, the difference in share between the company and the player ranking second in the market, and, where necessary, the extent of excess profits, the existence of potential new entrants, brand strength and so on.

Concerning point (2), while the Supreme Court has proposed 'practices of an artificial nature which deviate from methods of normal competition', this can simply be taken to mean anticompetitiveness. The extent of the anticompetitive nature of a conduct can be taken instead to mean the extent of the deviation from normal competition based on price and quality, that is to say from competition on the merits of the relevant products or services.

The effect on the relevant market (point (3)) refers to effects such as competitors failing to enter or being delayed in entering a market, withdrawing therefrom, experiencing fluctuations in their share, or increases or decreases in customer trading.

Because points (1) to (3) act on each other, if an anticompetitive effect is quantitatively assessed and given a numerical value, the anticompetitive effect is likely determined not through a summing up of such values, but by multiplying them and subtracting any pro-competitive effects instead. Once this is understood, the following examples become easier to comprehend.

In the Private Monopolisation Guidelines, four typical examples of exclusionary conduct constituting private monopolisation are given:

- a* predatory pricing;
- b* exclusive dealing;
- c* tie-in arrangements; and
- d* refusal to deal or discriminatory conduct.

While this is a simple way to classify such conduct, a much more broad and diverse range of types of conduct can be given. Additionally, the following classification of conduct is based on the JFTC's law applied to actual cases; however, this is fluid, and dependent on the details of each case. In many cases, if private monopolisation applies, this also constitutes a type of unfair business practice. However, the converse is not true.

ii Exclusionary conduct (private monopolisation)

Predatory pricing

According to the Private Monopolisation Guidelines, a price is highly likely to constitute exclusionary conduct where it is lower than the 'costs required to supply the product', which is a similar concept to average variable costs. On the other hand, where the price is lower than the total costs required to supply a product, but greater than the 'costs which does not arise if the product is not supplied', and there are no special circumstances such as that the product is being supplied over a long period of time and in high volume, there is a low possibility of such pricing constituting exclusionary conduct.

The *USEN Corporation* case⁴¹ is a typical example of this. USEN Corporation, which had a market-leading share in cable music broadcasting to retail offices (68 per cent, rising to 72 per cent as a result of exclusionary conduct), lowered the monthly listening fee that it charged to customers of its largest rival, Cansystem (26 per cent, decreasing to 20 per cent as a result of USEN's exclusionary conduct) as a condition of the customers switching to use its

41 See footnote 13.

own service, and also extended its promotional campaign to those customers (whereby those monthly fees were made free) from the standard three months to six, and so was determined to have engaged in exclusionary conduct.

Margin squeeze

Margin squeeze means conduct whereby a company that does business in both an upstream market and a downstream market tries to bring the price of an upstream product close to that of a downstream product. In some cases, it is regulated as a refusal to deal.

The Supreme Court's judgment in *NTT East* is a typical example of this. When providing new communication services using fibre optics to detached residential properties, NTT East, which owns more than 70 per cent of the fibre-optic lines in the east Japan region, provided users with such communication services under a system whereby one person used a single fibre-optic line (central wire direct connection system). However, the fact that the usage fee for this was less than the connection fee for other communications providers, when using the same central wire direct connection system, was treated as them being excluded. While the monthly usage fee was ¥5,800, the monthly connection fee was ¥6,328.⁴²

Exclusive dealing

In *Nordion*, the Canadian company Nordion, that held the majority of global production volume and a large part of the sales for Molybdenum 99 (a substance used in radiation therapy) and 100 per cent of the market share in Japan, required its Japanese business partners to purchase all of the products they required from it over the course of 10 years, and accordingly, was found to have excluded its competitors.⁴³ This is an exclusive purchasing obligation, which is one type of exclusive dealing.

Rebates

The Private Monopolisation Guidelines attempt to draw a line under whether conduct is illegal by listing a diverse range of factors, including loyalty rebates, but are unsuccessful in doing so. As such, analysis of exclusionary conduct is at a developing stage, whereby factors such as the discount aspect of rebates and pro-competitive effects are also taken into account.

A representative example of this is *Intel*.⁴⁴ Intel, which has a larger share of the market for central processing units (CPUs) installed in computers (rising from 76 to 89 per cent as a result of exclusionary conduct), provided its business partner computer manufacturers with rebates, etcetera, on the condition that they would use Intel CPUs for 90 to 100 per cent

42 The Supreme Court ruled as follows:

in the case of the conduct concerned, NTT East directly provided subscriber fibre optic equipment installed by it to its subscribers, and at the same time, when providing this equipment to other telecommunications providers with which it competed for connection purposes, made use of its position as effectively the sole supplier in the equipment connectivity market for subscriber fibre optics to set and present them with connectivity terms and conditions which those providers could not accept as reasonable in economic terms. This unilateral and one-sided act of refusal to deal and predatory pricing has an artificial nature which deviates from normal competitive methods, as seen in terms of them creating, maintaining or strengthening their own market power, and as it can be said that this had the effect of significantly making it difficult for those competitors to enter the market, this should be considered as constituting exclusionary conduct in that same market.

43 *Nordion*, JFTC recommendation decision, 3 September 1998.

44 See footnote 14.

of their computers, and would not use CPUs from Intel's competitor, AMD (with a share of 22 per cent falling to 10 per cent as a result of Intel's exclusionary conduct), for those computers that had a high production volume. Intel's conduct in causing them not to adopt the CPUs of its competitor was deemed to be exclusionary.

Mixed conduct

There are some situations in which various different types of exclusionary conduct are mixed together, or combine to form a consecutive series.

*NIPRO*⁴⁵ is a typical example of mixed conduct. In this case, NAIGAI Group, a business partner of NIPRO that produces and sells glass tubes for use in ampoules (and has a share of 85 per cent), began dealing in non-Japanese made glass tubes, which were competitor products to NIPRO's. To restrain the expansion of NAIGAI's dealing in such glass tubes, and with the intention of imposing sanctions on it, NIPRO raised the sale price for glass tubes to NAIGAI Group only (price discrimination); refused to accept orders placed by NAIGAI Group (refusal to deal); and required NAIGAI Group alone to provide security or to settle invoices with cash payments (abuse of superior bargaining position).

The JFTC decided that exclusionary conduct had taken place after taking into account a series of conduct by NIPRO over some four years. While NIPRO was the first case of private monopolisation in which the JFTC's findings were contested, it also alleged in the course of the hearing as a preliminary claim that NIPRO's same series of conduct also constituted unfair business practices.⁴⁶

As NAIGAI Group had not decreased its dealings in imported glass tubes despite such course of conduct, NIPRO was able to exclude the imported tubes, but only slightly, and accordingly, the JFTC added an allegation of unfair business practices, which have a low evidential burden and for which it is sufficient to show that there was a 'likelihood of impeding fair competition'. Finally, the JFTC returned to its claim of private monopolisation and won its case.

*Hokkaido Shimbun*⁴⁷ is also an interesting example of a mixed conduct case. The *Hokkaido Shimbun* newspaper covered the entire Hokkaido area, and had a dominant position even within newspaper sales in the Hakodate region (which is located within the Hokkaido area). Given that *Hakodate Shimbun* was established in the same region with the aim of publishing an evening paper, *Hokkaido Shimbun* both filed a trademark on title lettering that the new market entrant, *Hakodate Shimbun* newspaper, was likely to use, and also greatly reduced its newspaper advertising fees in the same region and put pressure on the press agency not to broadcast news to *Hakodate Shimbun*. It further demanded that the TV stations would not broadcast its commercials. This conduct was treated as *Hakodate Shimbun* being excluded.

Other examples of mixed conduct are outlined below. While these types of conduct are difficult to typify under the Private Monopolisation Guidelines, they are clear examples of exclusionary conduct.

In *Japan Medical Foods Association*, the Association, which exclusively carried out inspection work on medical food products (that is, it had a share of 100 per cent) through the public inspections system, colluded with Nisshin Healthcare Food Service Co, Ltd, a primary

45 See footnote 11.

46 Trading subject to restrictive conditions, GD, Paragraph 12.

47 JFTC recommendation decision, 28 February 2000.

seller of food products for medical use, to construct a production and sale system that made it clearly difficult for new players to enter the market, such as requiring registration for medical food products and certification for production plants, and so was deemed to have excluded new market participants from producing and selling medical food products.⁴⁸

In *Pachinko machine production patent pool*, 10 pachinko machine producers that held key patents on the manufacturing of these machines (and together held approximately 90 per cent of the pachinko machine market), and that had gathered their patents together and were managing them as a patent 'pool', were deemed to have committed exclusionary conduct for not granting new participants licence rights to those patents.⁴⁹

In *Paramount Bed*, Paramount Bed placed pressure on the person at the Tokyo metropolitan government in charge of placing orders for medical-use beds (Paramount had an almost 100 per cent share of this market) to enable delivery only of beds for which Paramount Bed had utility model rights, so that competing providers could not supply other beds, and accordingly was found to have committed exclusionary conduct.⁵⁰

iii Controlling conduct (private monopolisation)

There are few cases concerning controlling-type conduct; nor are there any guidelines thereon from the JFTC. An example that constitutes controlling is a company using a given investment in another company to restrict its sales areas against its wishes, and to prohibit the establishment of new factories.⁵¹ Also, while there are very few examples of this (just five cases to date), cases such as the *Japan Medical Foods* case and the *Paramount Bed* case involved both exclusionary conduct and controlling conduct. Since the *Toyo Seikan* case, there has been only one case of controlling conduct alone – the 2015 *Fukui Agricultural Cooperative* case.

While *Fukui Agricultural Cooperative*⁵² is a controlling-type case, the scale thereof was small, and it was extremely local in nature.

iv Unfair business practices

Price discrimination

In *Hokkaido Electric Power*, the company set different fees for returning consumers that were higher than those for new consumers, and accordingly the JFTC issued a warning on suspicion of price discrimination.⁵³

While Japanese electric power companies once tended to dominate certain areas for long periods of time, the regulations were gradually eased to accommodate new market entrants. In particular, in recent years a liberalisation of retail electricity has begun, starting with the super-high voltage field (such as for large-scale power plants), then office buildings, and finally low-voltage family retail electricity as of April 2016, with the result that the Japanese electricity retail market has become completely liberalised. The case of *Hokkaido Electric Power* can be positioned as occurring in the midst of the retail electricity market's shift to a competitive market.

48 *Japan Medical Foods Association*, JFTC recommendation decision, 8 May 1996.

49 *Pachinko machine production patent pool*, JFTC recommendation decision, 6 August 1997.

50 *Paramount Bed*, JFTC recommendation decision, 3 September 1998.

51 *Toyo Seikan*, JFTC recommendation decision, 18 September 1972.

52 16 January 2015.

53 JFTC warning, 30 June 2017.

The JFTC has made it clear to the energy industry (such as electricity and gas) that it will proactively investigate the situation going forward.

Tying

Microsoft Japan licensed its word processing software, Word, to computer manufacturers together with Excel (the spreadsheet software for which it has the leading market share) at the same time as licensing the latter, and accordingly was deemed to have engaged in 'tying'.⁵⁴ Following this, Ichitaro, competitor word processing software, suffered a notable reduction in its market share.

Non-assertion provisions clause

The *Microsoft* case is a typical example of this. Microsoft US was found to have created an anticompetitive effect in the computer audiovisual technology market by including in its contracts for licensing Windows (its core software for PCs), original equipment manufacturer (OEM) sales provisions whereby the OEM providers entering into those contracts promised not to sue Microsoft or other OEM providers for breaches of patent infringement by Windows (non-assertion provisions), and so this conduct was found to constitute trading subject to restrictive conditions.⁵⁵

In the decision, it was determined that the non-assertion provisions were extremely unreasonable given that it enabled the OEM providers' worldwide patents to be incorporated into the Windows series for free, and accordingly that there was a high probability of OEM providers losing the desire to research and develop new computer audiovisual technology.

In addition, given that the OEM providers and Microsoft are competitors in the computer audiovisual technology market, the OEM providers would, as a result of the non-assertion provisions, lose the desire to research and develop computer audiovisual technology if they had such powerful technology in their possession, and accordingly, their position would be weakened, while on the other hand, Microsoft could rapidly and widely distribute its computer audiovisual technology on a global scale by installing it within the Windows series.

Accordingly, it was determined that the non-assertion provisions had a likelihood of excluding competition in the computer audiovisual market, or causing it to stagnate, and so there was a high probability of an anticompetitive effect being extended to that market.

Breach of fair, reasonable and non-discriminatory terms

One-Blue, LLC manages and operates the patent pool for the standard essential patents for Blu-ray disc standards. Despite declaring that it would license these under fair, reasonable and non-discriminatory (FRAND) conditions, it did not reach an agreement with Imation Corporation, which wished to receive a licence under the FRAND conditions, and furthermore told its business partners that the Blu-ray discs produced and sold by Imation would infringe One-Blue, LLC's patent rights. Accordingly, this conduct was determined to constitute unfair interference with a competitor's transactions.⁵⁶

54 GD, Paragraph 10; JFTC recommendation decision, 14 December 1998.

55 GD, Paragraph 12; JFTC hearing decision, 16 September 2008.

56 GD, Paragraph 14; JFTC press release, 18 November 2016.

Most-favoured nation clause

Amazon Japan was found to have included in its seller display contracts for Amazon Marketplace (its electronic shopping mall) an MFN clause that required sellers to set prices and terms and conditions for products sold by them on Amazon Marketplace at whichever were the most favourable prices and terms and conditions of the same product as sold by other sales routes, and accordingly was investigated by the JFTC on suspicion of trading subject to restrictive conditions.⁵⁷ However, as Amazon Japan made a petition to the effect that it would take voluntary measures itself, and those measures, including deleting MFN clauses from the contracts and not introducing the clauses in new contracts, dispelled the suspicion, the JFTC broke off its investigation.⁵⁸ It could be said that Amazon took commitment procedures in advance.

Unfair interference with a competitor's transactions

DeNA is an online game platform that uses mobile phone and social network services (SNS), was ranked top in sales of SNS game software and was also in hot pursuit of its rival, Gree. DeNA planned to disrupt SNS game developers from providing software to Gree by eliminating their links to the DeNA platform when they provided software to Gree. DeNA was determined to have engaged in unfair interference with a competitor's transactions.⁵⁹

Exploitative abuse (abuse of superior bargaining position)

The provisions on unfair business practices contain prohibitions on abuse of superior bargaining position that are unique to Japan. One aspect to these provisions is the traditional Japanese industrial policy of protecting small and medium-sized companies, and, while they are somewhat hard to understand in terms of pure competition law theory, the JFTC makes frequent use of these provisions, therefore making them a key part of the regulations against unfair business practices.⁶⁰ It is enough for a company to have a superior bargaining position relative to its suppliers, and there is neither any need for the relevant company to have market power nor to have a strong position in the relevant market. Of course, if such elements exist, the possibility of the company being targeted by the JFTC will increase.

As such, the company is an important trading partner for suppliers; if they have a relationship with such company whereby they must accept any demand made by the company, no matter how unreasonable, the company in question will be deemed to have a superior bargaining position. Theoretically, the key factor in finding a superior bargaining position is the degree of dependence by the supplier on the transaction with the company, and the degree of dependence is generally evaluated by dividing the supplier's volume of sales to the company by the supplier's total amount of sales. However, in practice, the JFTC often finds dependency, even if the ratio is less than 5 per cent.

57 GD, Paragraph 12.

58 JFTC press release, 1 June 2017.

59 JFTC cease-and desist order, 9 June 2011.

60 The regulation on abuse of superior bargaining position is also implemented by the Subcontract Act, the supplemental act of the AMA. The Act applies to subcontract transactions related to the commission of manufacturing, repairing or making information-based products or providing services and only where the capital falls under the criteria in the Act. When the JFTC find a violation of the Subcontract Act, it firstly issues a recommendation. If the company does not comply, the JFTC issues a cease-and-desist order after evaluating the conduct in light of abuse of superior bargaining position.

The rules primarily regulate against large companies, such as mass electronics retailers, supermarkets, department stores, home and convenience stores, demanding cooperation fees from their suppliers, requiring them to dispatch their employees on secondment without charge, and returning products or reducing payments therefor without due cause.

In *Toys 'R'Us*, which was the largest Japanese retailer specialising in goods for children and infants at that time, Toys 'R'Us reduced the prices and returned products to the suppliers. Toys 'R'Us's conduct was deemed to be abuse of superior bargaining position.⁶¹

Note that there are no restrictions on the types of industry that may be targeted, and in the past, there have also been cases where banks were investigated. In *Mitsui Sumitomo Bank*, the JFTC found that Mitsui Sumitomo Bank forcing borrowers to purchase financial products was unlawful.⁶² Further note that the JFTC tends to apply this regulation easily.

Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc., 17 December 2019, the JFTC⁶³

Background

The services provided by digital platform operators constitute multisided markets with multiple user segments, and these services readily expand and promote monopolisation and oligopolisation through their characteristics – such as network effects, low marginal cost, and economies of scale. Furthermore, the data concentration through network effects and economies of scale increases users' benefits, but also the data-based business model as accumulating and utilising data by digital platform operators create cycles that maintain and enhance competitive advantages by further accelerating the accumulation and use of data by digital platform operators. Since, for accumulating data, some digital platform operators adopt a business model where they provide free goods and services in exchange for the acquisition or use of personal information, there are some concerns over the acquisition or use of consumers' personal information by digital platform operators that provide services to consumers. If the digital platform operator's acquisition or use of personal information in unfair ways causes consumers disadvantage and adverse effects on fair and free competition, then issues under the AMA will arise. Therefore, the Guidelines describe what kind of acts related to the acquisition of personal information, or use of acquired personal information, at a digital platform of a digital platform operator will be issues concerning abuse of a superior bargaining position in view of transparency of the AMA enforcement and improvement of predictability for digital platform operators. Note that if conduct described below violates other laws and regulations, interventions under these other laws and regulations will not be prevented.

Types of abuses of a superior bargaining position

Types of abuses of a superior bargaining position include:

- a* unjustifiable acquisition of personal information include:
- acquiring personal information without stating the purpose of its use to consumers;

61 JFTC hearing decision, 4 June 2015.

62 JFTC recommendation decision, 26 December 2005.

63 https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html.

- acquiring personal information beyond the scope necessary to achieve the purpose of use;
 - acquiring personal data without taking the precautions necessary and appropriate for safe management of personal information; and
 - causing consumers in continuous use of services to provide other economic interests like personal information in addition to the consideration provided in exchange for the use of services; and
- b* unjustifiable use of personal information, such as:
- using personal information beyond the scope necessary to achieve the purpose of use
 - using personal data without taking the precautions necessary and appropriate for the safe management of personal information

Apple case (unfair business practices: mixed conduct)

The JFTC has been investigating Apple Inc (Apple), the ultimate parent company of Apple Japan GK (Apple Japan), in accordance with the provisions of the AMA,⁶⁴ since October 2016. Apple Japan has, based on its agreements with NTT Docomo KK, KDDI KK and SoftBank KK⁶⁵ (collectively, three mobile network operators (3 MNOs)), been suspected of restricting the business activities of 3 MNOs regarding the following:

- a* quantities of iPhones that 3 MNOs order from Apple Japan;
- b* telecommunication service plans that 3 MNOs offer iPhone users;
- c* iPhones that users traded in to 3 MNOs; and
- d* subsidies that 3 MNOs and others offer users purchasing iPhones.

During the investigation, Apple reported to the JFTC that it would amend a part of the agreements. The JFTC reviewed these amendments. Consequently, on 11 July 2018, the JFTC decided to close the investigation, concluding that the amendments would eliminate the suspicion of the violation mentioned above. The JFTC's evaluations are as follows.⁶⁶

Apple Japan concluded iPhone agreements with, and sold iPhones to, 3 MNOs. The iPhone agreements include provisions regarding 3 MNOs' purchase and sale of iPhone products, iPhone service and support provided to users purchasing iPhones, and telecommunication services provided to users purchasing iPhones. The JFTC investigated the following provisions in the iPhone agreements.

Provisions regarding iPhone order quantities

It was seen that Apple Japan obligating an MNO to order a specific order quantity of iPhones could be a problem under the AMA if, for example, it reduces the sales opportunities of other smartphone makers. However, considering the fact that a specific order quantity was not set

64 The suspected violation of trading on restrictive terms, GD, Paragraph 12.

65 In Japan, the possession of smartphones is increasing trend, with over 60 per cent of consumers owning a smartphone. The number of smartphone shipments exceeds 30 million units per year, out of which the recent share of iPhones shipped by Apple Japan is approximately 50 per cent. SoftBank, KDDI and NTT Docomo launched the sales of iPhones in July 2008, October 2011 and September 2013, respectively.

66 www.jftc.go.jp/en/pressreleases/yearly-2018/July/180711.html.

out in the iPhone agreements except for during a limited time period and a stipulated order quantity did not appear to oblige an MNO to order the quantity, as well as other facts, it was not recognised that Apple Japan restricted an MNO's business activities.

Apple reported to the JFTC that, when concluding a new iPhone agreement with the MNO, it would stipulate that an order quantity would be a target for the MNO and that a failure to meet an order quantity would not be a breach of contract.

Provisions regarding iPhone plans

It was seen that Apple Japan obligating an MNO to offer an iPhone plan only could be a problem under the AMA if, for example, it lessens competition on service plans among MNOs. However, considering the fact that it was possible for other service plans to be offered under the iPhone agreements and a stipulated iPhone plan had not been offered, as well as other facts, it was not recognised that Apple Japan restricted an MNO's business activities.

Apple reported to the JFTC that it would amend the iPhone agreements and abolish the provisions regarding iPhone plans.

Provisions regarding traded-in iPhones

It was seen that Apple Japan restricting an MNO of its sales of traded-in iPhones within Japan could be a problem under the AMA, if, for example, it maintains or enhances the status of Apple Japan in the smartphone market, or it maintains the sales prices of iPhones, by promoting Apple Japan's sales of iPhones. Also, it is concerned that such restriction could hinder competition between MNOs and mobile network virtual operators, which offer telecommunication services to users who possess used handsets or that sell used handsets. However, considering the fact that the provisions regarding traded-in iPhones only defined the purpose of use within Japan of traded-in iPhones for one of the 3 MNOs, as well as other facts, it was not recognised that Apple Japan restricted the domestic distribution of traded-in iPhones.

Provisions on subsidy

Subsidies provided to users purchasing smartphones is considered to lessen the substantial costs to users in purchasing smartphones and to have promoted the wide use of smartphones. However, Apple Japan obligating an MNO to provide a certain amount of subsidy could be a problem under the AMA if, for example, it lessens competition among mobile telecommunication businesses through the smooth offering of low-price and diverse service plans, by constraining the price reduction of telecommunication services and the price combination of smartphones and telecommunication services under the current situation where MNOs bundle smartphones and telecommunication services to many users.

Apple proposed, to the JFTC, to amend the iPhone agreements with 3 MNOs so that they may offer (even if users purchasing iPhones subscribed to a term contract), service plans without subsidies (alternate plans), on the condition that 3 MNOs provide clear, fair and informed choices to users in their selection of either service plans with subsidies (standard plans) or alternate plans and other conditions. Apple agreed on such amendments with 3 MNOs and then reported them to the JFTC.

Even after the implementation of the above amendments, 3 MNOs' obligation to provide subsidies to users purchasing iPhones will still partly remain. However, it will become possible for 3 MNOs to offer alternate plans to users, which will not breach the iPhone agreements with Apple Japan. However, as long as 3 MNOs' sales promotion activities of

alternate plans are not hindered, it is considered that such marketing will provide users with the optimal service plan choice, promoting competition among telecommunication businesses. Considering these points, it is recognised that the amendments will eliminate the suspicion of the violation of the AMA.

V REMEDIES AND SANCTIONS

i Sanctions

The revision of the AMA in 2005 led to administrative surcharges also being levied for controlling a private monopolisation. The JFTC does not have discretion over the amount thereof, but rather surcharges are charged at 10 per cent of the consolidated annual sales affected by the conduct for the past maximum 10 years. Further, with the 2009 revision of the AMA, administrative surcharges came to be imposed on exclusionary private monopolisation as well. These are charged at 6 per cent of the consolidated annual sales affected by the conduct for the past maximum ten years. However, to date there has been no case of an administrative surcharge being levied for private monopolisation. In addition, while criminal charges are also prescribed in respect of private monopolisation, there is no example of these having actually been imposed.

With the 2009 revision of the AMA, administrative surcharges also came to be imposed for certain types of unfair business practices (certain types enacted only in the AMA, not in the GD). The basic rate for these is 3 per cent (but 1 per cent in the case of abuse of superior bargaining position). Actually, administrative surcharges have only been imposed for unfair business practices in the case of abuses of a superior bargaining position so far. While these surcharges are imposed in respect of the first instance of the conduct in violation of the prohibition on abuse of superior bargaining position, for other unfair business practices they are imposed in respect of the second instance of the offending conduct where it is repeated, within 10 years of its first violation.

With the 2019 revision of the AMA, the period calculating surcharge for private monopolisation and unfair business practices were extended from three years to maximum 10 years.⁶⁷

ii Behavioural remedies

Cease-and-desist orders, are formal behavioural remedies. The JFTC has broad discretion to order types of measures, which include an enterprise's resolution not to repeat the same violation, informing its customers of the violation and implementing a compliance programme. Even where the violation has already been extinguished, the JFTC may, where it deems particularly necessary, order the enterprise, for a period of seven years⁶⁸ after the extinguishment thereof, to take such measures as are required to ensure that the relevant conduct is removed, such as disseminating notices to the effect that the offending conduct is no longer taking place

⁶⁷ Article 2-2 Paragraph 13, Article 7-9 Paragraph 1 and 2, Article 18-2, 20-2, 20-3, 20-4, 20-5, 20-6 of the AMA.

⁶⁸ The period was extended from five years to seven years by the amendment of the AMA in 2019. Article 7 Paragraph 2, Article 7-8 Paragraph 6 of the AMA.

iii Structural remedies

While there is debate over whether the JFTC can order enterprises to take structural measures such as a company split, there has been no case so far of such an order being given.

VI PROCEDURE

i Overview

Investigations conducted by the JFTC consist of either an on-site investigation (dawn raid) or an order to report. While an on-site investigation is the method normally employed where there is strong suspicion of a violation, in recent years some investigations have been commenced through an order to report instead. Although at the time of commencing an investigation the JFTC gives a written notice of the suspected facts, it is common for the JFTC to describe both grounds for private monopolisation and unfair business practices, thereby investigating with the aim of finding both and proving at least one of the two, and for the applicable law to be determined mid-way through an investigation or indeed at the end thereof.

When the JFTC reaches a firm position,⁶⁹ it will send the enterprise in question a draft of the measures to be taken, and provide the enterprise with an opportunity to refute the allegations and view or copy evidence held by the JFTC. Formal measures, cease-and-desist orders, are then issued once this process is completed.

Where the enterprise in question objects to measures, it may dispute them through an action for revocation of administrative order made to the Tokyo District Court, the judgment of which may be further appealed to the Tokyo High Court and subsequently to the Supreme Court.

When the JFTC cannot prove a violation, it may issue informal administrative measures in the form of a warning or alert. The JFTC also can conduct sector or industry inquiries, most of which are done with the company's voluntary cooperation. However, the JFTC have the power to order any person to appear before the JFTC, or require them to submit necessary reports, information, materials or documents for their inquiries. This power was used in 2017 in an inquiry on liquid natural gas.

In addition to this formal enforcement, the JFTC may advise on business plans when consulted by the parties. This consultation system plays a very important role in practice.⁷⁰

Note that the company must consult with the JFTC before starting the activities.

Also note that, in spite of existence of the JFTC guideline 'Prior consultation system for activities of businesses', which requires a written answer from the JFTC, the JFTC hates very much to use this formal procedure in a sense. In practice, the JFTC gives oral answers in almost every case.

ii Commitment procedures

The purpose of commitment procedures is to ensure the transparency of the application, as well as predictability for businesses, of the law related to commitment procedures by clarifying the policies concerning commitment procedures as much as possible.

69 The JFTC may plead to the Tokyo High Court for an emergency interim order when immediate action is necessary. The most recent plea was made in 2020.

70 Prior consultation system for activities of businesses, etc.; www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/priorconsultationsystem.pdf.

Subjects of commitment procedures

The JFTC applies commitment procedures to the suspected violation when the JFTC recognises that it is necessary for promotion of free and fair competition. On the other hand, the following cases are not subject to commitment procedures: (1) suspected violations, such as bid rigging or price-fixing cartels (hardcore cartels); (2) cases in which an enterprise has violated the same provisions within a 10-year period; and (3) cases recognised as constituting vicious and serious suspected violations that are considered to deserve a criminal sanction.

Commitment measures

In order to ensure the restoration of competition order or that the act will not be repeated in the future, the commitment measures shall satisfy the following requirements: (1) they are sufficient for excluding the suspected violation or to confirm that the suspected violation has been excluded; and (2) they are expected to be reliably conducted.

Typical examples of commitment measures are cessation of the suspected violation, confirmation that it has ceased, notification to trading partners and others or publicising information to users and others, development of a compliance programme, amendments of contracts, transfer of business, etc., recovery of monetary value provided by trading partners and others and reporting on the state of implementation.

Other key points

Public comments

If the JFTC finds that it needs to invite opinions of third parties for commitment plans, it requests public comments regarding an overview of such.

Public announcements

After the approval of a commitment plan, the JFTC shall publicly announce a summary of the approved commitment plan, a summary of the suspected violation and other matters as necessary.

Exercise of investigatory authority after migration to commitment procedures

After the issuance of a notification of commitment procedures, the JFTC shall not, in principle, conduct any investigation, such as an on-site inspection, report order or seeking testimony of the notified enterprise.

iii Commitment cases

Approval of the commitment plan submitted by Rakuten, Inc⁷¹

In response to the notice of commitment procedures that the JFTC issued to Rakuten, Inc on 23 July 2019 because the JFTC suspected that activities by Rakuten mentioned below violated Article 19, GD paragraph 12 (trading on restrictive terms) of the AMA, Rakuten made an application for commitment approval. The JFTC recognised that the plan would conform to the approval requirements and approved the commitment plan on 25 October 2019. This is the first commitment case approved by the JFTC.

71 25 October 2019, <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191025.html>.

Note that, this approval of the commitment plan does not represent a determination that the activities of Rakuten constituted a violation of the AMA.

Overview of the suspected violation

In the contracts between Rakuten and accommodation operators that place information about accommodation on the website named 'Rakuten Travel' operated by Rakuten, Rakuten had set the conditions to require the operators to make the prices and the numbers of rooms placed on the website equal to or better than those through other distribution channels with the minimum number of rooms requirement.

Overview of the commitment plan

The commitment plan consists of the following.

- a* Rakuten will cease the activities that in the contracts between Rakuten and accommodation operators that place information about accommodation on the Rakuten Travel website operated by Rakuten. Rakuten had set the conditions to require the operators to make the prices and the numbers of rooms that they placed on the website equal to or better than those through other distribution channels with the minimum number of rooms requirement.
- b* The board of directors of Rakuten will resolve to cease the activities mentioned in (a) above and not to perform the activities similar to those mentioned in (a) above for the next three years.
- c* Rakuten will notify the operators mentioned in (a) above of the measures taken based on (a) and (b) above, and thoroughly make the measures known to the employees involved in the Rakuten Travel business.
- d* Rakuten will publicise (a) mentioned above and (e) mentioned below to general consumers.
- e* Rakuten will not perform the activities similar to those mentioned in (a) above for the next three years.
- f* Rakuten will take measures necessary to do the following: (1) preparation of guidelines for compliance with the AMA concerning transactions with the operators mentioned in (a) above, and thorough disseminating them to the employees involved in the Rakuten Travel business; and (2) regular training of the employees involved in the Rakuten Travel business regarding compliance with the AMA concerning transactions with the operators mentioned in (a) above and regular audit by auditors;
- g* Rakuten will report on the state of implementation of the measures mentioned in (a)–(d) and (f) above to the JFTC.
- h* Rakuten will report annually on the state of implementation of the measures mentioned in (e) and the state of implementation of the measures taken based on (f)(2) above to the JFTC for the next three years.

Approval of the commitment plan

The JFTC recognised that the commitment plan mentioned above would conform to the approval requirements and approved the commitment plan.

*Approval of the commitment plan submitted by Nihon Medi-Physics Co, Ltd*⁷²

In response to the notice of commitment procedures that the JFTC issued to Nihon Medi-Physics Co, Ltd on 15 January 2020 because the JFTC suspected that activities by Nihon Medi-Physics violated Article 3 (private monopolisation) or Article 19, paragraph 14 (interference with a competitor's transactions) of the AMA, Nihon Medi-Physics made an application for commitment approval. The JFTC recognised that the commitment plan would conform to the approval requirements and approved it on 11 March 2020.

VII PRIVATE ENFORCEMENT

i Claims for damages

A person who suffers damage as a result of private monopolisation or unfair business practices may make a claim for compensation against the offending person pursuant to Article 25 of the AMA or Article 709 of the Civil Code. In Japan, there is no system of punitive compensation for damages or triple damages, so it will only ever be possible to claim the actual amount of loss suffered.

Claims for compensation made pursuant to Article 25 of the AMA cannot be made unless the JFTC's order has been finalised,⁷³ and in the first instance, the Tokyo District Court has exclusive jurisdiction.⁷⁴ Negligence is not required to establish liability, so the party engaging in the relevant conduct cannot avoid liability on the basis that it did not act intentionally or negligently.⁷⁵

On the other hand, claims for compensation made pursuant to Article 709 of the Civil Code are made based on unlawful conduct in general, and so a claim can be made regardless of whether the JFTC has made an order or not.

These two rights of claim are separate from each other, and while it is in practice unusual, it is lawful to both bring a lawsuit pursuant to Article 25 of the AMA and at the same time another pursuant to Article 709 of the Civil Code, and provided the statute of limitations has not taken effect, it is also lawful for a claimant to bring a lawsuit pursuant to Article 25 of the AMA after losing a lawsuit brought under Article 709 of the Civil Code. While the limitation period is three years in either case, the starting point for calculating that period for lawsuits brought under Article 25 of the AMA is from the time at which the JFTC's order is finalised,⁷⁶ whereas for lawsuits brought under Article 709 of the Civil Code, it is 'the point in time at which the loss and the party causing that loss are known'.⁷⁷

While at first sight, lawsuits brought pursuant to Article 25 of the AMA, which do not require negligence to establish liability, may seem more advantageous to the affected party, these claims are restricted to violating conduct that is identified by the JFTC, and accordingly it may not necessarily be advantageous to the affected party, *inter alia*, where the actual violating conduct lasts longer than as identified by the JFTC. For this reason, when one excludes cases that have been statute-barred, affected parties, as often as not, choose to make a claim for compensation pursuant to Article 709 of the Civil Code.

72 12 March 2020, <https://www.jftc.go.jp/en/pressreleases/yearly-2020/March/200312.html>.

73 Article 26, Paragraph 1 of the AMA.

74 Article 85-2 of the AMA.

75 Article 25, Paragraph 2 of the AMA.

76 Article 26, Paragraph 2 of the AMA.

77 Article 724 of the Civil Code.

ii Claims for injunction

Injunction lawsuits by private persons were first introduced in 2001. In Article 24 of the AMA, it is prescribed that a person whose interests are harmed owing to unfair business practices, or that are at risk of being harmed thereby, and who clearly suffers loss as a result thereof or is likely to do so, may make a claim against the enterprise or trade association that is harming or at risk of harming its interests to have that infringement stopped or prevented. This system means that the party claiming does not have to wait for the JFTC to take enforcement measures, but can make an injunction claim in its own capacity as the harmed party. In the case of private monopolisation, the harmed party is not specified, and while this is a flaw of the legal system, as mentioned previously, in many cases private monopolisation also constitutes one of the forms of unfair business practices, so if one adjusts the legal configuration, it is in practice possible for a party harmed by private monopolisation to make an injunction claim.

While many lawsuits have been brought since the introduction of the system, there were, for a long time, no successful cases brought by claimants, with the first such case occurring 10 years after the system was introduced.

This was a case in which an enterprise that had an extremely powerful position in the dry ice market (the leading player with a share of 49 per cent) slandered its competitors to the effect that they were breaching their non-compete obligations, or repeatedly made allegations to stir up its exaggerated claim that they were not reliable suppliers, and in doing so weakened their position in the dry ice market, or tried to prevent them from entering the market altogether. In this case, it was deemed that there was 'a likelihood of impeding fair competition'.⁷⁸

Following this was a case of a successful claim in the taxi industry.⁷⁹

Situations where a person's interests are 'clearly harmed' include 'situations where damage arises due to conduct in violation of the Antimonopoly Act that is difficult to recover from, or where financial compensation is insufficient to remedy the situation, such as where the relevant enterprise is at risk of being expelled from the market or is being prevented from entering it as a new participant'.⁸⁰

Going forward, it is expected that private court actions will become more common.

VIII FUTURE DEVELOPMENTS

Due to covid-19, the activities of the JFTC are also affected. It is unknown at this moment when this impact will end. However, the basic activities of the JFTC are expected to remain the same. On a different note, the term of chair Mr Kazuyuki Sugimoto, which was renewed in March 2018, will expire in September 2020, by the act of retiring the chair at the age of 70. On 17 April 2020, Yazuyuki Furuya was approved by the Diet as a successor. The current position of Mr Furuaya is assistant chief cabinet secretary. Prior to that, he had worked for the Ministry of Finance for a long time and also served as commissioner of National Tax Agency. Although the reputation of his ability regarding political coordination is very high, his ability as an enforcer of competition law is unknown.

78 Tokyo District Court judgment. 30 March 2011.

79 *Shintetsu taxi*, Osaka High Court judgment, 31 October 2014, Decisions, Vol. 61, p. 260.

80 *Yamato transport postal service*, Tokyo High Court judgment, 29 November 2007, Decisions, Vol. 24, p. 699.

KENYA

*Dominic Rebelo and Edwina Warambo*¹

I INTRODUCTION

The Kenyan competition regulatory regime is governed by the Competition Act (the Act) as amended by the Competition (Amendment) Act No. 27 of 2019, which amended the Act with effect from 31 December 2019. The Act's primary purposes are to promote and safeguard competition in the national economy, protect consumers from unfair and misleading market conduct, and establish and provide for the powers and functions of the Competition Authority of Kenya (CAK) and the Competition Tribunal. The amendments that came into force in 2019 seek to clarify the abuse of buyer power under the Act and empower the CAK to investigate abuse of buyer power and issue directions and sanctions for conduct amounting to abuse of buyer power.

Kenya is also subject to the following regional competition law regimes: the East African Community (EAC) Competition Act, 2006, enacted by the EAC; and the Common Market for Eastern and Southern Africa (COMESA) Competition Commission Competition Regulations enforced by the COMESA Competition Commission.

To help market participants understand the CAK's mandate and the factors that it will take into consideration when exercising its powers, the CAK and the Cabinet Secretary have issued the following guidelines, the titles of which reflect their primary purpose:

- 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;
- e* Consolidated Guidelines on Substantive Assessment of Mergers under the Competition Act;
- f* Guidelines on Engaging with Consumer Organisations;
- g* Guidelines on Consumer Protection;
- h* Leniency Programme Guidelines;
- i* Public Interests Test In Merger Determinations Guidelines;
- j* Merger Threshold Guidelines;
- k* Block Exemption Guidelines;
- l* Search and Seizure Guidelines; and
- m* Fines and Settlement Guidelines.

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II YEAR IN REVIEW

The Competition Amendment Act 2019 (the Amendment Act) came into force in December 2019 with the aim of providing clarity on the concept of abuse of buyer power. Buyer power has been defined under the Amendment Act as:

influence exerted by an undertaking . . . in the position of a Purchaser . . . To obtain from a supplier more favourable terms, or to impose a long term opportunity cost including harm or withheld benefit which if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking.

This definition catches retailers and wholesalers, particularly retailers such as supermarkets that are likely, by the nature of their business, to have ‘buyer power’.

The Amendment Act introduced a stand-alone provision in the Act, dealing specifically with the concept of abuse of buyer power. The new provisions include a non-exhaustive list of examples of conduct that constitutes abuse of buyer power, which include delays in paying suppliers without justifiable reason and in breach of agreed payment terms; unilateral termination or threatened termination of a commercial relationship without notice or on unreasonably short notice without an objectively justifiable reason; the refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms; and the transfer of costs or risks to suppliers’ of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of goods or services.

In addition, the Amendment Act now requires agreements between suppliers and buyers to contain provisions detailing certain terms including the terms of payment, the payment date, the interest rate payable for late payment and the mechanism for the resolution of disputes.

Lastly, the Amendment Act makes it compulsory for professional associations to apply to the CAK for an exemption from the Act if their rules contain restrictions which have the effect of preventing, distorting or lessening competition in a market. The failure to apply for an exemption is punishable on conviction by imprisonment for up to five years or a fine of up to 10 million Kenya shillings, or both. The Amendment Act also empowers the CAK to monitor the activities of a sector or undertaking likely experiencing or likely to experience incidences of abuse of buyer power and to require industries and sectors, in which instances of abuse of buyer power are likely to occur, to develop a binding code of practice. The CAK has created a separate Buyer Power Department to handle this area.

With respect to mergers, Kenya has enacted new Competition (General) Rules 2019 (the Rules), which came into force on 6 December 2019. The Rules introduced changes to the merger notification thresholds, requirements and filing fees and clarify certain procedural aspects of Kenya’s competition law regime relating to merger control, restrictive trade practices (block exemptions) and consumer welfare. In summary, the key changes include:

- a* the value of assets (and not just turnover) to be considered in determining whether a transaction is notifiable;
- b* merger filing fees being revised upwards in some cases;
- c* relatively small transactions falling below the thresholds are now automatically excluded and do not require any merger approval or exclusion; and
- d* no merger application (only notification of the application to the COMESA Competition Commission) will be required by the CAK where the COMESA

Competition Commission Merger Notification Thresholds are met and two-thirds or more of the merger parties' turnover or assets (whichever is higher) is generated or located outside Kenya.

The CAK in June 2019 established an online case management system (CMS) as part of its efforts to improve services and deliver on its core mandate to stakeholders. The CMS enables users to do the following: complete and submit merger applications; apply for exemptions in respect of restrictive trade practices; file complaints; request advisory opinions; apply for leniency in respect of cartel conduct; and make submissions in respect of matters handled by the CAK. While stakeholders are encouraged to use the platform, they can, however, still access these services offline.

The CAK has also increased enforcement of the provisions on merger control, restrictive trade practices and consumer welfare in the country.

The CAK continues to focus on public interest concerns in its analysis of mergers with particular emphasis being placed on the termination of employees and the impact on competitiveness of small- and medium-sized enterprises (SMEs). The Public Interests Test In Merger Determinations Guidelines are cognisant of the need to enhance and sustain employment of both human and capital resources through supporting: measures to ensure no substantial job losses occur as a result of mergers, and that the effects on employments are mitigated in the short run; the salvaging of failing and dormant undertakings; and encouraging mergers of media undertakings that will enhance the production of local content and programmes, and support youth employment.²

A notable merger transaction determined by the CAK depicting the CAK's evaluation of the impact of mergers on the public interest and competition is the transaction involving Gulf Energy Holdings Limited (Gulf Energy) and KenolKobil PLC. The CAK approved the merger and indicated that the merger was likely to lead to redundancies and, therefore, imposed conditions:

- a* preventing the parties from terminating any of the employees for a period of 24 months from the date of implementing the transaction;
- b* not to declare any of the target's 102 employees redundant;
- c* requiring that for the duration of the existing contract between Gulf Energy and the SMEs operating within the retail stations, the merged entity shall ensure that these SMEs enjoy the same benefits within the contract as provided at the signing of the contract;
- d* that the contracts entered into between Gulf Energy and the retail station dealers be maintained for the length of the contracts; and
- e* for the merged entity to provide it with annual reports regarding compliance with the conditions for a period of at least 24 months following completion of the transaction.³

2 Competition Authority of Kenya Annual Report 2015/2016, p. 21.

3 <https://cak.go.ke/sites/default/files/2020-02/CAK%20Decision%20on%20Acquisition%20of%20Control%20of%20Gul%20Energy%20Holdings%20Limited%20by%20KenolKobil%20Plc%20%281%29.pdf>.

In addition, the CAK conditionally approved acquisition of National Bank of Kenya Ltd by KCB group subject to the condition that 90 per cent of the merged entity's employees will be retained for a period of 18 months from the date of the closing of the merger.⁴

The CAK also continues to impose penalties on parties for implementation of mergers without prior approval; for example, imposing a fine of approximately 500,000 Kenya shillings on Moringa School for implementing a merger without the CAK's approval.⁵ The CAK also imposed a financial penalty of 1.5 million Kenya shillings on Interconsumer Products Ltd for acquiring the assets of Belsize Industries Ltd and implementing the transaction without prior merger approval.⁶

The CAK investigated 15 restrictive trade practices cases, 13 of which were finalised, with the rest at various stages of investigation at the close of the reporting period. During the financial year 2017/2018, 11 exemption applications were received and evaluated. Seven exemption applications were evaluated in the air transport, agriculture, retail and professional services sectors, and the CAK granted three and rejected four applications that did not meet the threshold of generating overriding benefits to the public.⁷

In addition, the Kenya Competition Tribunal (the Tribunal) conducted its first review application in 2020. In December 2019, the CAK conditionally approved the merger between Airtel Networks Kenya Limited (Airtel) and Telkom Kenya Limited (TKL) (Kenya's second and third largest telecommunications companies respectively in Kenya). The parties applied to the Tribunal to have the CAK's decision and conditions imposed reviewed. This is a welcome development as it is the first review that the Tribunal has had to reconsider since it was established. The parties received a successful outcome as they were each allowed (amongst other things) to retain all their spectrum and will not be prohibited from entering into further transactions in future (which were part of the restrictions imposed by the conditions). The review application has provided an opportunity to understand the limitations of the CAK's discretion in imposing conditions as well as the general nature of review proceedings at the Tribunal.⁸

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 produces, supplies, distributes or otherwise controls not less than one-half of the total goods

4 <https://cak.go.ke/sites/default/files/2019-09/CAK%20Decision%20on%20Proposed%20Acquisition%20of%20100%25%20of%20the%20Ordinary%20Shares%20of%20National%20Bank%20of%20Kenya%20Limited%20by%20KCB%20Group%20PLC.pdf>.

5 <https://www.cak.go.ke/sites/default/files/2019-09/CAK%20Decision%20on%20Merger%20Implemented%20Without%20Approval.pdf>.

6 <http://www.cak.go.ke/sites/default/files/2019-06/CAK%20Administrative%20Action%20on%20Interconsumer%20Products%20Ltd.pdf>.

7 Competition Authority of Kenya Annual Report 2017/2018, p. 27.

8 <https://www.standardmedia.co.ke/business/article/2001358745/airtel-telkom-reject-market-regulator-s-merger-conditions>.

of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or that provides or otherwise controls not less than half of the services that are rendered in Kenya or any substantial part thereof.

Section 23(2) of the Act 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.⁹*

Section 4(2) sets out the additional factors to be considered in determining dominance to include the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and 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 has published its Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices (RTP Guidelines), which detail the factors the CAK will consider when determining if an undertaking is dominant. These include:

- a* potential and actual competition;
- b* barriers to entry into the market;
- c* the degree to which countervailing market powers can impact an undertaking's ability to exercise its power in a market;
- d* product differentiation;
- e* the stability of market shares; and
- f* the ability of an undertaking to act independently of its customers and competitors.¹⁰

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.

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.

⁹ The Finance Act 2014 broadened the definition of a dominant undertaking by inserting subsection 23(2).

¹⁰ Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act, p. 25.

The Competition Authority Guidelines on Relevant Market Definition (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.¹¹

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’.¹² 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’.¹³

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.¹⁴

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 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 owing 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;

11 Competition Authority of Kenya, ‘Guidelines for Market Definition’, Paragraph 7, www.cak.go.ke/images/docs/guidelines_for__market_definition1.pdf.

12 Guidelines for Market Definition (No. 14), Paragraph 8.

13 *ibid.*, Paragraph 9.

14 *ibid.*, Paragraph 21.

- d* making the conclusion of contracts subject to acceptance by other parties of supplementary conditions that 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.¹⁵

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. The RTP Guidelines provide that the CAK bears the burden of proof. Further, the RTP Guidelines categorise abuse of dominance into two categories: exploitative and exclusionary abuses.

These provisions of the Act have not been subject to judicial interpretation, and the CAK has not published its decisions in sufficient detail to create a body of case law that would give 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.¹⁶ This would include conventions and treaties against discrimination as well as unfair economic practices under international law.¹⁷

Restrictive trade practices

Under the Act, practices such as price-fixing, limitations on sales and production, restrictions on advertising, the exclusion of competitors from the market and the entry into agreements that would otherwise assign distributors to specific regions are deemed to be restrictive trade practices. The CAK continues to focus on enforcement against businesses and undertakings engaging in restrictive trade practices, cartel behaviour and abuse of dominance. The CAK has conducted sector-specific investigations and dawn raids, and has imposed penalties on parties found to be engaged in 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’.¹⁸

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;

15 Competition Act, Section 24(2)(e), Part III C.

16 This is pursuant to Article 2(5) and (6) of the Constitution of Kenya, 2010.

17 One such example is the Treaty Establishing the Common Market for Eastern and Southern Africa to advance the economic integration of Eastern and Southern Africa adopted 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 the development, recognition and observance of the rule of law.

18 Competition Act, Section 21(1), Part III A.

- 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 that 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.¹⁹

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.

ii Exclusionary abuses

As noted above, 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 these 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, which provide guidance regarding 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.

¹⁹ Competition Act, Section 21(3), Part III A.

Predatory pricing and price-fixing

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.²⁰

There is, unfortunately, scant case law on predatory pricing. One of the few cases in this regard was decided in 2012. It arose from a complaint made by Telkom (which is the sole landline telephone services provider in Kenya) against 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.²¹ Unfortunately, the reported decision is only a summary, and does not provide significant detail on the analysis of the facts and evidence presented.

However, the CAK has ordered the abolition of pacts fixing advertising prices, with several advertising companies having been flagged for price-fixing, with the segment topping the number of restrictive trade practice investigations in the CAK's 2017/2018 Annual Report.

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 if an undertaking makes the conclusion of a contract subject to acceptance by other parties of supplementary conditions that 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.

iii Discrimination

The Act prohibits discriminatory conduct by a dominant undertaking, including any agreement or concerted practice that applies dissimilar conditions to equivalent transactions with other trading parties.²²

iv Exploitative abuses

Exploitative abuses are generally prohibited under the restrictive trade practices provisions of the Act.

20 Competition Act, Sections 21(3)(a) and 24(2)(a).

21 Competition Authority of Kenya Annual Report 2012/2013, p. 49.

22 Competition Act, Sections 21(3)(f) and 24(2)(c).

V REMEDIES AND SANCTIONS

i Sanctions

For most breaches, the Act contains two main potential sanctions: fines and prison sentences. For an abuse of dominance or an offence relating to restrictive trade practices, fines can be up to 10 million Kenya shillings, and potential imprisonment can be up to five years. As mentioned above, the CAK may also impose a financial penalty of up to 10 per cent of the immediately preceding year's gross annual turnover in Kenya of the undertaking in question.

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;
- 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

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.²³

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 the production and distribution of goods and services in Kenya under review in order to determine where concentrations of economic power exist under which the detrimental impact 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.²⁴

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 the production, distribution or supply of services as it deems necessary to remove the unwarranted concentration; however, no order should be issued that has the effect of

23 Competition Act, Section 37(1).

24 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.

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.²⁵ We are not aware of any case to which the CAK has applied this provision.

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 the prohibitions relating to an abuse of dominance, on its own motion or upon receipt of information or a complaint from any person, including a government agency. During 2017 and 2018, the CAK continued to increase the number of officers dealing with investigations among its staff. The CAK continues to recruit for several positions in its buyer power division, having advertised positions in the division indicating its intention to focus on regulating buyer power.

We expect an increase in reported investigations during the course of 2020, as the CAK continues to be bolder in its use of its powers to investigate, and in light of the publication of the Leniency Programme Guidelines.

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: the reasons for the proposed decision and the details of any relief that the CAK may consider imposing. The notice should further inform each undertaking that it may make written representations to the CAK and indicate whether it requires an opportunity to make oral representations.

Pursuant to the Competition Amendment Act, the CAK can now make a proposed decision and invite written and oral representations in relation to restrictive trade practices.

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.

25 Competition Act, Section 52(4).

iii Appeals

A person aggrieved by a determination of the CAK may appeal to the Competition Tribunal. Following the promulgation of the Competition (Tribunal) Rules and the swearing in of the members of the Tribunal in 2017, the Tribunal is now receiving such appeals. Under the provisions of the Act, an aggrieved party has to appeal to the Tribunal within 30 days of the CAK's decision.²⁶

iv Leniency

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.

The CAK has, through a Gazette Notice of 19 May 2017 publishing the Leniency Programme Guidelines, introduced a competition leniency regime that applies to restrictive trade practices. These guidelines set out the principles and conditions that shall govern the processing and granting of leniency.

The CAK has recently announced that it is offering penalty waivers to firms that self-report cartel behaviour to it and provide evidence against other members involved in cartel behaviour. The CAK also announced that companies willing to work with the authority are expected to provide direct evidence and to proactively cooperate in bringing successful enforcement action in return for full or partial immunity.

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

The CAK is expected to continue its focus on restrictive trade practices and cartels and increase its focus on the abuse of buyer power in 2020. In mid-2016, the COMESA Competition Commission (CCC) issued draft guidelines on the enforcement of restrictive business practices and the abuse of dominance, and has begun to similarly focus on cartels and investigations into restrictive trade practices. In 2018, the CCC launched investigations into FIFA's refusal to allow Egypt's state television broadcaster to air the 2018 FIFA World Cup matches.

The CAK and the CCC signed a memorandum of understanding that provides that the two authorities will share information in respect of investigations that concern the other regulator's jurisdiction.

The East African Competition Authority, which covers Kenya, became operational in 2018; however, its focus is currently on investigating firms and trade associations engaged in malpractices and exploitation of consumers through price-fixing. The Authority is also

²⁶ Competition Act, Section 40(1).

undertaking sector studies on the competitiveness of the regional economy; however, no cases have been decided yet. One of the challenges the Authority faces is the overlap with the existing Tanzanian and Kenyan regulators, as well as with the COMESA Competition Commission.

The Tribunal is expected to receive more review applications as entities begin to appreciate its role as it conducts its first ever review into the *Telkom/Airtel* merger as mentioned above.

MALAYSIA

*Shanthi Kandiah*¹

I INTRODUCTION

The Competition Act 2010 (the CA 2010), which came into force on 1 January 2012, is a cross-sectoral legislation (subject to certain exceptions)² that aims to promote and protect the process of competition in the interests of consumers. The CA 2010 applies to any commercial activity both within and outside Malaysia (if the commercial activity has an effect on competition in any market in Malaysia). The CA 2010 presently sets out prohibitions on anticompetitive agreements (horizontal and vertical agreements) and abuse of dominant position. Section 10 of the CA 2010 prohibits enterprises from engaging, independently or collectively, in conduct that amounts to an abuse of dominance in a relevant market.

The CA 2010 does not provide for merger control powers. The absence of merger control powers deprives the enforcement agency and the government of a more direct influence over changes in market structures that may be adverse to competition.

The Malaysia Competition Commission (MyCC) is the enforcer of the CA 2010. To date, the MyCC has issued seven guidelines to act as reference to the public on how the MyCC interprets the CA 2010:

- a* Guidelines on Complaints Procedures;
- b* Guidelines on Market Definition;
- c* Guidelines on Anti-competitive Agreements;
- d* Guidelines on Abuse of Dominant Position (Guidelines on Abuse of Dominance);
- e* Guidelines on Financial Penalties;
- f* Guidelines on Leniency Regime; and
- g* Guidelines on Intellectual Property Rights and Competition Law.

Several sectors have been given carve-outs from the CA 2010 (set out in the First Schedule therein) as sector laws provide for competition rules.

Guidelines on market definition, agreements, conduct that substantially lessens competition and abuse of dominance were issued by the MCMC, the MAVCOM and the EC for their respective sectors.

A notable requirement within the communications and multimedia sector as well as the aviation services sector is the presence of a merger clearance regime. Guidelines have been issued by the MCMC and the MAVCOM respectively in respect of the notification

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2 Section 3(3) (read together with the First Schedule) and Section 13(1) (read together with the Second Schedule) of the CA 2010.

and application process for any merger or acquisition or anticipated M&A. Both regimes provide for voluntary notification, but authorities can initiate investigations into any non-notified merger.

The GSA 1993 was amended to facilitate the third-party access network, which aims to provide easy access to new players into the gas market by substantially changing the licensing requirements of the gas supply chain.

In 2013, an amendment was made to the CA 2010 to exclude commercial activities undertaken under the Petroleum Development Act 1974 (PDA 1974) and Petroleum Development Regulations 1974 insofar as the activities are directly in connection with the activities of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore of Malaysia. The PDA 1974 grants exclusive rights to the national petroleum corporation, PETRONAS, which is, in effect, a statutory monopoly. All of PETRONAS' downstream activities or concessions granted by PETRONAS to third parties remain liable to be sanctioned under the CA 2010 or the ECA 2001 (for matters falling within the scope of the ECA 2001) where it is found to be anticompetitive.

II YEAR IN REVIEW

2019 saw robust reviews of competition law and policy in Malaysia, as evidenced by the government's action in the following industries:

- a* telecommunications: The implementation of the Mandatory Standard on Access Pricing, which requires that infrastructure providers give access to their networks at regulated prices, reduced broadband prices by 49 per cent on average since the end of 2018;³ and
- b* sugar: As at 6 December 2019, the Ministry of Domestic Trade and Consumer Affairs (MDTCA) granted 11 sugar import permits for Sarawak food and beverage manufacturers, and with that, broke the monopolistic control over the sale of sugar in Malaysia's domestic market by two sugar refiners for many years. Mr Chong Chieng Jen, the Deputy Minister of the MDTCA (as he then was), stated that the next target in liberalising the sugar import industry is Sabah, signalling the government's continued efforts to break up monopolies in a bid to spur competition in business and reduce the cost of living.

Additionally, the government identified a number of companies as potentially having a monopolistic position in the market, namely Padiberas Nasional Bhd (Bernas), Pusat Pemeriksaan Kenderaan Berkomputer (Puspakom), Pharmaniaga Bhd and MyEG Services Bhd (MyEG). Datuk Seri Saifuddin Nasution bin Ismail, the Minister of the MDTCA (as he then was) was quoted as saying that the government believes that the increase in the cost of living was partly contributed to by resources being controlled by a small group of individuals and big conglomerates. This serves as part of the government's initiative to liberalise industry and promote competition and technological innovation in business and services. What is yet unclear is whether the approach, stance and initiatives taken by the MDTCA and the MyCC as elaborated above may potentially change following the recent change of government, which occurred on 1 March 2020.

³ <https://www.malaysiakini.com/news/472565>.

In terms of enforcement action by the MyCC, there has only been one abuse of dominance infringement finding to date and two proposed decisions.

Sector	Investigating authority	Conduct	Fines levied or proposed
Insurance (MyEG) ⁴	MyCC	Section 10(2)(d)(iii) of the CA 2010: imposing different conditions in equivalent transactions in the purchase of mandatory insurances for the renewal of temporary work permits for foreign workers	Financial penalty of 2,272,200 ringgit and a directive to cease and desist its infringing conduct
Trade facilitation (Dagang Net Technologies Sdn Bhd (Dagang Net))	MyCC	Section 10(2)(c) of the CA 2010: monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system	Proposed financial penalty of 17,397,695.30 ringgit and a directive to cease and desist its infringing conduct
E-hailing and transit media advertising (Grab Inc, GrabCar Sdn. Bhd and MyTeksi Sdn. Bhd (collectively, 'Grab'))	MyCC	Section 10 of the CA 2010: imposing a restrictive clause on its drivers, which prevented drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising market	Proposed financial penalty of 86,772,943.76 ringgit and a daily penalty of 15,000 ringgit from the date of service of the proposed decision should Grab fail to take remedial actions as directed by the MyCC in addressing competition concerns

III MARKET DEFINITION AND MARKET POWER

Section 2 of the CA 2010 defines 'market' as a market in or in any part of Malaysia, and when used in relation to any goods or services, 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. Defining a 'relevant market' means identifying all the close substitutes for the product under investigation.

Section 10 of the CA 2010 does not prohibit an enterprise from being dominant in a relevant market so long as the enterprise does not abuse its dominant position.

The MyCC adopts a two-stage test in determining if an enterprise has infringed Section 10 of the CA 2010:

- a whether the enterprise being complained about is dominant in a relevant market in Malaysia; and
- b if the enterprise is dominant, whether the enterprise is abusing that dominant position.

A 'dominant position' is defined as a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms without effective constraint from competitors or potential competitors.⁵

In general, the MyCC will consider a market share of above 60 per cent to be indicative of dominance. However, the fact that the market share of any enterprise is above or below any particular level shall not in itself be conclusive of dominance.

The Guidelines on Abuse of Dominance clearly point out that dominance is not simply a conduct by a single enterprise, but can also include conduct of enterprises exercising significant market power together (i.e., 'collective dominance').⁶ The MyCC will look at

4 Case No. MyCC (ED) 700-1/1/2/2015, 24 June 2016.

5 Section 2 of the CA 2010.

6 Guidelines on Abuse of Dominance, Paragraph 2.23.

each case on its merits but, in general, an infringement finding may be made if two or more separate enterprises, which have significant market power, act similarly in a market and that conduct excludes equally efficient competitors.⁷

In assessing whether an enterprise is dominant, first the relevant market must be defined in accordance with the MyCC's Guidelines on Market Definition. This involves determining both:

- a* the relevant product market; and
- b* the relevant geographic market.

In identifying the relevant market, the MyCC has said that it will employ the hypothetical monopolist test (HMT), and will rely on economic evidence in defining the relevant market, such as:

- a* market research surveys; and
- b* interviews with:
 - industry associations;
 - the initial complainant;
 - competitors; and
 - customers.

In practice, we have not seen significant evidence of an economic approach as the only infringement finding for abuse of dominance made by the MyCC involved a monopoly concessionaire.

i Aviation service sector

Apart from issuing the Guidelines on Abuse of Dominant Position, the MAVCOM has also issued the Guidelines on Aviation Service Market Definition, which adopts principles similar to those applied by the MyCC in defining a market.

ii Communications and multimedia sector

In the Guideline on Dominant Position issued by the MCMC, the MCMC outlines the general approach in identifying whether a licensee is dominant. This includes defining the boundaries of the relevant communications market and determining whether the licensee is in a dominant position in the relevant market.

The MCMC's approach to market definition is similar to the MyCC's in that it applies the HMT in identifying the relevant market. The CMA 1998 empowers the MCMC to pre-define markets for purposes of making a determination of dominance under Section 137 of the CMA 1998. There are currently 26 pre-determined markets, according to the 'Market Definition Analysis – Definition of Communications Market in Malaysia' dated 24 September 2014. The finding of a market does not pre-empt a finding of dominance, and instead, it identifies the boundaries of the field of rivalry that exists in the communications sector. In some markets, effective competitive constraints may exist and no dominance finding will need to be made. In other markets, effective competitive constraints may be dormant or inhibited and a finding of dominance may be made.⁸

7 Guidelines on Abuse of Dominance, Paragraph 2.24.

8 Market Definition Analysis – Definition of Communications Market in Malaysia, Paragraph 6.2.

When analysing market share data, the MCMC will consider the current market share of the licensee against market shares of its competitors and the changes in the licensee's market shares over time. A market share of more than 40 per cent will be considered a high market share. However, this does not preclude a licensee with a market share of less than 40 per cent from being found to be dominant if it is not subject to effective competitive constraints.⁹

The MCMC will consider certain key factors in determining whether a licensee is in a dominant position in the market. The non-exhaustive list is as follows:

- a* the structure of the market and the nature of competition in that market, including market shares;
- b* barriers to entry and expansion;
- c* the countervailing power of buyers; and
- d* the nature and effectiveness of economic regulation (if any).¹⁰

iii Gas supply sector

The Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements and Abuse of Dominant Position (the Gas Market Guidelines) issued pursuant to Section 37C of the GSA 1993 employs the MyCC's approach of applying the HMT in identifying the relevant market. The EC considers a market share of above 60 per cent as a strong indication of a dominant position in the relevant market and it is unlikely that an entity will be individually dominant if its market share is below 40 per cent.¹¹ However, market share is said to not be the sole indicator of dominance.

IV ABUSE

i Overview

Malaysian law recognises the same categories of abuse (i.e., exclusionary and exploitative abuses) as the European Union. Section 10(2) of the CA 2010 provides a non-exhaustive list of what an abuse of a dominant position may include:

- a* directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- b* limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
- c* refusing to supply to a particular enterprise or group or category of enterprises;
- d* applying different conditions to equivalent transactions with other trading parties;
- e* making the conclusion of contract subject to acceptance by other parties of supplementary conditions that have no connection with the subject matter of the contract;
- f* predatory behaviour towards competitors; and
- g* buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification.

9 MCMC Guideline on Dominant Position, Paragraph 4.17(a).

10 MCMC Guideline on Dominant Position, Paragraph 4.6.

11 The Gas Market Guidelines, Paragraph 5.3(c)(i).

The CA 2010 does not prohibit an enterprise in a dominant position from taking any step that has a reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor.¹² The MyCC has committed to an ‘effects-based’ approach when assessing a potential abuse of dominance.

ii Exclusionary abuses

The MyCC has said via its Guidelines on Abuse of Dominance that an assessment of exclusionary conduct is in terms of its impact on the competitive process and not its effects on competitors. Exclusionary conduct includes predatory pricing, price discrimination, exclusive dealings, loyalty rebates and discounts, refusal to supply and share essential facilities, buying up scarce intermediate goods or resources and bundling and tying.

By adopting an effects-based approach, the MyCC ensures that conduct that benefits consumers will not be prohibited and therefore ensuring that enterprises have the incentives to compete on merits. In assessing whether the effect of an exclusionary conduct is an abuse, the MyCC will use two tests for assessing anticompetitive effects:

- a whether the conduct adversely affects consumers; and
- b whether the conduct excludes a competitor that is just as efficient as the dominant enterprise.¹³

The MyCC’s Guidelines on Abuse of Dominance in taking an effects-based approach, also references the fact that this approach ensures good economic outcome consistent with the aims of the CA 2010. To quote from the preamble to the CA 2010 which appears to embody a singular goal: “An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith.”

The following sets out key enforcement actions pursued by the MyCC for exclusionary abuse.

On 3 October 2019, the MyCC issued a proposed decision against Grab for allegedly abusing its dominant position by imposing a restrictive clause on its drivers that prevented the drivers from promoting and providing advertising services for Grab’s competitors in the e-hailing and transit media advertising markets.

In July 2018, Dagang Net was provisionally found to have infringed Section 10(2)(c) of the CA 2010 for allegedly abusing its position as a monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system. Dagang Net was also provisionally found to have imposed an exclusivity clause on its business partners that would have had the effect of distorting competition in the provision of trade facilitation services under the national single window, thereby creating a barrier to entry. The MyCC imposed a proposed financial penalty of 17,397,695.30 ringgit, as well as a directive on Dagang Net to cease and desist its infringing conduct and any future conduct that may disrupt competition. The directors and senior management of Dagang Net and its related companies were required to undergo a competition law compliance programme within three months of the issuance of the proposed decision.

12 Section 10(3) of the CA 2010.

13 Guidelines on Abuse of Dominance, Paragraph 3.9.

The MyCC, in its non-infringement finding against Megasteel Sdn Bhd,¹⁴ initially provisionally found that Megasteel had abused its dominant position in the hot rolled coil (HRC) market by charging or imposing a price for its HRC that amounts to a margin squeeze that has an actual or potential effect of constraining the ability of reasonable efficient competitors in the downstream cold rolled coil market. Upon the submission of Megasteel's oral and written representations, the MyCC found that, while Megasteel was a dominant in the upstream market for HRC, it had not abused its dominance.

The MyCC made a non-infringement finding in the Pangsapuri Perdana case,¹⁵ where a complaint was made to the MyCC alleging that there was a monopoly of renovation contracts by a single contractor at the Pangsapuri Perdana apartment building. The alleged abuse was in relation to an exclusivity given to the contractor. The investigations revealed that this was not the case and the owners of Pangsapuri Perdana were free to appoint any contractor to carry out renovation works.

iii Discrimination

An abuse of dominant position includes applying different conditions to equivalent transactions with other trading parties to an extent that may:

- a discourage new market entry or expansion or investment by an existing competitor;
- b force from the market or seriously damage an existing competitor that is as efficient as the dominant enterprise; or
- c harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.¹⁶

An example of the MyCC investigating a dominant player that has engaged in discriminatory conduct is the MyEG case. MyEG is an electronic government (e-government) service that enables employers to renew insurances for foreign and domestic workers. MyEG, via its subsidiary, is also engaged in the sale and purchase of insurance as an insurance agent. For renewals to be approved, employees must upload mandatory insurance policies through MyEG's e-government service. However, renewals of insurance policies purchased from other insurers were not approved as fast as renewal policies purchased from MyEG. The MyCC found that, as a dominant concessionaire, MyEG is obliged to grant equal access of its facilities and promote competition in the downstream market. MyEG's conduct of imposing different conditions on equivalent transactions in the purchase of mandatory insurances for the renewal of insurance policies for foreign workers constituted an abuse of dominance as per Section 10(2)(d) of the CA 2010.

MyEG appealed against the MyCC's decision. However, the Competition Appeal Tribunal (CAT) upheld the MyCC's decision and, on 22 January 2019, the High Court dismissed MyEG's judicial review application upholding both the MyCC and the CAT's findings of infringement. At the time of writing, MyEG had also filed for an appeal to the Court of Appeal against the MyCC and CAT's findings and against the penalty imposed by the MyCC.

14 Case No. MyCC/002/2012, 15 April 2016.

15 Case No. MyCC.700.2.008.2014, 12 February 2015.

16 Section 10(2)(d) of the CA 2010.

iv Exploitative abuses

Exploitative conduct, such as excessive pricing, may result from structural conditions in the market. For example, where there are high barriers of market entry, a dominant enterprise may set high prices to exploit customers. This type of conduct typically occurs where the enterprise is a sole concessionaire and would be able to abuse its dominance by imposing an unfair purchase or selling price to exploit suppliers or customers. The MyCC is only concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market.

V REMEDIES AND SANCTIONS

Section 40 of the CA 2010 empowers the MyCC to impose a number of remedial actions against an enterprise that has infringed Section 10 of the CA 2010 by:

- a* requiring that the infringement be ceased immediately;
- b* specifying steps to be taken by the infringing enterprise to bring the infringement to an end;
- c* imposing a financial penalty; or
- d* giving any other direction that the MyCC deems appropriate.

These remedies are also available under the GSA 1993 and the MACA 2015.¹⁷

i Sanctions

The MyCC may impose a financial penalty of up to 10 per cent of the infringing enterprise's worldwide turnover for the duration of the infringement period.¹⁸ The financial penalty that may be imposed pursuant to the GSA 1993 and the MACA 2015 is similar to the financial penalty that may be imposed by the MyCC pursuant to the CA 2010.¹⁹ The MACA 2015 additionally provides that the MAVCOM may impose financial penalties of up to 1 million ringgit against an individual and up to 5 per cent of an enterprise's annual turnover for the preceding financial year for non-compliance of guidelines issued under the MACA 2015.²⁰ For the communications and multimedia sector, licensees under the CMA 1998 may be subject to criminal penalties of up to 500,000 ringgit or a term of imprisonment of up to five years, or both.²¹

In MyEG's case, the total financial penalty imposed by the MyCC was 2.272 million ringgit. The financial penalty was inclusive of the penalty imposed during the infringement period and a daily penalty for MyEG's ongoing infringement for failure to adhere to the directions imposed in the MyCC's proposed decision to provide an efficient gateway for all its competitors at the downstream market.

In relation to the Dagang Net case, the MyCC proposed to impose a financial penalty of 17.4 million ringgit. The provisional financial penalty is, however, subject to the final decision by the MyCC.

17 Section 59(1) of the MACA 2015 and Section 28N(2) of the GSA 1993.

18 Section 40(4) of the CA 2010.

19 Section 28N(5)(a) of the GSA 1993 and Section 59(1)(c) of the MACA 2015.

20 Section 65(4) of the MACA 2015.

21 Section 143 of the CMA 1998.

In the Grab case, the MyCC proposed to impose a financial penalty of 86,773 ringgit against Grab as well as a daily penalty of 15,000 ringgit from the date of service of the proposed decision should it fail to take remedial actions as directed by the MyCC. If an infringement finding is made against Grab, the proposed financial penalty imposed by the MyCC against Grab would be the highest financial penalty against a single company to date for an abuse of dominance case in Malaysia.

In determining the total financial penalty imposed against an infringing enterprise, the MyCC may have regard to the following factors:

- a* seriousness (gravity) or impact of the infringement;
- b* duration of the infringement;
- c* turnover of the market involved;
- d* degree of fault (negligence or intention);
- e* recidivism;
- f* the role of the enterprise in the infringement;
- g* aggravating and mitigating factors;
- h* existence of a compliance programme; and
- i* level of financial penalties imposed in similar cases.²²

ii Behavioural remedies

Where an investigation has been initiated but not completed, the MyCC may impose interim measures if it has reasonable grounds to believe the infringement occurred, and considers the interim measures necessary as a matter of urgency to prevent serious damage or protect the public interest.²³ Interim measures are only available for *ex officio* investigations and not where an investigation is initiated pursuant to a complaint made to the MyCC. These measures include directing an infringing enterprise to desist from any suspected infringement.

The MyCC will first issue a written notice to the relevant enterprise and permit the enterprise to make written representations within seven days of the date of the written notice. The notice should indicate the nature of and reasons for the direction that the MyCC proposes to give.²⁴ The MyCC may bring proceedings before the High Court against any person that fails to comply with interim measures imposed by the MyCC under Section 35 of the CA 2010,²⁵ and where a person is found guilty of this conduct, the High Court shall make an order requiring the person to comply with the direction.²⁶

While the MyCC has imposed interim measures in cartel cases, it has yet to issue any interim measures in cases of abuse of dominance.

Communications and multimedia sector

The MCMC or a person may seek an interim or interlocutory injunction against any conduct prohibited in Chapter 2 of Part VI of the CMA 1998 (e.g., prohibitions on anticompetitive conduct, entering into collusive agreements and tying or linking arrangements).²⁷

22 Guidelines on Financial Penalties, Paragraph 3.2.

23 Section 35(1) and (2) of the CA 2010.

24 Section 35(4) of the CA 2010.

25 Section 42(1) of the CA 2010.

26 Section 42(2) of the CA 2010.

27 Section 142(1) of the CMA 1998.

The MCMC may also direct a licensee in a dominant position to cease conduct that has or may have the effect of substantially lessening competition, or to implement appropriate remedies.²⁸ The MCMC, however, may only issue such a direction if the MCMC is satisfied that the direction is consistent with the objects of the CMA 1998 and any relevant instrument under the CMA 1998.²⁹

Aviation service sector

The provisions on interim measures under the MACA 2015 are similar to the interim measures as provided in the CA 2010.³⁰

Gas supply sector

The provisions on interim measures under the GSA 1993 are similar to the interim measures as provided in the CA 2010.³¹

iii Structural remedies

Structural remedies are not available for infringements under the CA 2010.

VI PROCEDURE

The MyCC may initiate investigations:

- a* through an *ex officio* investigation;³²
- b* under the direction of the MDTCA to investigate any suspected infringement under the CA 2010;³³ or
- c* upon receipt of a complaint.³⁴

The procedural stages of an investigation once initiated are as follows:

- a* An *ex officio* investigation may only be launched if the MyCC has 'reason to suspect' that an enterprise has infringed or is infringing Section 10 of the CA 2010.
- b* If an investigation is initiated pursuant to a complaint, the MyCC may first make inquiries on the complainant to decide whether the matter should be investigated. If a complaint comes from an anonymous source, the MyCC may open an *ex officio* investigation instead.
- c* The MyCC will then proceed with an information-gathering process, which enables the MyCC to request the production of information or a statement of parties in relation to the requested information.³⁵ The MyCC also has the power to conduct a raid with or

28 Section 139(1) of the CMA 1998.

29 Section 139(2) of the CMA 1998.

30 Sections 57, 61(1), 61(2) and 61(4) of the MACA 2015.

31 Sections 28J, 28P(1), 28P(2) and 28P(4) of the GSA 1993.

32 Section 14(1) of the CA 2010.

33 Section 14(2) of the CA 2010.

34 Section 15 of the CA 2010.

35 Section 18(1) and (2) of the CA 2010.

without a warrant on any premises (i.e., dawn raids).³⁶ A raid can only be conducted without a warrant if the MyCC has ‘reasonable cause to believe’ that the investigation would be adversely affected owing to the delay in obtaining a search warrant.³⁷

- d* An enterprise can make a legally binding undertaking to the MyCC.³⁸ If the MyCC accepts an undertaking, the MyCC shall close the investigation without making any finding of infringement and shall not impose a penalty on the enterprise.
- e* If the MyCC decides to make an infringement finding, it will first issue a proposed decision against the enterprise, which is essentially a written notice detailing the reasons for the proposed decision and any provisional penalties or remedial actions.³⁹ It will also inform the enterprise concerned of the period in which the enterprise may submit a written representation and for the enterprise to indicate whether it wishes to make oral representations before the panel of members of the MyCC.
- f* The MyCC will make an infringement or non-infringement finding. Final decisions are usually published on the MyCC official website.

The MyCC does not offer guidance or a review process to enterprises in regards to the interpretation and application of competition law. Enterprises that require such guidance would have to seek independent legal advice. In the Competition Act 2010 – Compliance Guidelines, the MyCC recommends Malaysian businesses to review all existing arrangements and practices to ensure compliance with the CA 2010 and to implement a competition law compliance programme.

The aforementioned procedures are also available under the GSA 1993.

i Aviation service sector

An authorised officer of the MAVCOM has the power to conduct an investigation where there is reason to suspect that, among other things, an offence, breach or infringement of any prohibition has been or is being committed in relation to the MACA 2015⁴⁰ – this includes entering into an anticompetitive agreement⁴¹ and engaging in any conduct that amounts to an abuse of dominant position.⁴²

If the MAVCOM determines that there is an infringement of a prohibition under Part VII of the MACA 2015, the MAVCOM shall, among others, require that the infringement be ceased immediately.⁴³ The MAVCOM shall also notify any person affected by the infringement decision within 14 days of making an infringement finding.⁴⁴ The MAVCOM may initiate court proceedings against an infringing enterprise that does not

36 Sections 25 and 26 of the CA 2010.

37 Section 26 of the CA 2010.

38 Section 43 of the CA 2010.

39 Section 36 of the CA 2010.

40 Section 83(a) of the MACA 2015.

41 Section 49 of the MACA 2015.

42 Section 53 of the MACA 2015.

43 Section 59(1)(a) of the MACA 2015.

44 Section 59(2) of the MACA 2015.

comply with any given directions or decision.⁴⁵ If the High Court finds that an entity has failed to comply with the directions or decision, the High Court will make an order requiring the entity to comply.⁴⁶

An authorised officer of the MAVCOM can also issue a compliance order if satisfied of an infringement or likely infringement pursuant to the MACA 2015.⁴⁷ The compliance order can require a person to refrain from conduct in contravention of MACA 2015 or to take actions required in order to comply with MACA 2015.⁴⁸

ii Communications and multimedia sector

The MCMC can conduct an investigation on any matter under the CMA 1998, either upon the direction of the Minister of the MCMC or if the MCMC has grounds to believe that a civil or criminal offence will be committed.⁴⁹ The MCMC may also conduct an investigation pursuant to a complaint received.

Upon concluding an investigation, the MCMC may prepare a report for the Minister of the MCMC, and the Minister of the MCMC may issue a direction to the MCMC to publish the report if satisfied that it would be in the national interest to do so.⁵⁰

iii Appeals and judicial review

A person who is aggrieved or whose interests are affected by a decision of the MyCC under Sections 35, 39 or 40⁵¹ of the CA 2010 may appeal to the CAT by filing a notice of appeal to the CAT. A decision of the CAT is final and binding on the parties to the appeal. However, parties aggrieved by the findings of the CAT may make a judicial review application to the High Court.

In this regard, it is worth noting that judicial review applications have in fact been made against the MyCC in recent years. The MyEG case was the first abuse of dominance case to have been judicially reviewed by the High Court, which upheld the decisions of both the CAT and the MyCC in making an infringement finding.

Two separate applications for judicial reviews were also made by enterprises in respect of notices issued by the MyCC to require provision of information and documents from these enterprises. The MyCC had investigated these enterprises for price-fixing. The applicants argued, among others, that the MyCC did not state in detail the particulars of the investigation conducted as well as the documents referred to in suspecting that the applicants were in breach of the CA 2010. In holding that the applications did not carry any merit, the High Court stated that the MyCC's investigations had not been completed and that the applicant was not entitled to obstruct the MyCC's investigations with frivolous excuses.

In March 2020, the High Court dismissed an application for leave to commence a judicial review filed by Grab that sought to challenge the legality of the proposed decision

45 Section 61(1) of the MACA 2015.

46 Section 61(2) of the MACA 2015.

47 Section 85(1) of the MACA 2015.

48 Section 85(3) of the MACA 2015.

49 Section 68 of the CMA 1998.

50 Sections 71 and 72 of the CMA 1998.

51 These sections are in relation to directions for interim measures made by the MyCC where the MyCC has commenced but has not completed an investigation, as well as findings of non-infringement or infringement by the MyCC.

against Grab on the grounds that the proposed decision was the product of a roving investigation and for failure by the MyCC to give Grab notice of the alleged infringement that it was being investigated for. Grab also challenged the fact that the directions issued by the MyCC that Grab was required to comply with commenced from the date of the proposed decision, failing which a hefty daily penalty of 15,000 ringgit daily would be applied, on grounds of this being evidence of pre-judgement of the case. Other procedural issues highlighted by the challenge included the lack of guidelines providing for procedural safeguards given the MyCC's role as investigator, prosecutor and judge and the fact that the MyCC acts on its own behalf in all of its enforcement actions.⁵² The application for leave was dismissed on grounds that the action was premature. The court found that the proposed decision is not considered a final decision.⁵³ It is reported that Grab intends to appeal the High Court's dismissal of its leave application.⁵⁴

Parties aggrieved by decisions of the MCMC or the EC may appeal to the respective appeal tribunal. The CMA 1998 also provides for an aggrieved party to further apply for judicial review if the party is dissatisfied with the decision of the appeal tribunal. The MACA 2015 only enables an aggrieved party to bring an appeal directly to the High Court.

VII PRIVATE ENFORCEMENT

Any person who suffers loss or damage directly as a result of an infringement of any prohibition under the CA 2010 can initiate an action for relief in civil proceedings against any infringing enterprise.⁵⁵ There is no requirement for the MyCC to make an infringement finding before a civil action may be initiated. The MACA 2015 and the GSA 1993 also provide for the right of private action.

While the CA 2010 does not specify whether collective actions are available in civil proceedings, such actions, commonly known as representative actions, are available.⁵⁶ The civil courts have the jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality. In assessing the amount of damages to be awarded, a party claiming for special damages (where the amount of damages is quantifiable) would have to prove that the sum being claimed was reasonably incurred. If the party is claiming for general damages (where the amount may not be quantifiable), the court will assess the amount to be awarded.

While there does not appear to be a large number of cases actioned through the courts, there are cases where the civil courts were open to making declaratory orders if an enterprise infringed the CA 2010. In *Fantasy Ruby Sdn Bhd v. Padiberas Nasional Bhd*,⁵⁷ the plaintiff sought a declaration that the defendant's termination of a broken rice contract was unlawful, and the defendant argued that the contract was null, void and unenforceable owing to a

52 It is noteworthy that Section 27(2) of the Competition Commission Act 2010, provides that, inter alia, all monies lawfully received by the MyCC (including fines and penalties imposed by the MyCC) is to be paid into the Competition Commission Fund.

53 <https://www.theedgemarkets.com/article/high-court-dismisses-grabs-legal-challenge-company-appeal-decision>.

54 <https://www.theedgemarkets.com/article/high-court-dismisses-grabs-legal-challenge-company-appeal-decision>.

55 Section 64(1) of the CA 2010.

56 Order 15, Rule 12 of the Rules of Court.

57 [2018] 11 MLJ 618.

breach of the CA 2010. While the court considered the prohibitions set out under the CA 2010, it eventually concluded that no evidence was adduced to prove that any breach had occurred under the relevant sections of the CA 2010.

In *Honda Giken Kogyo Kabushiki Kaisha v. Dnc Asiatic Holdings Sdn Bhd & Ors and another suit*,⁵⁸ the plaintiff initiated an action for copyright infringement as the defendant distributed motorcycles that were based on the model created by the plaintiff's employee. A counterclaim was filed by the defendant for, among others, a declaratory order under the CA 2010 for unlawful interference with trade. In its counterclaim, the defendant claimed that the plaintiff's action in enforcing its copyright prevented 'legitimate competition'. However, the court dismissed the defendant's counterclaim and stated that the plaintiff would suffer unjust and unfair competition if its competitors were free to copy its copyright-protected works under the guise of the CA 2010.

Contingency fee or conditional fee arrangements are prohibited;⁵⁹ however, advocates and solicitors can enter into an agreement on the amount of legal costs in respect of contentious business pursuant to Section 116 of the Legal Profession Act 1976.

VIII FUTURE DEVELOPMENTS

There remains some level of uncertainty as to the policies and approach that will be taken following the recent change of government on 1 March 2020. It is unclear at this juncture whether the new Minister of the MDTCA will continue the initiatives (which were notably wary of monopolies and dominant entities, including government-linked entities) that were undertaken by the previous Minister of the MDTCA.

One such policy includes the MyCC's plans to seek for legislative amendments to include new provisions on merger control into the law by end 2020. Given the change in government, it is unclear whether this will continue as a priority for the new government. In the absence of merger control provisions, however, it is also likely that the MyCC will take a more aggressive tone in pursuing abuses of dominant positions.

The country continues to witness challenges to the MyCC's enforcement jurisdiction, particularly via judicial review. In some countries, regulations or guidelines exist to define investigative procedures or the manner in which the authority is to determine whether a proposed decision is warranted. These are seen as important safeguards to address any apprehension of bias. It will be interesting to see whether these challenges will bring about more transparency on enforcement procedures. Clearly, the MyCC has made some changes: earlier this year, the MyCC announced its new policy of not publicising the amount of the proposed fine at the stage of announcing its proposed decision.⁶⁰ This change will bring the MyCC's practices in line with that of other major competition authorities.

58 [2017] MLJU 1575.

59 Section 112 of the Legal Profession Act 1976.

60 <https://www.theedgemarkets.com/article/mycc-proposes-fine-seven-warehouse-operators-price-fixing>.

NETHERLANDS

*Bart de Rijke*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 Further, the legislature has indicated that the DCA should be neither more nor less lenient than the EU competition rules.⁴

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

Insofar 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.⁶ 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.⁷

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2 Although such an exemption has to be applied for and granted by the ACM to take effect under Article 25 of the DCA; this exemption may also be requested once a procedure inquiring a possible breach has been started.

3 Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 71.

4 *ibid.*

5 *ibid.*

6 See, for example, the decision of the Dutch Competition Authority, 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.

7 ‘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.

Finally, there is special regulation comprising rules on market power in respect of the telecommunications sector (telephone and internet services),⁸ the electricity and gas sectors, the postal sector and the transportation sector. These regimes are all supervised by the Authority for Consumers and Markets (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’.⁹ A bill to transfer this supervisory task to the ACM is currently pending.¹⁰

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 and presented in 2012 (the SEO study).¹¹ In the study period from 2005 to 2009, only one out of 18 investigations relating to abuse of a dominant position resulted in an intervention, and that intervention was eventually overturned in a court review.¹²

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;¹³ however, it is probably linked to the prioritisation policy of the ACM, and its predecessor, the NMa,¹⁴ 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.¹⁵ Demonstrating harm is generally less expensive in the case of a cartel than it is 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 more resources. Moreover, as the ACM has pointed out itself in an official reaction

8 The ACM decided that the two telecom incumbents Vodafone Ziggo and KPN had collective significant market power (SMP) in order to regulate access to their networks. On appeal, the Trade and Industry Appeals Tribunal applied the *Airtours* criteria and came to the conclusion that there was no collective SMP; decision of 17 March 2020, ECLI:NL:CBB:2020:177 (*Vodafone Ziggo and KPN/ACM*).

9 The Health-care Market Regulation Act is available (in Dutch) at www.nza.nl/regelgeving/wetgeving/wmg.

10 Amendment of the Healthcare Market Regulation Act and other laws in connection with adjustments to tariff and performance regulation and market surveillance in the field of healthcare, Parliamentary paper 34445.

11 The study is available (in English) at www.seo.nl/uploads/media/2011-63_An_international_comparison_of_the_abuse-of-dominance.pdf.

12 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, AWB 07/596, LJN: BN9947 (*CR-Delta*).

13 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 NMa chose to intervene in few abuse of dominance cases in the period studied, or resolved a relatively high number of cases informally.

14 The ACM is the result of a 2013 merger of three previously independent authorities: the Dutch competition authority, the NMa, the postal and telecoms authority and the consumer authority.

15 Prioritisation policy of the ACM, available (in Dutch), Stcrt.2016 No. 14564 of 18 March 2016.

to the SEO study,¹⁶ 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.¹⁷

The case law in the Netherlands has been too fragmented to be able to deduce any clear trends apart from a high standard of proof for the claimant, which is often not met in civil litigation cases. Both the ACM and the courts in the Netherlands try 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 great value to economic evidence in abuse cases.

II YEAR IN REVIEW

As previously explained, there are generally very few abuse of dominance interventions in the Netherlands. In 2019, the ACM took no decisions on abuse.

In 2018, the ACM carried out a market study on app stores, and researched the ability of Apple and Google, as owners of the app store platforms, to influence the supply of apps. The market study resulted in the opening of a formal investigation into Apple at the beginning of 2019. The ACM received complaints during the market study about Apple favouring its own apps over those of external app providers, especially those providing Dutch news apps.

Further, the ACM opened a case against pharmaceutical company Leadiant in 2018. It had received a complaint about the allegedly excessive price of Leadiant's medicine, chenodeoxycholic acid, which is a drug used against the rare autosomal recessive lipid storage disease cerebrotendinous xanthomatosis. The investigation is still ongoing, and no final decision has been reached yet.

There is also generally 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 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.¹⁸ This trend has not changed in the past 10 years. In 2019, most private enforcement cases concerned the refusal to supply, often after a contractual relationship of supply or when negotiations of FRAND terms for a licence did not succeed.

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, see the European Union chapter for more detailed information on European practice.

16 Reaction of the ACM to the SEO study, available (in Dutch) at www.eerstekamer.nl/overig/20121123/brief_van_de_nma/document.

17 *ibid.*, Paragraph 3.

18 SEO study, p. 15.

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.¹⁹

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 European Court of Justice (ECJ) in the *United Brands* case:

*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.*²⁰

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.²¹ In its 2017 ruling, the District Court of Amsterdam relied on the advice of three appointed experts for its conclusion that online real estate platform Funda held a dominant position on the online housing market in the Netherlands. According to the experts, the combination of Funda's strong position and the significant entry barriers to the Dutch online housing market enabled Funda to behave independently.²²

The ACM and the courts will normally also look for contraindications, such as countervailing power, when determining dominance.

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.

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

20 European Court of Justice 14 February 1978, case C-27/76 (*United Brands v. Commission*).

21 This also follows from the Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 25.

22 Decision of the District Court of Amsterdam of 21 March 2018, ECLI:NL:RBAMS:2018:1654.

ii Exclusionary abuses

Exclusionary pricing

The ACM concluded its first predatory pricing case in a tender procedure in 2017 with the imposition of a €41 million fine on Dutch Railways (NS) for abuse of dominance in a regional tender process.²³ According to the ACM, NS wanted to prevent its competitors from winning the tender at all costs, as the tender process served as a pilot for a further decentralisation of the main railway network. NS was found to have abused its dominant position on the main railway network in two ways. First by submitting a loss-making bid for a public transport contract in the Dutch province of Limburg, and second, by a combination of exclusionary conduct (see below for details). In respect of the exclusionary pricing, instead of an *ex post* comparison of actual costs and actual revenue, the ACM had to use an *ex ante* approach to determine predation because the case related to a bid for a concession that was ultimately not awarded to NS. The ACM compared NS's internal rate of return (IRR) when performing the concession with its weighted average costs of capital (WACC), and concluded that the IRR would be lower than the WACC. As a result, the concession's expected revenue would be insufficient to recover the anticipated costs. According to the ACM, this made it impossible for as-efficient competitors to match or outbid the NS bid without incurring loss. NS has appealed the decision before the Rotterdam District Court, which annulled the ACM's decision. According to the judge, the ACM did not prove the existence of dominance on the main railway network for which it has a concession until 2024. The judge also found that the relationship between the market for the exploitation of the main railway network and the adjacent regional market in Limburg on which the presumed abuse took place was not strong enough.²⁴

The *Sandd* case provides another good example of the ACM's policy views with respect to exclusionary (predatory) pricing. 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.²⁵ Sandd had claimed, inter alia, that the 'free' use of PostNL's network by its 'price fighting' subsidiary Network VSP distorted competition on the Dutch postal (addressed mail) market. Sandd argued that the predation assessment should consist in comparing Network VSP's prices and costs, whereby the remuneration paid by Network VSP for the use of PostNL's network should be considered costs of Network 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 Network VSP was above the long-run average incremental costs (LRAIC) of PostNL (including Network 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.²⁶ 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

23 Case No. 16.0691.31, decision of the ACM of 22 May 2017.

24 Decision of the District Court of Rotterdam of 27 June 2019, ECLI:NL:RBROT:2019:5089 (*NS/ACM*).

25 Case No. 6207, decision of the NMa of 21 May 2012.

26 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.

as efficiently as the 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.²⁷

Exclusive dealing

Loyalty rebates

In the *CR-Delta* case, the ACM held, inter alia, that certain rebates granted by the (dominant) Dutch 'cattle improvement cooperative' on its insemination services were of a loyalty-inducing nature and, therefore, anticompetitive. This view was later confirmed by the District Court of Rotterdam.²⁸ However, the Trade and Industry Appeals Tribunal (CBB), the highest administrative court in cases on appeal of decisions from the ACM, 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 these 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.

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 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.²⁹

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

27 Decision of the District Court of Rotterdam of 26 September 2013, ECLI:NL:RBROT:2013:7337.

28 Decision of the Trade and Industry Appeal Tribunal of 7 October 2010, AWB 07/596, LJN: BN9947 (*CR-Delta*).

29 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*).

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.³⁰

Refusal to deal

On the subject of refusal to deal, *NVM v. HPC* confirms that the Dutch courts closely follow the *Bronner* criteria in their assessment of such cases. 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 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*³¹ to determine whether the alleged (constructive) refusal to deal should be held abusive. It ruled that HPC had not been able to convincingly demonstrate that all competition had been eliminated by the NVM's alleged refusal; and 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.³² 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.³³ 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 the NVM's behaviour, given HPC's 20 per cent market share.

In the 2017 case against the Dutch Railways, the ACM not only decided that NS was guilty of predatory pricing, but also of exclusionary measures aimed at putting competitors at a disadvantage. The conduct consisted of providing delayed and incomplete responses to competitors' access requests to certain services and facilities owned by NS, using confidential information obtained from a former director of one of its competitors and passing on that confidential information about its competitors to its subsidiary, which participated in the tender process. As indicated above, the District Court of the Rotterdam District annulled the decision of the ACM, because dominance was not proven; the judges did not rule on the question of whether the behaviour constituted an abuse.³⁴

Refusal to license and FRAND

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

30 Case No. 5702, decision of the NMa of 20 July 2007 (207).

31 European Court of Justice 26 November 1998, case C-7/97 (*Bronner*).

32 Decision of the Amsterdam Court of Appeals of 12 June 2012, case No. 200.018.917, LJN: BX0460.

33 Decision of the Dutch Supreme Court of 24 January 2014, ECLI:NL:HR:2014:149.

34 Decision of the District Court of Rotterdam of 27 June 2019, ECLI:NL:RBROT:2019:5089 (*NS/ACM*).

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.³⁵

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.³⁶ With respect to the argument raised by the broadcasters before the Supreme Court that the Court of Appeals had not 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.³⁷

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,³⁸ 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’.³⁹ 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.⁴⁰

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 before the CBB’s decision. However, it still 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 consider it satisfied by referring to the existence of a demand for the product.

In 2019, the Court of Appeal of The Hague ruled several times on the refusal to license a standard essential patent (SEP) on fair, reasonable and non-discriminatory (FRAND) terms.⁴¹ In those cases, the Court applied the framework the ECJ developed in the *Huawei*

35 Case No. 501.0119, decision of the NMA of 3 October 2001 and decision of the District Court of Rotterdam of 22 June 2000, case No. VMEDED 00/0903-SIMO; VMEDED 00/1187-SIMO, LJN: ZF1130.

36 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.

37 Decision of the Supreme Court of 6 June 2003, C01/183HR, LJN: AF5100, Paragraph 3.11.

38 European Court of Justice 29 April 2004, case C-418/01 (*IMS Health*).

39 Decision of the Trade and Industry Appeal Tribunal of 15 July 2004, AWB 03/132, LJN: AQ1727 (*NOS v. NMA*).

40 Decision of the President of the District Court of Amsterdam of 28 July 2005, case No. 317128/ KG 05-1040 P, LJN: AU0253 (*SBS v. Quote Media*).

41 Decisions of the Court of Appeal of The Hague of 7 May 2019, ECLI:NL:GHDHA:2019:1065 (*Philips/Asus*); of 2 July 2019, ECLI:NL:GHDHA:2019:3613 (*Philips/Wiko*); of 24 December 2019, ECLI:NL:GHDHA:2019:3535 (*Philips/Asus*); and of 24 December 2019, ECLI:NL:GHDHA:2019:3537 (*Philips/Wiko*).

ZTE case on the abuse of a dominant position in relation to a SEP.⁴² That framework gives guidance as to the steps to be taken by the SEP owner and the party requesting a licence in concluding a FRAND licence. In two proceedings brought by Philips as the owner of several SEPs, Philips claimed that the other party was infringing its SEPs. In defence, the alleged infringer raised a FRAND defence by arguing that it wanted to conclude a licence agreement, but that the offer made by Philips was not FRAND. According to the Court of Appeal of The Hague, the *Huawei/ZTE* framework does not imply that the owner of the SEP needs to substantiate why its offer to license the SEP is FRAND. Therefore, it does not need, for example, to disclose licence agreements concluded with other licensees to demonstrate that its offer was non-discriminatory. Instead, it is up to the party requesting the licence to prove that the offer that is made is not FRAND. This outcome of the Dutch cases is in contrast to the manner in which German courts apply the *Huawei/ZTE*-criteria.

iii Discrimination

In March 2018, the District Court of Amsterdam dismissed the claim by real estate association VBO that online real estate platform Funda provided preferential treatment to real estate association NVM, co-founder and indirect shareholder of Funda, in terms of, inter alia, costs and ranking on its website. The District Court first underlined that applying dissimilar conditions to equivalent transactions with other trading parties only qualifies as abuse if it thereby places them at a competitive disadvantage. As a result, for conduct to qualify as abuse there must be a finding not only that the dominant company's conduct is discriminatory, but also that the dominant company's conduct tends, having regard to the whole of the circumstances of a case, to lead to a distortion of competition between business partners. In this context it is particularly necessary to examine whether the discrimination is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured. The District Court found that VBO had failed to demonstrate that the discrimination tended to distort its competitive position. As a result, the Court concluded that it could not be established that Funda had abused its dominant position.

In May 2012, the CbB 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.⁴³ 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.⁴⁴ On ultimate appeal to the court, the

42 Decision of the ECJ of 16 July 2015, case C-170/13, ECLI:EU:C:2015:477, (*Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*).

43 Decision of the Trade and Industry Appeal Tribunal of 24 May 2012, AWB 09/1302, LJN: BW6327.

44 Case No. 3295, Decision of the NMa of 10 May 2007 (78), and decision on appeal of the NMa of 2 April 2008 (133).

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 and the European Court of Justice,⁴⁵ had already been propagated by the CBB in its decision in the *CR-Delta* case in 2010.⁴⁶

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.⁴⁷

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.⁴⁸

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).⁴⁹

Further, 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.⁵⁰

The ACM's standing advisory committee in review proceedings agreed with the banks on these points. Subsequently, the ACM, in its decision in administrative review, referencing that it was '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.⁵¹

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

45 General Court of the EU 9 September 2010, case T-155/06 (*Tomra v. Commission*); European Court of Justice 19 April 2012, case C-549/10P (*Tomra v. Commission*).

46 See footnote 27.

47 Case No. 2910, decision of the NMa of 28 April 2004 (700).

48 *ibid.*, Paragraphs 145, 202, 219–221.

49 Case No. 2910, decision on appeal of the NMa of 21 December 2005 (864), Paragraphs 10, 12.

50 *ibid.*

51 *ibid.*, Paragraphs 15–16, 21–26.

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 using 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 first been 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 held a dominant position. In its decision, the ACM distinguished an intramural market and an 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. Regarding 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 competitors. In April 2014, the ACM published a commitment decision relating to a possible abuse of a dominant position.

In February 2018, the Rotterdam District Court ruled on excessive pricing in a private enforcement case against Videma.⁵² Videma is a collecting society that issues licences for TV transmission in hotels, hospitals, pubs, healthcare institutions, etc. As a collecting society it has a dominant position.⁵³ Hospitals had to pay royalties to Videma for TV transmission within the hospitals and claimed that the royalties were excessively high, and, therefore, abusive. The Court appointed copyrights experts of the Consumer Complaints Boards as expert witnesses to answer questions relating to the royalty rates. A reliable international benchmark was not available, since in many EU Member States, hospitals do not pay royalties for TV transmission, and, in countries where royalties were paid, the bundle and number of TV channels were not comparable. The experts concluded that the royalties had increased excessively and that Videma was not able to give an objective justification for the increase. Therefore, the Court held that Videma abused its dominant position and referred the case to a follow-up proceeding for the determination of damages.

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.⁵⁴ The fines are administrative, and not criminal, in

52 Decision of the Court of Rotterdam of 21 February 2018, ECLI:NL:RBROT:2018:1037 (*NVZ Vereniging van Ziekenhuizen ao v. Videma*).

53 Often, collecting societies have a (*de facto*) monopoly in their respective geographical area; see European Court of Justice, 19 April 2018, case C-525/16 (*MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência*).

54 See Act establishing the Authority for Consumers and Market (2012/2013, Nos. 1 and 2, 33 186).

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.⁵⁵

In addition to the statutory law, the ACM relies on a policy rule concerning the determination of fines: the 2014 ACM Fining Policy Rule issued by the Ministry of Economic Affairs.⁵⁶ The fine calculation method applicable to infringements of the cartel prohibition and the abuse of dominance prohibition that follows from these guidelines resembles the EU approach (as laid down in the fining guidelines of the Commission)⁵⁷ in several respects, but not entirely. According to the Fining Policy Rule, the basic fine is calculated as a percentage (of zero to 50 per cent) of a company’s turnover 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 reach up to a maximum of €900,000 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.⁵⁸

The ACM can also fine individuals up to €900,000. 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.⁵⁹

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 to pursue a case (see Section I).

There is no fixed time limit for an investigation. It may take months, but will usually take 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

55 These rules, laid down in the General Administrative Law Act, comprise the ‘right to remain silent’ and the *ne bis in idem* principle.

56 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/. As amended by the Policy Rule of the Minister of Economic Affairs of 28 June 2016, No. WJZ/16056097.

57 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.

58 Dutch Competition Act, Articles 56 and 58a.

59 ACM Policy Guidelines Administrative Fines, pp. 4 and 5.

to present its views on the allegations in the report, in writing and at an oral hearing.⁶⁰ 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.

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 a decision of the ACM until the date of a 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). Sometimes the ACM publishes such guidance in an informal guidance letter. To date, these have been limited to merger control cases and cases relating to the possible application of individual exemptions of the cartel prohibition. It is not inconceivable that the ACM will also hand out an informal guidance letter in abuse cases.

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).⁶¹ So far, there is no specific regime for enforcement of national competition law infringements. The Dutch Act implementing the EU Damages Directive⁶² entered into force on 10 February 2017, and only applies to cases where there is a breach of EU competition law.⁶³

60 Article 59 of the DCA in combination with the rules laid down in Chapter 5 of the General Administrative Law Act.

61 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 a price squeeze. The Court also ordered KPN to desist from making abusive offers in the future.

62 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

63 Law of 25 January 2017, amending Book 6 of the Civil Code and the Code of Civil Procedure, in connection with the transposition of Directive 2014/104/EU of the European Parliament and of the

A consultation on a bill to also apply these provisions to civil damages actions in cases solely featuring infringements of domestic competition law was closed in November 2017.⁶⁴ For now, 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 v. 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.⁶⁵ The case was 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.⁶⁶

Private enforcement of Article 24 of the DCA is attempted relatively frequently in the Netherlands, but these attempts are mostly unsuccessful. Claimants often fail to meet the evidentiary thresholds. As explained above, Dutch courts tend to follow EU practice and trends, and therefore attach considerable weight to economic evidence. Claimants only rarely make the effort of building a convincing economic narrative to support a claim of abuse of dominance.

VIII FUTURE DEVELOPMENTS

Before the covid-19 outbreak in the Netherlands, the ACM stated that the digital economy and energy transition are its main priorities for 2020–2021.

The ACM will, therefore, likely be focusing on potential unfair trading practices and other abuse types in the online sector in the near future especially with regard to online platforms and tech companies entering the payments market. Next to that, the ACM will likely focus on the investments required by network operators in the electricity network in order to make the energy transition; underinvestment has in the past led to abuse of dominance cases.

Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Implementation of the Private Law Enforcement of Competition Law Directive), Bulletin of Acts and Decrees 2017, Vol. 28.

64 Draft regulation: Bill on amendment of the Competition Act in relation to market and government, merger control and private enforcement.

65 Decision by the Court of Central Netherlands of 10 July 2013, ECLI:NL:RBMNE:2013:3245.

66 Decision by the Court of Central Netherlands of 30 December 2013, ECLI:NL:RBMNE:2013:7536.

After the covid-19 outbreak in the Netherlands in the first quarter of 2020, the ACM also started to look at competition law issues relating to the economic consequences of that outbreak. More specifically with regard to abuse of dominance, the ACM already looked into a case of possible, alleged abuse regarding refusal to supply. In the Netherlands, there was a shortage in testing capacity for the virus. One of the bottlenecks concerned insufficient capacity in the production of a lysis buffer, which is used during the tests. In the Netherlands, most testing machines were supplied by La Roche, and it supplied the required lysis buffer as well. In the media, it was reported that La Roche could not supply sufficient lysis buffer but was also not willing to share its recipe of the lysis buffer in order for Dutch labs to produce the required additional lysis buffer. The ACM contacted La Roche and various of its customers and concluded that La Roche has an important position on the Dutch market for testing machines and materials; no conclusion was drawn regarding possible dominance. La Roche offered the commitment to share the lysis buffer recipe with the Dutch government and under the direction of the government it would cooperate with Dutch parties to increase production.⁶⁷

⁶⁷ Press release of 3 April 2020 of the ACM, ‘ACM heeft vertrouwen in toezeggingen Roche om problemen testmateriaal te helpen oplossen’.

NEW ZEALAND

*Anna Ryan, Ellen Sewell and Kristina Sutherland*¹

I INTRODUCTION

Competition in New Zealand markets is primarily regulated under the Commerce Act 1986 (Act), which aims to promote competition in markets for the long-term benefit of consumers in New Zealand.² Closely modelled on the Australian Trade Practices Act 1974 (Cth),³ the Act was introduced as part of an ambitious programme of economic reforms undertaken by New Zealand's fourth Labour Government in the mid-1980s 'aimed at reducing the role of government in business, promoting competition and strengthening the role of markets in determining prices and allocating resources.'⁴ A central plank in the government's reform programme, the Act was intended to safeguard New Zealand's newly deregulated markets against manipulation and abuse.

Unilateral market power is regulated under the Act through two mechanisms, contained in Section 36 and Part 4 respectively. Section 36 sets out New Zealand's general misuse of market power provision, which prohibits firms with a substantial degree of power in a market from engaging in anticompetitive conduct for a proscribed purpose. Part 4 'provides for the regulation of the price and quality of goods or services in markets where there is little or no competition and little or no likelihood of a substantial increase in competition'.⁵

Section 36 of the Act is thought to be unique amongst countries with a developed competition law, in that it is not concerned with the effect of the unilateral exercise of market power on competition in a market. Instead, Section 36(2) prohibits a person with substantial market power from 'taking advantage' of that power for the purpose of (1) restricting a person's entry to a market; (2) preventing or deterring a person from competing in a market; or (3) eliminating a person from a market.

Significantly, for reasons explored later in this Chapter, the question of whether Section 36 is fit for purpose has been widely canvassed in recent years, and prior to the outbreak of the covid-19 global pandemic, the New Zealand government was expected to announce in the first half of 2020 regarding whether Section 36 would be amended to align

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2 Section 1A of the Act. This purpose statement was inserted into the Act on 26 May 2001, by Section 4 of the Commerce Amendment Act 2001.

3 Now the Competition and Consumer Act 2010 (Cth).

4 James Every-Palmer, 'The State and Monopolies: New Zealand's Experience', (2010) 12(2) *Otago Law Review* 227, 229.

5 Section 52 of the Act.

with the key elements of the equivalent Australian (effects-based) provision. It is anticipated that the government's focus on New Zealand's covid-19 response will result in a delay to this process.

Formal guidance on Section 36 in its current form is published on the New Zealand Commerce Commission (Commission) website.⁶ Guidance can also be derived from New Zealand case law and information published on the Commission's case register, which includes enforcement outcomes and selected open investigations. Guidance can also be drawn from past Australian case law on Section 46 of the Competition and Consumer Act 2010 (Cth).⁷

The Act applies to all Crown corporations that engage in trade, as if they were private companies.⁸ The Act also applies to the Crown itself insofar as it engages in trade.⁹ However, the Crown is not liable to be prosecuted for an offence under the Act¹⁰ or to pay a pecuniary penalty.¹¹ Rather, if a court is satisfied beyond reasonable doubt that the Crown has contravened an offence provision of the Act, it may make a declaration accordingly.¹²

II YEAR IN REVIEW

There were no judgments of the New Zealand courts relating to Section 36 of the Act in 2019. The Commission opened one investigation, into the pricing and terms on which competitors access data from the Meteorological Service of New Zealand Ltd and the National Institute of Water and Atmospheric Research.

Uncertainty as to the timing of any legislative changes concerning Section 36 of the Act was, and continues to be, the main issue facing both the Commission and New Zealand businesses. This is discussed in more detail in Section VIII of this chapter. The lack of both public and private prosecutions under Section 36 in recent years is almost certainly due to

6 Commerce Commission, *Taking Advantage of Market Power Fact Sheet* (2018) <https://comcom.govt.nz/_data/assets/pdf_file/0041/89897/Taking-advantage-of-market-power-Fact-sheet-July-2018.pdf>; Commerce Commission, *Where Tying Harms Competition Case Study* (2018) <https://comcom.govt.nz/_data/assets/pdf_file/0029/116993/Where-tying-harms-competition-Case-study-July-2018.pdf>; Commerce Commission, *Predatory Pricing or Competitive Price Matching? Case Study* (2018) <https://comcom.govt.nz/_data/assets/pdf_file/0031/116995/Predatory-pricing-or-competitive-price-matching-Case-study-July-2018.pdf>; Commerce Commission, *Assessing a Refusal to Supply Case Study* (2018) <https://comcom.govt.nz/_data/assets/pdf_file/0027/116991/Assessing-a-refusal-to-supply-Case-study-July-2018.pdf>.

7 It is important to note, however, that changes to the Australian law that came into force on 6 November 2017 mean that the wording of the Australian and New Zealand provisions are no longer aligned, and even prior to the Australian law change, there was a divergence in the way in which the Australian and New Zealand courts applied the 'take advantage' limb of the respective countries' misuse of market power provisions.

8 Section 6 of the Act.

9 Section 5 of the Act. 'Trade' is defined in Section 2(1) of the Act as 'any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.' The question of whether the Minister of Health was 'engaged in trade' for the purposes of Section 36 of the Act was considered by both the New Zealand High Court and the Court of Appeal in *Glaxo New Zealand Ltd v. Attorney General* [1991] 3 NZLR 129 (HC & CA).

10 Section 5(3).

11 Section 5(2).

12 Section 5(4).

the challenges associated with its application and, in particular, the counterfactual analysis used by the New Zealand courts in order to determine whether a person has taken advantage of its substantial market power.

Current active investigation of the Commerce Commission (as at April 2020)

Sector	Investigating authority	Conduct	Case opened
Science and technology	Commerce Commission	Investigation into the pricing and terms on which competitors can access weather data from the Meteorological Service of New Zealand Ltd and the National Institute of Water and Atmospheric Research	September 2019

III MARKET DEFINITION AND MARKET POWER

Section 36 applies to firms that have a ‘substantial degree of power in a market’. As the Act was modelled on Australian legislation, New Zealand draws heavily on the guidance provided by Australian case law for its analysis of market definition and market power. Although Australia has recently amended its misuse of market power provision, this has not impacted its market power or market power analysis.

i Market definition

The Act defines a market as ‘a market in New Zealand for goods or services as well as all other goods or services that, as a matter of fact and commercial common sense, are substitutable for them’.¹³

When determining the relevant market, the main task is, therefore, to identify goods and services that would, in response to changing prices, be treated as substitutes.¹⁴ Both supply-side and demand-side substitutability are relevant.

In assessing substitutability, the Commission¹⁵ and the courts consider the following dimensions of a market:

- a* the goods or services supplied or received (the product dimension);
- b* the level in the supply chain at which the parties operate (the functional dimension);
- c* the geographic area the goods or services are being supplied in (the geographic dimension);
- d* the different customer types (the customer dimension); and
- e* the time period within which the market operates (the temporal dimension).¹⁶

Delineating the relevant market is not always a straightforward exercise. For this reason, the Commission often uses the hypothetical monopolist or SSNIP (i.e., ‘a small but significant non-transitory increase in price’) test to determine demand-side substitutability.¹⁷ Under

¹³ Section 3(1A) of the Act.

¹⁴ *Commerce Commission v. New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [123].

¹⁵ As market definition plays a central role in applications for clearance or authorisation of a proposed merger under Part 5 of the Act, helpful guidance on market definition can be found in the Mergers and Acquisitions Guidelines issued by the Commerce Commission in July 2019 (the Guidelines).

¹⁶ Paragraph 3.14 of the Guidelines.

¹⁷ Paragraph 3.17 of the Guidelines.

the SSNIP test, the Commission begins with a potential market definition that covers a reasonably narrow set of goods or services and analyses the effect of a small, but significant price increase.¹⁸

ii Market power

The Commission and the courts take an economic approach to the question of market power. Market power is the ability to act without constraint and arises as a result of a range of circumstances.¹⁹ A large market share does not necessarily equate to market power.²⁰ The existence and extent of barriers to entry are the primary considerations in determining market power²¹ as is the ability to raise and hold prices above the competitive level.²²

Market power must be substantial in order to meet the threshold test in Section 36. The Act's definition of substantial as 'real or of substance' does not apply to Section 36;²³ instead, substantial is understood to mean 'large or weighty' or 'considerable'.²⁴

IV ABUSE

i Overview

New Zealand's rule against anti-competitive unilateral conduct is framed in a way to prohibit a person with a substantial degree of market power from 'taking advantage' of their market power for an anticompetitive purpose. Specifically, Section 36(2) of the Act provides:

A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of:

- (a) restricting the entry of a person into that or any other market;*
- (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or*
- (c) eliminating a person from that or any other market.*

Take advantage

Once the 'substantial degree of market power' threshold is satisfied, the second limb of Section 36 –the requirement that a firm must 'take advantage' of its market power – is intended to ensure that there is an adequate 'causal connection' between a firm's market power and the conduct at issue.²⁵

To establish whether a firm has taken advantage of its market power, the New Zealand courts apply a 'counterfactual test' which asks whether a firm without a substantial degree of

18 The Commission generally uses 5% as the SSNIP (paragraph 3.18 of the Guidelines).

19 *Boral Besser Masonry Ltd v. Australian Competition and Consumer Commission* (2003) 215 CLR 374, [2003] HCA 5 at [137].

20 *ibid*; *Commerce Commission v. Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [68].

21 *Boral Besser*, see note 19.

22 *ibid* at [136] and Commerce Commission, *Taking Advantage of Market Power Fact Sheet*, see note 19.

23 Section 2(1A) of the Act.

24 See Mark Berry and Lewis Evans (eds), *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, 2004) 250.

25 *Carter Holt Harvey Building Products Ltd v. Commerce Commission* [2006] 1 NZLR 145 (PC) at [51].

market power could rationally have engaged in the conduct in question.²⁶ If the answer is yes, then the firm has not ‘taken advantage’ of its market power. The premise of the counterfactual test was described by the Supreme Court in *Commerce Commission v. Telecom Corp of New Zealand Ltd*:

*The essential point is that if the dominant firm would, as a matter of commercial judgement, have acted in the same way in a hypothetically competitive market, it cannot logically be said that its dominance has given it the advantage that is implied in the concepts of using or taking advantage of dominance or a substantial degree of market power. Conversely, if the dominant firm would not have acted in the same way in a hypothetically competitive market, it can logically be said that its dominance did give it the necessary advantage. This is because it can then reasonably be concluded that it was its dominance or substantial degree of market power that caused, enabled or facilitated its acting as it did in the actual market.*²⁷

The counterfactual test has attracted considerable criticism. The Commission itself has described the test as difficult, complex and costly to apply, and lacking certainty and predictability for day-to-day decision-making.²⁸ These observations largely reflect the significant challenges associated with determining the exact conditions which should be assumed to be present in the hypothetical market (i.e., one in which the firm in question does not possess market power).

Critics also argue that the test fails to consider the competitive impact of the impugned conduct on the actual market,²⁹ and centres on a fictitious market in which unrealistic market conditions may be present.³⁰ As one commentator notes, ‘The counterfactual as so designed substitutes a hypothetical inquiry into the incentives of a firm without market power for an examination of the actual or probable effects of conduct undertaken by one that possesses it.’³¹ While concerns have been raised over the test’s potential to generate both type 1 and type 2 errors,³² the possibility of false negatives is thought to be a particular risk due to the fact that an action may be competitively neutral (or even pro-competitive) when undertaken by a firm without market power, but the same action may have exclusionary effects when undertaken by a firm with market power.³³ In the words of one commentator, ‘[Use of the

26 *Telecom Corp of New Zealand Ltd v. Clear Communications Ltd* (1994) 5 NZBLC 103,552; [1995] 1 NZLR 385 (PC) at NZBLC 103,566; NZLR 403, considered and endorsed again by the Privy Council in *Carter Holt Harvey v. Commerce Commission*, see note 25 at [9], [29] and [60], and by the New Zealand Supreme Court in *Commerce Commission v. Telecom Corp of New Zealand Ltd* [2010] NZSC 111 at [31].

27 *ibid.*

28 Commerce Commission, Submission to the Ministry of Business, Innovation and Employment, *Review of Section 36 of the Commerce Act and other matters*, 1 April 2019 at [11].

29 This language was used in the Australian case of *Melway Publishing v. Robert Hicks* (2001) ATPR 41-805; 205 CLR 1 (HCA) at [44].

30 The New Zealand courts have expressly noted that the counterfactual need not depend on realistic or practical assumptions, and unrealistic scenarios are permitted – see *Turners & Growers Ltd v. Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 12 August 2011 at [345].

31 Andrew Gavil, ‘Imagining a Counterfactual Section 36: Rebalancing New Zealand’s Competition Law Framework’ (2015) 46 *Victoria University of Wellington Law Review* 1043 at 1053.

32 i.e. a ‘false positive’ or ‘false negative’, respectively.

33 See Ministry of Business, Innovation and Employment, *Discussion Paper: Review of s36 of the Commerce Act and other matters* (2018), 18; Australian Competition and Consumer Commission, Submissions to Treasury, *Options to strengthen the misuse of market power law* (2016).

counterfactual] is akin to saying that because a person can walk into a room with a lighted match without setting off an explosion, doing so in a room where there is a suspected gas leak did not ‘cause’ the explosion.’³⁴

Purpose

The final limb of Section 36 – that a person with a substantial degree of market power must take advantage of that power for one of the purposes outlined in Section 36(2)(a) to (c) – differentiates between a straight exercise of market power (such as monopoly pricing) and the exercise of market power for an exclusionary purpose.³⁵ Given the wording of Section 36(2)(a) to (c), the purpose need not relate to the market in which the person has the substantial degree of market power and can also relate to any other market.

Section 2(5B) of the Act deems a person to have acted for a particular purpose if that purpose was a substantial purpose.

Section 36B enables a firm’s purpose to be inferred from conduct or from any other relevant circumstances. However, as the Privy Council cautioned in *Carter Holt Harvey Building Products Ltd v. Commerce Commission*:

*[W]hile it is legitimate to infer ‘purpose’ from use of a dominant position producing an anti-competitive effect, it may be dangerous to argue the converse that because the anti-competitive purpose was present, therefore there was use of a dominant position. This is because the effect of preventing a monopolist from competing with its competitors like everyone else would be to protect inefficient competitors.*³⁶

A monopolist, like all other firms, is allowed to compete with its competitors,³⁷ and firms of all sizes engage in conduct that is designed to harm their competitors on a daily basis; as the Australian Competition and Consumer Commission noted in its submissions to the New Zealand Government on Section 36 in 2015, ‘this is exactly what occurs in well-functioning competitive markets’.³⁸ What is unlawful is for a monopolist to take advantage of its market power to achieve those objectives. Consequently, it has been observed that ‘the purpose element of a Section 36 case is usually straightforward: the handwringing takes place in the assessment of the connection element [i.e. the ‘taking advantage’ limb of Section 36]’.³⁹

Regarding the specific nature of the ‘purpose’ inquiry, the New Zealand courts have held that purpose can be established on either a subjective or objective analysis.⁴⁰ In some circumstances purpose can also be inferred from evidence of the anticompetitive effect of a firm’s conduct.⁴¹

34 Cento Veljanovski, ‘The Flawed Market Power Counterfactual’ (2013) *New Zealand Law Journal* 247, 252.

35 See note 33 at 13.

36 See note 25 at [40].

37 *Telecom v. Clear*, see note 26 at 103,565; 402-403; *Carter Holt Harvey v. Commerce Commission*, see note 25 at [51].

38 Australian Competition and Consumer Commission, Submissions to the Ministry of Business, Innovation and Employment, *Targeted Review of the Commerce Act 1986* (2016) 4.

39 Matt Sumpster, *New Zealand Competition Law and Policy* (CCH, 2010) 274.

40 See *Port Nelson Ltd v. Commerce Commission* (1996) 5 NZBLC 104,142, 104,151; [1996] 3 NZLR 554, 564.

41 *New Zealand Private Hospitals Association - Auckland Branch (Inc) v. Northern Regional Health Authority* HC Auckland CP440/94, 7 December 1994, 24.

ii Exclusionary abuses

Predatory pricing

It is not disputed that in principle, predatory pricing can constitute a breach of Section 36.⁴² However, the New Zealand courts have proven reluctant to condemn price cutting as anticompetitive, on the basis that the reduction of prices generally reflects competition at work,⁴³ and that it is not desirable for powerful firms to be reluctant to engage in discounting out of concern for breaching Section 36.⁴⁴

The leading New Zealand decision on predatory pricing is *Carter Holt Harvey Building Products Ltd v. Commerce Commission*.⁴⁵ This case concerned a dominant glasswool insulation manufacturer, which in response to the launch of a competing wool-based insulation product, developed its own wool-based product and for a period of seven months, offered it on a '2-for-1' basis. This translated to a per-bale price that was between 17 per cent and 28 per cent below the dominant firm's supply cost. Overturning the decisions of the New Zealand High Court⁴⁶ and Court of Appeal,⁴⁷ the majority of the Privy Council controversially held that the dominant firm had not misused its market power for the purpose of Section 36; rather, its sustained below-cost pricing strategy was held to be simply a rational response to strong competition.

In *Carter Holt Harvey*, the majority of the Privy Council was at pains to emphasise that Section 36 is not intended to deny a dominant firm the opportunity to protect its market share by engaging in price cutting strategies:

*a monopolist is entitled like everyone else to compete with his competitors. He is not required to stand idly by as he sees his market share being eaten into by others who are not dominant. That would be stifling competition – the very thing the section [Section 36] is designed to promote, for the consumer's benefit.*⁴⁸

Significantly, following *Carter Holt Harvey*, a powerful firm will only be guilty of misusing its market power in a predatory pricing case if (1) the firm prices below a measure of variable cost for a period of time; and (2) there is the potential for the firm to recoup its losses at a later date. On the issue of recoupment, the majority of the Privy Council held:

There must . . . be a causal connection between the dominant position and the conduct which is alleged to have breached section 36. That will not be so unless the conduct has given the dominant firm some advantage that it would not have had in the absence of its dominance. It is the ability to recoup losses because its price-cutting has removed competition and allows it to charge supra-competitive

42 See, for example, Commerce Commission, *Taking Advantage of Market Power Fact Sheet and Predatory Pricing or Competitive Price Matching? Case Study*, see note 6.

43 *Port Nelson v. Commerce Commission*, see note 40 at NZBLC 104,158; NZLR 572.

44 *Carter Holt Harvey v. Commerce Commission*, see note 25 at [66].

45 *ibid.*

46 *Commerce Commission v. Carter Holt Harvey Building Products Group Ltd* (2000) 9 TCLR 535.

47 *Carter Holt Harvey Building Products Group Ltd v. Commerce Commission* [2001] NZCA 298; (2001) 10 TCLR 247.

48 See note 25 at [23].

*prices that harms consumers. Treating recoupment as a fundamental element in determining a claim of predatory pricing provides a simple means of applying the section without affecting the object of protecting consumer interests . . .*⁴⁹

Margin squeeze

A margin squeeze occurs where a vertically integrated firm with market power in respect of the supply of an upstream input sets its prices in the upstream and downstream markets at levels that prevent efficient competitors from operating profitably in the downstream market. In New Zealand, the so-called ‘Data Tails’ litigation involved an alleged margin squeeze where the Commission asserted that Telecom (which owned New Zealand’s national telecommunications network) overcharged downstream competitors for access to its wholesale network, which prevented them from offering retail end-to-end high-speed data services on a competitive basis. Both the High Court⁵⁰ and the Court of Appeal⁵¹ held that Telecom had breached Section 36 by imposing a margin squeeze on its downstream competitors. Significantly, the High Court effectively treated the case as a constructive refusal to deal.⁵² After holding that Telecom possessed requisite market power for the purposes of Section 36, it then approached the question of whether Telecom had ‘taken advantage’ of this market power by asking firstly whether Telecom was obliged to grant competitors access to its wholesale network, and secondly whether the prices Telecom charged its competitors were greater than the prices it would have charged in a hypothetical competitive market. On appeal, the Court of Appeal clarified that under the requisite counterfactual test, the first limb of the inquiry involved asking whether a non-dominant Telecom would in fact grant competitors access to its wholesale network.⁵³

Exclusive dealing

While exclusive dealing arrangements can benefit competition (for instance, by encouraging investment by retailers and distributors in advertising and after-sales care), they can also raise competition issues where they deny competitors access to an important input or a significant distribution channel. As exclusive dealing arrangements are typically bilateral, they lend themselves to challenge under Section 27 of the Act, which prohibits firms from entering into contracts, arrangements or understandings with the purpose or effect of substantially

49 *ibid.*

50 *Commerce Commission v. Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004- 404-1333, 9 October 2009; *Commerce Commission v. Telecom Corporation of New Zealand Ltd* HC Auckland CIV-2004- 404-1333, 19 April 2011.

51 *Telecom Corporation of New Zealand Ltd v. Commerce Commission* [2012] NZCA 278; *Telecom Corporation of New Zealand Ltd v. Commerce Commission* [2012] NZCA 344.

52 See Bradley Aburn, ‘Margin Squeezing: The Superfluous ‘Fancy Phrase’ of New Zealand Competition Law’ (2012) *Auckland University Law Review* 216 for a useful discussion.

53 See note 51 at [131] – [132]. The Court of Appeal found that while the High Court had not expressly referred to it, in context it had applied counterfactual analysis, and was correct in finding that Telecom was obliged to grant competitors access to its wholesale network, in the sense that in the agreed counterfactual a non-dominant Telecom would not rationally have refused to grant such access. For an Australian example of misuse of market power in respect of the pricing of an essential input, see *Queensland Wire Industries Pty Ltd v. Broken Hill Pty Co Ltd* (1989) 167 CLR 177; [1989] HCA 6.

lessening competition. However, a breach of Section 36 will occur if a firm uses its substantial market power through an exclusive dealing arrangement for one of the purposes prohibited under Section 36(2)(a)–(c).⁵⁴

Leveraging

Leveraging market power through tying or bundling will constitute a breach of Section 36 if it involves a firm taking advantage of its market power for a purpose proscribed under Section 36(2)(a)–(c). The leading New Zealand case on tying is *Port Nelson Ltd v. Commerce Commission*.⁵⁵ Port Nelson possessed market power in respect of the supply of tugs, but required tug users to also purchase pilotage services from the Port. The High Court held that the ‘tug tie’ (as it was referred to in the litigation) breached Section 36.⁵⁶ This finding was upheld in the Court of Appeal.

In relation to Section 36, bundling has also been considered by the Commission in two investigations. The first concerned the compulsory bundling of ‘dinner, bed and breakfast’ by the sole hotelier in the tourist resort village of Aoraki/Mt Cook. The hotelier was found to have breached Section 36 by leveraging its market power in the accommodation market to foreclose competition in the local restaurant market.⁵⁷

The second investigation considered Telecom’s bundling of broadband services. Telecom offered a NZ\$10 discount on broadband to customers who also purchased homeline (local calls) and toll services. Telecom had market power in respect of local calls, but not in respect of tolls or broadband. In its investigation report, the Commission outlined a test for determining whether bundling constituted ‘taking advantage’ of market power for the purposes of Section 36: could an equally efficient supplier of a competitive product compete with the bundled discount? To answer this question, the Commission spread the discount across the competitive services. As the average margin was found to be positive, no breach of Section 36 was found to have occurred, since efficient competitors could earn positive margins over the combined calling and broadband offering when they sold similar bundles.⁵⁸

Refusal to deal

The starting proposition under New Zealand law is that outside of certain regulated industries,⁵⁹ firms are generally permitted to determine for themselves who they will do business with.⁶⁰ There is one caveat, however: while the ‘essential facilities doctrine’ has been discussed in a number of cases,⁶¹ these have not been determinative and it is an open question

54 See, for example, *Auckland Regional Authority v. Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647, (1987) 2 TCLR 141, (1988) 2 NZBLC 103,041 (HC). The argument that an exclusive dealing arrangement breached Section 36 was also advanced in *Bond & Bond Ltd v. Fisher & Paykel Ltd* (1986) 2 TCLR 79, (1987) 1 NZBLC 102,622 (HC); *Marine Resources (NZ) Ltd (in rec) v. Natural Gas Corp of NZ Ltd* HC Hamilton CP237/91, 8 April 1993; *Turners & Growers v. Zespri Group*, see note 30.

55 See note 40.

56 *Commerce Commission v. Port Nelson Ltd* [1995] TCLR 406.

57 See Commerce Commission, *Where Tying Harms Competition Case Study*, see note 6.

58 Commerce Commission, Investigation Report, *Telecom Bundling of Broadband Services* (21 December 2007).

59 Such as telecommunications (in respect of interconnection) and the dairy industry (in respect of raw milk).

60 Subject to their obligations under New Zealand’s human rights legislation.

61 See, for example, *Auckland Regional Authority v. Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647; (1987) 2 TCLR 141, (1988) 2 NZBLC 103,041 (HC); *Union Shipping NZ Ltd v. Port Nelson*

as to whether the doctrine operates in New Zealand. In *Commerce Commission v. Bay of Plenty Electricity Ltd*,⁶² the New Zealand High Court cited with approval the High Court of Australia's approach to the essential facilities doctrine in *Queensland Wire Industries Pty Ltd v. Broken Hill Proprietary Co Ltd*, and indicated that were the doctrine accepted in New Zealand, four requirements would need to be made out: (1) for a facility or input to be considered 'essential', it must not be practically duplicable or economically viable to replicate; (2) where an input is used to produce a product in a downstream market, there must be no close substitutes to the downstream product; (3) the dominant firm must control the essential facility or input; and (4) there must not be any legitimate business rationale for the refusal to deal.

ii Discrimination and exploitative abuses

Section 36 does not prohibit discriminatory or exploitative practices such as price discrimination or excessive pricing by a firm with a substantial degree of market power, unless, in engaging in the relevant conduct, the firm in question takes advantage of its market power for one of the exclusionary purposes listed in Section 36(2)(a)–(c). One scenario in which a breach of Section 36 can occur is where a monopoly input supplier competes with its customers in a downstream market, and sets its upstream prices so high as to prevent its customers from competing effectively in the downstream market, such as occurred in the 'Data Tails' litigation.⁶³

Significantly, Part 4 of the Act provides for the regulation of the price and quality of goods and services sold in markets where there is little or no competition and little or no likelihood of a substantial increase in competition.⁶⁴ Regulation under Part 4 of the Act is not imposed lightly, however: there must be scope for the exercise of substantial market power in relation to the relevant goods or services, and the benefit of regulating the goods or services under Part 4 must materially exceed the costs of regulation.⁶⁵ Regulation is imposed by way of an Order in Council issued by the Governor General, outlining the goods or services to be regulated and the types of regulation that will apply.⁶⁶ An Order in Council may only be issued upon the recommendation of the Minister of Commerce,⁶⁷ following a formal inquiry by the Commission into the state of competition in the relevant market.⁶⁸ Currently, Part 4 of the Act applies to electricity lines services,⁶⁹ gas pipeline services⁷⁰ and certain services supplied at Auckland, Wellington and Christchurch airports.⁷¹

Under the Telecommunications Act 2001, the Commission also regulates certain fixed-line and mobile services by setting the price or access terms, or both, for those services, and reports on competition, performance and developments in telecommunications

Ltd [1990] 2 NZLR 662, (1990) 3 NZBLC 101,618 (HC); *Telecom Corp of New Zealand Ltd v. Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

62 HC Wellington CIV-2001-485-917, 13 December 2007.

63 Discussed above under the heading 'Margin squeeze'.

64 Section 52 of the Act.

65 Section 52G.

66 Section 52N.

67 Section 52L and M.

68 Section 52H – K.

69 See Part 4, Subpart 9.

70 See Part 4, Subpart 10.

71 See Part 4, Subpart 11.

markets. These functions aim to promote competition in telecommunications markets for the benefit of consumers.⁷² Amendments to the Telecommunications Act 2001 passed on 7 November 2017 also provide for the regulation of ultra-fast broadband (UFB) fibre networks. Under the new regulatory regime, the Commission is responsible, inter alia, for regulating the maximum revenue that the largest UFB network operator can generate and the quality of the service it must deliver, and operating an information disclosure regime in respect of local fibre companies.

Under the Dairy Industry Restructuring Act 2002, the Commission also conducts annual reviews of Fonterra's⁷³ milk price manual and its calculation of the 'base milk price'.

V REMEDIES AND SANCTIONS

i Sanctions

Section 80 of the Act allows the courts to impose pecuniary penalties for contraventions of Part 2 of the Act, which includes Section 36.

A penalty of up to NZ\$500,000 may apply to an individual. For companies, the court may impose penalties of up to the greater of: NZ\$10 million; or where the commercial gain resulting from the contravention can be ascertained, three times the value of that commercial gain; or where the commercial gain cannot be ascertained, 10 per cent of turnover of the company and its interconnected companies. In many instances the turnover of the company and interconnected companies will produce the largest maximum penalty.

Penalties can also be imposed on persons who are accessories, that is, who have aided, abetted, procured, induced, attempted to induce or have been in any way, directly or indirectly, knowingly concerned in or a party to a contravention of Section 36.⁷⁴ Accessory liability is widely cast and can extend to directors, employees and professional advisers. However, due to the requirement for actual knowledge, advisers, directors and staff will not be liable for innocent conduct.

Section 82 of the Act allows for damages to be awarded for loss or damage caused by a contravention of Part 2, and Section 82A allows for an award of exemplary damages. Damages or exemplary damages, or both, may be in addition to a pecuniary penalty already ordered for the same conduct.⁷⁵ To date, no damages have been awarded under Section 82 for misuse of market power as the actions have either failed or been settled.

ii Behavioural remedies

The Act authorises the court to grant an injunction to restrain a person from engaging in any contravention or attempted contravention of Part 2, or from engaging in conduct that would give rise to accessory liability under the Act.⁷⁶ Injunctions can be permanent or interim.⁷⁷ The Commission is not required to give an undertaking as to damages when applying for an injunction.⁷⁸

72 Section 18 of the Telecommunications Act 2001.

73 New Zealand's largest dairy cooperative.

74 Section 80(1) of the Act.

75 Section 82A(2).

76 Section 81.

77 Section 88(2).

78 Section 88A.

Section 89 contains additional remedies that allow a court where a contract or covenant breaches the Act to vary, cancel or require a party to the contract or covenant to compensate another party to the contract.⁷⁹ More widely, the court has the power to make such an order or orders as it thinks appropriate against those persons involved in a breach of Part 2.⁸⁰ This can include the power to grant declarations in respect of past or future conduct.⁸¹

iii Structural remedies

The Act does not currently provide structural remedies for a contravention of Section 36. This could change as part of the review of Section 36 being carried out by the New Zealand Government.

VI PROCEDURE

The Commission is responsible for enforcement of the Act and has wide powers to investigate and prosecute breaches of the Act. The Commission cannot investigate all suspected or alleged breaches of the Act, and consequently it has developed and published guidelines on investigation and enforcement. The key policies of relevance to investigations into misuse of market power are the Enforcement Response Guidelines,⁸² Enforcement Criteria⁸³ and Model Litigant Policy.⁸⁴

The Enforcement Response Guidelines describe the potential enforcement responses available and include compliance advice letters, warning letters, injunctions, civil proceedings⁸⁵ and negotiated settlements.

In deciding whether to investigate, and the type of enforcement appropriate, the Commission considers the following enforcement criteria: the extent of detriment suffered by consumers or businesses; the seriousness of the contravening conduct; and the public interest in the matter.

The Model Litigant Policy describes how the Commission must act in litigating matters under the Act. This includes dealing with litigation promptly, efficiently and without unnecessary delay or expense, considering the possibilities for alternate means of avoiding or resolving litigation and at all times acting according to the Commission's purpose of promoting dynamic and responsive markets.⁸⁶

79 Sections 89(2) and (3).

80 Section 89(1).

81 The courts also have an inherent power to grant declaratory relief under the Declaratory Judgments Act 1908.

82 (2013) <<https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>>.

83 <<https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>>.

84 (2009) <<https://comcom.govt.nz/about-us/our-policies-and-guidelines/model-litigant-policy>>.

85 New Zealand has criminal liability in the Act for a few specific matters relating to cartel conduct. Broader criminal liability for cartel conduct is set to be introduced in 2021 under the Commerce (Criminalisation of Cartels) Amendment Act 2019.

86 See note 83, 1.

i Investigation

The Act grants the Commission wide powers of investigation including to require a person to supply information, produce documents or appear before the Commission to give evidence.⁸⁷ These powers are available to the Commission regardless of whether proceedings have been commenced.⁸⁸ The Commission may make a voluntary information request before using the investigation powers contained in the Act. The Act also permits an employee of the Commission to conduct a search under a warrant (i.e., dawn raids).⁸⁹ Information requests may be made of the person being investigated but also of other industry participants.

A person may not refuse to comply with a notice issued under Section 98 on the grounds it may incriminate that person.⁹⁰ Refusal to comply with a Section 98 notice, giving false or misleading information or evidence, or resisting or delaying a search warrant are all offences⁹¹ punishable, in the case of an individual, by a maximum fine of NZ\$100,000, and in other cases a maximum fine of NZ\$300,000.⁹²

The Commission's power to request information or documents under Section 98 must be used to investigate potential breaches of the Act and not to probe market activity generally.

An investigation can be initiated by the Commission of its own volition or be prompted by a complaint from a third party.

When investigating a breach of Section 36A of the Act, the Commission can require information or documents from a person ordinarily resident in Australia or who carries on business in Australia.⁹³ Where the Commission has entered into a cooperation arrangement with an overseas regulator or government,⁹⁴ the Commission can provide compulsorily acquired information and investigative assistance to the overseas regulator.⁹⁵

ii Enforcement measures

The Commission has a range of methods that it uses to enforce Part 2 of the Act, with less significant infractions being dealt with using low level or administrative responses (such as a 'compliance advice letter'⁹⁶ or warning letter) through to more serious breaches being pursued in the courts.⁹⁷

87 Section 98A.

88 Section 98G.

89 Section 98A.

90 Section 106(4).

91 Section 103(1).

92 Section 103(4).

93 Section 98H. Section 36A prohibits taking advantage of power in trans-Tasman markets. It is sufficient in complying with an information request under Section 98H to supply the information or documents requested to the Australian Competition and Consumer Commission (ACCC) (see Section 98H(2)). Likewise, the Commission may receive information and documents on behalf of the ACCC where the ACCC requires any information or documents from a person resident or carrying on business in New Zealand (see Section 99A).

94 The Commerce Commission currently has cooperation arrangements with Australia and Canada.

95 Section 99I.

96 The *Enforcement Response Guidelines*, see note 81, contain useful summaries of the Commission's use of 'compliance advice letters' and 'warning letters' (see [30]–[44]). Unlike compliance advice letters, warning letters are generally published on the Commission's website.

97 Where possible, the Commission prefers to encourage compliance with the law through the use of non-enforcement options (see *Enforcement Response Guidelines*, see note 81 [10]).

iii Negotiated settlements

The Commission has stated that it is receptive to requests to resolve matters early through negotiation and agreement.⁹⁸ An approach to make a settlement proposal can be on a 'without prejudice' basis for civil proceedings.

A negotiated settlement can be used before proceedings commence with an out-of-court settlement, or during proceedings. An out-of-court settlement requires an admission of liability, with the Commission and the party under investigation agreeing on the terms of settlement. With an in-court settlement, the defendant admits liability according to an agreed summary of fact and the parties make a joint submission to the court on the appropriate penalty; however, the penalty will ultimately be set by the court.⁹⁹ Settlement outcomes are generally published.

iv Court proceedings

The Commission is more likely to consider issuing court proceedings where: the conduct is of significant public interest or concern, the conduct is deliberate or repeated, there has been a disregard for the law, the detriment is significant, for deterrence reasons or if the Commission wants the court to determine an important area of the law.¹⁰⁰

Very few cases regarding breach of Section 36 have been fully litigated as the cases are often settled. Additionally in the last decade, lack of certainty over the counterfactual test when considering a potential breach of Section 36 has made it difficult for the Commission to undertake court proceedings.

VII PRIVATE ENFORCEMENT

Damages, exemplary damages and injunctions are available for private enforcement of a breach of Section 36.¹⁰¹ Pecuniary penalties are only available if the action is brought by the Commission. There have been very few private enforcement actions brought in the last decade, due in large part, in the authors' view, to the difficulties with the application of Section 36 and the counterfactual analysis used by the New Zealand courts in order to determine whether a person has taken advantage of its substantial market power.

VIII FUTURE DEVELOPMENTS

In recent years, significant questions have been raised as to whether Section 36 sufficiently safeguards the New Zealand economy from unilateral abuses of market power. The Commission and the Australian Competition and Consumer Commission have both been critical of Section 36's preoccupation with purpose, and the counterfactual test for determining whether a firm has 'taken advantage' of its market power.

A public consultation run by the Ministry of Business, Innovation and Employment (MBIE) from late 2015 to mid-2016 concluded that further work should be carried out on

98 *ibid* [65].

99 See for example *Commerce Commission v. New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730.

100 *Enforcement Response Guidelines*, see note 81 [51] – [53] sets out the Commission's approach to issuing court proceedings and lists these and other factors as relevant.

101 Sections 81, 82(1) and 82A of the Act.

the costs and benefits of adopting alternative wording to Section 36, and the extent of actual harm resulting from Section 36 as currently drafted. In view of MBIE's recommendations, Cabinet invited the Minister of Commerce and Consumer Affairs to report back to the government in 2018 on whether it would be appropriate to produce an 'options paper' on Section 36.

In parallel with these investigations, Australia conducted a thorough review of its misuse of market power provision (Section 46 of the Competition and Consumer Act 2010 (Cth)), upon which New Zealand's own Section 36 was based. The Australian review concluded that the Australian economy would be better served by a unilateral misuse of market power provision that focused on whether a firm's conduct had an anticompetitive effect, rather than on whether the firm's purpose was anticompetitive. The Australian government announced in March 2016 that it would be implementing this law change, and in August 2017, Section 46 was amended accordingly.

The recent amendments to the Australian law have profoundly shaped recent discussions in New Zealand concerning the future of Section 36, with MBIE recommending in a Discussion Paper released for public consultation in late 2018¹⁰² that New Zealand adopt an adapted version of the new Australian legislation as follows:

A person [which, for the avoidance of doubt, includes a company or other entity] that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.

Prior to the outbreak of covid-19, the government was expected to make final policy decisions on Section 36 in early 2020. It is anticipated that this process may be delayed due to the government's focus on New Zealand's pandemic response.

102 See note 33.

RUSSIA

*Maxim Boulba and Maria Ermolaeva*¹

I INTRODUCTION

Federal Law No. 135-FZ on Protection of Competition dated 26 July 2006 (the Competition Law) is the main statute applicable to the behaviour of dominant undertakings. Article 5 of the Competition Law contains the definition of dominance, while Article 10 prohibits its abuse. Special rules can be found in Federal Law No. 147-FZ on Natural Monopolies dated 17 August 1995, and in industry-specific legislation, such as Federal Law No. 35-FZ on Electric Power Industry dated 26 March 2003 and Federal Law No. 126-FZ on Communication dated 7 July 2003. Decrees of the government are adopted in furtherance of the statutory provisions; these mainly govern non-discriminatory access to certain markets, goods, services or infrastructure. The Russian competition authority, the Federal Antimonopoly Service (FAS), is in charge of the investigation and enforcement of dominance rules. In addition, the FAS has issued several regulations and guidelines relating to, for instance, market definition, determination of monopolistically high and low prices, assessment of business practices of dominant market players, application of Article 10 of the Competition Law and collective dominance.

II YEAR IN REVIEW

While abuse of dominance is one of the enforcement priorities of the FAS, the overall number of cases relating to abuse of dominance is generally declining. This reduction is mostly owing to amendments to the Competition Law that introduced a revised definition of abuse of dominance and a widespread use of warnings.

Traditionally, the authority pays particular attention to certain industries of ‘social importance’: electrical energy and infrastructure (and, more generally, natural monopolies); life sciences; oil and gas; telecommunications; and transportation. Having looked into the activities of Google, Microsoft and Apple, the FAS continues to scrutinise the practices of IT and digital companies. The correlation between intellectual property (IP) and abuse of dominance remains a topical issue in Russia.

Most notably, the FAS uncovered the following prohibited practices: abuse of collective dominance by major Russian mobile operators; anticompetitive conduct of two Russian power supply companies that led to the infringement of consumers’ rights (they had to pay for the capacity that was not actually provided in the amount of over 950 million roubles) and

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ultimately resulted in changes to the operation of the wholesale market; and establishing of discriminatory conditions in the area of gasoline trading by a key oil company (this company complied with the warning issued by the FAS, so no further proceedings were initiated).

III MARKET DEFINITION AND MARKET POWER

Further to Article 5 of the Competition Law, dominance is defined as the position of an undertaking or a group of undertakings allowing them to have a decisive influence on the general terms of circulation of goods on a relevant market, eliminate other entities from the relevant market or impede other entities' access to this market. Market share of an undertaking is the cornerstone in the assessment of a dominant position.

The dominance standard is primarily economic. The associated test is discussed in detail in the FAS Guidelines on Application of Article 10 of the Competition Law issued on 7 June 2017. In the meantime, the approach of the authority regarding market definition, which is the essential part of the analysis, is outlined in the FAS Regulations No. 220 on Procedure for Assessment of Competition on the Market dated 28 April 2010 and in the FAS Guidelines No. 17 dated 10 April 2019. Market analysis under the Regulations is necessary in antitrust cases involving abuse of dominance. Since the rules provided for in the Regulations are often rather broad, the FAS often enjoys considerable discretion in defining markets.

As part of the market assessment, the FAS generally conducts its own analysis of an industry, existing suppliers and customers, and specifics of the business. The FAS prepares a questionnaire that covers potential interchangeability of the goods in question, and distributes it to the market players in order to collect information from the inside. Initially, the temporal boundaries are defined. One year (or the period during which the market exists, if it is less than a year), including the time when an infringement took place, constitutes a minimum period of time relevant for the market analysis.

The definition of the relevant product market, which is based on the concept of interchangeability, may turn out to be a rather sensitive issue. The geographical boundaries of a market are normally defined as the territory of the Russian Federation or its regions and municipalities. To assess the geographic boundaries of the market, the FAS identifies the territory within which it is feasible for a customer, from a business and technical perspective, to buy similar products. Other factors that are taken into account by the authority include information on the region, pricing structures and differences in prices throughout the Russian territory, and the structure of goods flow.

The Competition Law applies to both dominant sellers and buyers (naturally, some of the prohibitions are only relevant for dominant suppliers); in certain instances, arguments concerning buyer power are taken into account by the FAS.

As to the market share thresholds, the general rule is that a company is deemed to be dominant if it has a market share of over 50 per cent unless the FAS determines otherwise (presumption of dominance). Under these circumstances, an undertaking is entitled to provide evidence to the contrary suggesting that it does not exercise monopoly power; however, these claims are hardly ever successful.

Further, dominance may be established where a company has a market share of less than 50 per cent. If an undertaking's market share is between 35 and 50 per cent, it can be considered as a dominant entity should the FAS manage to prove it so on the basis of criteria such as:

- a* the relative stability of its market share;
- b* its correlation with the market shares of competitors;

- c* accessibility of the market to new competitors (barriers to market entry); and
- d* other factors characteristic of the market.

An undertaking with a market share of less than 35 per cent can be viewed as dominant only in a situation of collective dominance or if the thresholds provided for in industry-specific legislation apply.

Special dominance rules are established in respect of:

- a* telecommunications (a service provider with a market share exceeding 25 per cent is considered as a dominant firm);
- b* river and sea port service providers (a share of more than 20 per cent within a port);
- c* electrical energy (as a general rule, if an entity's share of capacity of the generating facilities or share of the generated electrical energy within the boundaries of the free power transfer zone exceed 20 per cent; or if the share of electrical energy or capacity, or both (bought or consumed) within the boundaries of the free power transfer zone exceeds 20 per cent); and
- d* financial organisations (a financial organisation is dominant if its market share is more than 10 per cent of the only (financial) market in the Russian Federation, or if more than 20 per cent if its products circulate on other markets; and if, within a considerable period of time, its market share has been increasing or always exceeds the above threshold).

The Competition Law rules on unilateral conduct deal with collective dominance. For an undertaking to be considered collectively dominant, the following criteria shall be met:

- a* the aggregate market share of no more than three market players exceeds 50 per cent; or the aggregate market share of no more than five market players exceeds 70 per cent, while the market share of each undertaking concerned exceeds 8 per cent. Further, their market share must remain stable within an extended period of time (of more than a year);
- b* there are barriers to market entry for competitors;
- c* the relevant goods cannot be substituted by other products;
- d* an increase in prices does not result in a corresponding decrease in demand; and
- e* the information on the prices and terms of distribution and sale of goods is publicly available.

The situations of collective dominance are dealt with in the FAS Presidium Guidelines No. 15.

The highest fines in FAS history (several billion roubles) were imposed on major Russian oil companies that abused their position of collective dominance in the form of discrimination.

Finally, an undertaking with a revenue of below 400 million roubles cannot be declared dominant if certain conditions set forth by the Competition Law are met (this exemption is mainly relevant for small and medium-sized enterprises rather than undertakings that have substantial market power).

IV ABUSE

i Overview

Dominance of a market is, in itself, not an infringement. Under Article 10 of the Competition Law, abuse of dominance is defined through its consequences as acts or omissions of a dominant undertaking that result or may result in the prevention, restriction or elimination of competition; or the infringement of rights of other undertakings in a field of business activities or an unlimited number of consumers; or both (effects-based approach).

The Competition Law provides for a non-exhaustive list of types of unilateral conduct that amount to abuse of dominance and are prohibited per se (i.e., there is no need for the FAS to establish a conduct's adverse effect on competition as such):

- a* fixing or maintaining monopolistically high or low prices;
- b* withdrawal of products from circulation if this results in an increase in prices;
- c* imposing unfavourable contractual terms (or contractual terms unrelated to the subject matter of an agreement) on a counterparty;
- d* reducing or terminating the production of goods, works or services without an economic or technological justification;
- e* refusal to deal with certain customers without an economic or technological justification;
- f* establishing different prices for the same product without an economic or technological justification;
- g* fixing high or low prices for financial services without any substantiation (for financial institutions);
- h* establishing discriminatory conditions;
- i* creating barriers to market entry or exit for other undertakings;
- j* failure to comply with the regulatory requirements as to pricing; and
- k* manipulation of prices on the wholesale or retail markets, or both, for electrical energy (capacity).

The FAS is required to prove that an undertaking is a dominant entity and that it has been involved in abusive conduct caught by Article 10. As to the available defences, an undertaking may contest the assessment of its market position as dominant and, as occurs frequently, claim that its behaviour was part of an ordinary business strategy (i.e., competition on the merits), and can be substantiated by commercial and technological reasons. Still, in many cases, the success of these arguments is far from obvious.

More importantly, by statute, an undertaking may provide evidence suggesting that its conduct is admissible only in relation to certain types of abuse (reduction or termination of production, establishing discriminatory conditions and creating barriers to market entry). In particular, potentially abusive conduct may be admissible if it:

- a* does not eliminate competition on the market;
- b* does not impose limitations on third parties; or
- c* results in production improvement, technological progress or increased competitive performance of Russian products, or creates benefits for consumers.

ii Exclusionary abuses

Exclusionary pricing

Exclusionary pricing practices, such as predation, fall under the prohibition on establishing monopolistically low prices. There are two main criteria for a price to be qualified as monopolistically low: it is below the necessary production and distribution costs, as well as the profit; and it is below the price that was formed under competitive conditions in a market with a comparable composition of suppliers and customers and conditions of goods circulation. Margin squeeze is not specifically mentioned in the Competition Law, but this type of abusive behaviour can be viewed as creating barriers to market entry (and fixing monopolistically low prices, as in the case of predatory pricing).

Exclusive dealing

Exclusive dealing practices are caught by the prohibitions of Article 10 of the Competition Law if they result in market foreclosure by creating barriers to market entry or refusal to deal with other market players. Loyalty rebates are not prohibited per se, but should always be treated with caution by dominant undertakings, as rebates are usually viewed by the FAS as price components. Establishing such rebates may be considered as abuse of dominance in the form of discrimination or establishing different prices for the same products.

Leveraging

Leveraging practices, including tying and bundling, are prohibited under the Competition Law and are not uncommon in the FAS' practice. For example, the FAS has looked into such practices in relation to the electrical power industry and insurance. Tying and bundling essentially lead to the imposition of unfavourable terms (terms that are not relevant for the subject matter of the agreement) on a counterparty. There are no uniform criteria, so the FAS usually analyses the economic nature of the parties' arrangement to establish, among other things, whether the customer was duly informed and aware of its options.

Refusal to deal

Unjustified refusal to deal is among the most common types of abuse in the FAS' practice (in particular, in the pharmaceutical industry). Special rules apply to natural monopolists and dominant undertakings with a market share of more than 70 per cent to ensure access to certain products and infrastructure. Currently, refusal to license does not expressly fall foul of the Competition Law requirements. Owing to the IP-related exemption, the prohibitions of Article 10 as to abuse of dominance do not apply to the exercise of IP rights, but the relevant legal framework may change in the near future. The overall abolition of this exemption and the subsequent introduction of such mechanisms as compulsory licensing are being considered.

Dominant market players cannot refuse to enter into a contract with certain customers without a reasonable commercial or technological justification (should it be possible to manufacture or supply such products). The following shall be confirmed by the FAS to establish the violation:

- a* a customer contacted a dominant undertaking and sent a corresponding request;
- b* a dominant undertaking refused to deal or supply (such a refusal can take different forms; it can be indirect or implied (e.g., by delaying responses or ignoring negotiations));
- c* a dominant undertaking can (objectively) procure the production or supply of the products; and
- d* a dominant undertaking does not have any proper commercial or technological grounds to substantiate its refusal to deal.

When reviewing cases on abusive refusal to deal by a dominant undertaking, the FAS has also looked into the potential interplay between the antitrust and anticorruption concerns. According to the FAS, refusal to enter into an agreement with a potential distributor should be based on established facts and decisions of the competent bodies rather than any informal sources (mass media, online publications, phone calls, private investigators, etc.). The FAS is of the opinion that a Russian counterparty is supposed to act in compliance with Russian law, which does not provide for an obligation to undergo a compliance check essentially relating to foreign anticorruption laws (this requirement can also amount to exploitative abuse).

The ability to present evidence and build a well-grounded position is of the utmost importance in such cases. The FAS decides on a case-by-case basis whether there are valid reasons for a dominant undertaking not to deal with a particular distributor. In certain instances, the impracticality and unprofitability of cooperation for a dominant entity were found to be proper and sufficient grounds.

iii Discrimination

All forms of discrimination, including discriminatory pricing and other issues relating to interactions with counterparties, are prohibited for dominant entities. Thus, customers in the same position should be offered comparable deals, and customers not in the same position should be differentiated on an objective basis according to their divergent circumstances. FAS and court practice suggests that the same pricing policy shall be applied to all counterparties, whether they are part of the same group or not.

As suggested by the FAS' practice, the basic principle here is the following: while the 'freedom of contract' concept still applies, prices and rebates offered by a dominant undertaking shall be substantiated (i.e., based on transparent, objective, clear and well-grounded criteria), and at the same time shall not be discriminatory (e.g., they shall not be drastically different in comparable situations).

Additional rules preventing discrimination can be found in sector-specific legislation, such as Federal Law No. 381-FZ on Fundamentals of State Regulation of Trading Activities in the Russian Federation dated 28 December 2009, which governs relationships between retail food chains and their suppliers and specifically prohibits discrimination (and other forms of abuse).

iv Exploitative abuses

Prohibitions of Article 10 of the Competition Law apply to exploitative abuses. Excessive pricing is assessed in the same way as predatory pricing in terms of the Competition Law provisions preventing dominant undertakings from establishing monopolistically high and low prices. In most cases, other types of exploitative abuse are qualified as imposing unfavourable and excessive terms on counterparties.

V REMEDIES AND SANCTIONS

i Sanctions

The most common penalties imposed on a dominant undertaking as a result of its abusive conduct are administrative fines of up to 1 million roubles (if the infringement does not result in an adverse effect on competition) or turnover fines of up to 15 per cent of the company's turnover in the market concerned for the preceding year. Company officials may be held liable (and be fined up to 50,000 roubles or disqualified for up to three years). The FAS can only impose administrative fines on offenders; disqualification (a prohibition to hold certain posts or carry out certain activities) can be applied only by a court.

Both mitigating circumstances (e.g., an offender stopped a violation, contributed to an investigation or took certain steps to remedy a violation) and aggravating circumstances (e.g., an offender refused to stop a violation or repeated a violation, or a prohibited practice resulted in damage exceeding 1 million roubles or allowed a dominant firm to generate profit of over 5 million roubles) stipulated in the Code on Administrative Offences are taken into account for the purposes of a fine's calculation and possible reduction.

Alternatively, the FAS is entitled to issue an order requiring an infringer to transfer to the state budget all revenue received as a result of an antitrust violation. It is expressly prohibited to resort to administrative liability (as discussed above) if an offender complied with such an order and transferred the prescribed amount to the budget.

ii Behavioural remedies

Behavioural remedies are clearly preferred by the FAS and are frequently used in practice. The FAS is authorised to issue orders aimed at putting an end to a violation. This is a binding instruction, further to which the undertaking may be obliged to stop its abusive conduct, enter into (amend or terminate) contracts or take other measures to restore competition. Such orders normally describe in detail what actions are expected from a dominant undertaking. Thus, both positive and negative obligations may be imposed on an infringing entity.

In certain instances (particular types of abuse of dominance), the FAS is required to issue a warning (i.e., a specific request to terminate anticompetitive behaviour). If a dominant entity complies with the requirements contained therein within the timeline set forth in the warning, formal proceedings cannot be initiated. Similarly, in this case, a company cannot be held liable for an antitrust violation (i.e., no fines shall be imposed).

This (relatively new) procedure allows the infringing party to deal with the antitrust risks in a relatively straightforward manner; however, it still requires compliance with the terms of a warning. Practically speaking, the number of these cases is rising, so fewer infringements are resulting in investigations. A dominant undertaking will be expected to act, as prescribed in the warning (i.e., enter into an agreement, supply products or ensure a level playing field among its distributors), which may be challenging in practice. In cases of non-compliance, the proceedings continue, and a formal 'case' is initiated.

For completeness, in the most extreme cases, the FAS has a right to invalidate agreements (or certain clauses thereof) through court proceedings.

iii Structural remedies

In accordance with Article 38 of the Competition Law, the FAS may initiate court proceedings aimed at splitting up a dominant undertaking that is engaged in systematic (more than twice in three years) abuse of its dominant position. However, the FAS has never exercised this right and applied structural remedies to dominant entities.

VI PROCEDURE

The FAS investigates antitrust violations and determines whether an undertaking holds a dominant position. The FAS investigates and reviews cases of abuse of dominance, conducts inspections and imposes sanctions on offenders. Its officials have a right to access and inspect premises, offices and documents of a legal entity, request and review any documents and information, and interview those involved.

The FAS initiates investigations within its powers and on its own initiative. Information on alleged abuse can be obtained by the authority from different sources, including data from other state bodies, complaints of individuals and legal entities, publications in the media and the results of its own inspections. A commission composed of FAS officials is set up to review a case once initiated. Dominant undertakings and interested parties may participate in the hearings of the above commission, present evidence and give further clarifications.

Cases are supposed to be reviewed within three months, but this initial term may be extended further for up to six months. On average, cases on abuse of dominance are resolved within six months, while in more complex, high-profile cases, the authority may exceed the above time frame, which is not preclusive, and conduct an in-depth analysis that may easily take more than one year.

The Competition Law does not provide for mechanisms such as early resolution. Settlement procedures are not available at the stages of an FAS investigation and a review of the case. An amicable settlement agreement can be entered into with the FAS when a decision of the FAS is appealed in court. A settlement agreement must be approved by the court and is binding on the parties (the dominant entity and the FAS). The settlement implies that the offender is required to acknowledge the violation, while the FAS agrees to reduce the fine. Additional behavioural commitments may be imposed on the dominant firm. From a practical perspective, settlement agreements are viewed as something extraordinary, and are often entered into in high-profile cases (e.g., *Google*).

FAS decisions can be appealed to the commercial courts within three months of the date of the decision on abuse of dominance. It is possible to appeal decisions of the regional offices of the FAS to the FAS Presidium (within one month of a decision being issued). This internal appeal is allowed in situations where a decision of the regional office is not in line with the FAS' practice and the uniform application of the Competition Law by the authority. If an appeal is filed with the FAS Presidium, then further appeal to court is still allowed, but only within one month. Dominant undertakings usually prefer to challenge FAS decisions; however, FAS decisions stand in courts in the absolute majority (more than 90 per cent) of cases.

VII PRIVATE ENFORCEMENT

Although a private right of action is possible under Russian law, and there have been several successful actions brought by private claimants following abuse by a dominant undertaking, for the time being, private antitrust enforcement does not play a large role. A private action may be initiated before the court by any person whose rights and interests have been violated by an antitrust infringement. General procedural rules apply to the review of private antitrust actions and their funding: legal costs (stamp duty and, within reasonable limits, legal fees) may be recovered from the defeated party.

By way of illustration, a private claimant may seek to have access to the infrastructure of a dominant entity or to enter into a contract with it. Further, actual damages and lost profits can be claimed. For example, in 2015, a dominant pharmaceutical company (Teva Pharmaceutical Industries) was ordered to pay around 408 million roubles in damages (lost profit) to its distributor for refusal to supply.²

Difficulties relating to the calculation of damages (in particular, lost profit) and associated high standards of proof traditionally adhered to by the Russian courts are among the major problems preventing the development of private antitrust actions. There is a clear preference for government enforcement by the FAS; market players are generally reluctant to opt for private enforcement. The FAS is adamant about changing the existing situation: its Guidelines on Proof and Calculation of Damages Resulting from Antitrust Violations shed some light on certain aspects of private litigation.

2 Case No. A40-14800/2014.

To obtain damages, a plaintiff is supposed to prove a violation of the Competition Law, the existence of damage (including the amount), and the cause-and-effect relationship between the violation and the inflicted damage. Naturally, an FAS decision establishing a violation is instrumental during the court proceedings, but it does not lower the burden of proof imposed on the plaintiff (as to the amount of damage and the cause–effect relationship). While an FAS decision serves as evidence, the FAS in any case urges future plaintiffs to be more active in collecting and presenting evidence in the course of private antitrust proceedings.

The FAS has always been a proponent of class actions to deal with antitrust matters and has even drawn up several draft laws to this end. Traditionally, the concept of class action existing in common law legal systems has not been known to Russian law; while a general concept of collective (group) action (not specifically aimed at antimonopoly issues) has been modernised, private antitrust litigation remains a complex, somewhat expensive and, therefore, highly unpopular course of action.

VIII FUTURE DEVELOPMENTS

The concept of antimonopoly compliance has finally been introduced to the Competition Law. Implementing an antimonopoly compliance system is not compulsory. However, if a company or group of companies decides to implement such a system, it must make sure that the internal documents it adopts to this end include the following: requirements for the assessment of antimonopoly risks within the company; measures aimed at reducing these risks; monitoring measures; the procedure for informing employees of the compliance system; and information about the company's antimonopoly compliance officer.

Companies can apply to FAS to get confirmation that their internal documents on antimonopoly compliance are in line with the legislation. The FAS believes that putting in place antimonopoly compliance will help prevent violations by companies, including dominant entities. At the same time, the new law is silent on whether liability can be mitigated or excluded for violations by companies that have implemented a compliance system cleared with the FAS.

Further amendments to the Competition Law are to be expected in the near future: they may cover such topics as correlation between IP and antitrust regulations and issues relating to the digital economy.

Currently, the prohibitions on abuse of dominance do not apply to conduct associated with the exercise of exclusive rights to IP. Still, fairly recent cases support the FAS' outlook on the interplay between IP and antitrust (dominance): as long as rights holders can benefit from the existing exemption, there is room for abusive conduct (according to the FAS, IP rights should not create any benefits in terms of the circulation of products in the market). The FAS tends to view the above immunity as obsolete; it seeks to exert control over unilateral conduct and contractual arrangements in the area of IP, and to look into existing practices in terms of their compliance with the Competition Law (in particular, in relation to the pharmaceutical industry).

Finally, the FAS seeks to elaborate its approach as to the effect of pricing algorithms, digital platforms and, more generally, use of big data on the market position and associated practices.

SINGAPORE

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I INTRODUCTION

Competition law in Singapore is governed by the Competition Act (Chapter 50B) (the Act), and is enforced by the Competition and Consumer Commission of Singapore (CCCS).² Section 47 of the Act, which came into force on 1 January 2006, prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position, in any market in Singapore (the Section 47 Prohibition). The CCCS has issued the CCCS Guidelines on the Section 47 Prohibition 2016 (the Section 47 Guidelines),³ which sets out further details on its administrative approach to the enforcement of the Section 47 Prohibition.

Potentially abusive conduct will fall for consideration under Section 47 of the Act, where it has (or could potentially have) an effect on any market within Singapore. The Section 47 Prohibition requires a dual finding that the undertaking in question holds a dominant position within a relevant market, and that it has engaged in conduct that constitutes an abuse of that position.

Undertakings in this context includes individuals operating as sole proprietorships, as well as companies, partnerships, cooperatives, societies, business chambers, trade associations and non-profit making organisations, regardless of legal and ownership status (foreign or local, government or non-government) and the way in which they are financed. Section 33(4) of the Act provides for agreements entered into or any conduct on the part of the Singapore government, statutory bodies or any person acting on their behalf, to be exempted.

An illustrative list of conduct that could be considered abusive includes:

- a* predatory behaviour towards competitors;
- 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 by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.⁴

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2 <https://sso.agc.gov.sg/Act/CA2004>.

3 www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-section-47-prohibitions-2016.pdf?la=en&hash=7A9612B3CFCD096645D014141E5F3F10E506BF3A.

4 As set out in Section 47(2) of the Act.

The Section 47 Guidelines state that the Section 47 Prohibition can apply to undertakings in a dominant position outside Singapore that engage in conduct that amounts to an abuse of a dominant position within any market in Singapore.

With reference to the application of the Section 47 Prohibition to state-owned enterprises, the position was considered within *SISTIC*.⁵ In *SISTIC*, the undertaking subject to the investigation was 65 per cent owned by the Singapore Sports Council and 35 per cent indirectly owned by the then Ministry of Information, Communications and the Arts. Ultimately, the CCCS determined that the exclusion provided within Section 33(4) of the Act was not applicable to *SISTIC* because, inter alia:

- a* *SISTIC* was not part of the government or a statutory body in itself;
- b* the contractual terms and conditions under the agreements to which the investigation related were commercial in nature; and
- c* *SISTIC* was not acting on behalf of the government or a statutory body in relation to the commercial arrangements to which the investigation related.

By operation of the Third Schedule to the Act, the Section 47 Prohibition does not apply to undertakings entrusted with the operation of services of general economic interest, conduct required for compliance with laws, conduct necessary for reasons of public policy and that is also the subject of an order by the Minister for Trade and Industry, and conduct resulting in a merger. The following specified activities are also excluded from the Section 47 Prohibition:

- a* the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act;
- b* the supply of piped potable water;
- c* the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- d* the supply of bus services by a licensed bus operator under the Bus Services Industry Act 2015;
- e* the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act;
- f* cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act; and
- g* conduct that relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations or any related activities of the Singapore Clearing House Association.

The Section 47 Prohibition also does not apply to any agreement or conduct that relates to any goods or services to the extent to which any other written law or code of practice issued under any written law relating to competition gives another regulatory authority jurisdiction in the matter.⁶ This effectively includes conduct that is subject to:

- a* the Telecom Competition Code, enforced by the Infocomm Media Development Authority (IMDA);
- b* the Media Market Conduct Code, enforced by the IMDA;
- c* competition provisions under the Electricity Act, enforced by the Energy Market Authority (EMA);

⁵ Case CCS/600/008/07, abuse of a dominant position by *SISTIC.com Pte Ltd*, 4 June 2010.

⁶ As set out in Paragraph 5 of the Third Schedule to the Act.

- d* competition provisions under the Gas Act, enforced by the EMA; and
- e* the Airport Competition Code 2009, enforced by the Civil Aviation Authority of Singapore.⁷

II YEAR IN REVIEW

During 2019, the CCCS publicly announced that it had concluded investigations related to an abuse of dominance, concerning alleged refusal to supply lift spare parts.⁸ The CCCS's concerns centred on the act of lift companies (or distributors) not providing proprietary, essential lift parts to third-party lift maintenance contractors. The CCCS's position was that this conduct could prevent other lift maintenance contractors from effectively competing for contracts to maintain and service lifts of that brand.

In a press release issued by the CCCS on 28 May 2019, the CCCS stated that it had concluded its investigations into the supply of lift spare parts for the maintenance of lifts, after accepting voluntary commitments provided by Chevalier Singapore Holdings Pte Ltd and Fujitec Singapore Corporation Ltd. This follows an earlier press release issued by the CCCS on 28 March 2019 where the CCCS stated that it had accepted voluntary commitments provided by BNF Engineering (S) Pte Ltd and C&W Services Operations Pte Ltd. Including the commitments from the four companies above, the CCCS has, in total, accepted commitments provided by five companies in the course of its investigations.

The voluntary commitments involved the undertakings committing to sell lift spare parts of their relevant brands on a fair, reasonable and non-discriminatory basis, subject to certain terms and conditions. The CCCS considered that these commitments fully addressed its competition concerns in relation to these brands.

The approach of the CCCS in closing its investigation upon receipt of acceptable commitments has been typical of the authority with regard to abuse of dominance investigations since 2013. In the period 2013 to 2015, the CCCS closed three other investigations following the acceptance of commitments, all of which related to exclusivity agreements and potentially anticompetitive terms within supply agreements.

The CCCS also raised concerns in relation to exclusivity:

- a* in a market inquiry into car parts concluded in 2017.⁹ The CCCS noted that the practice of car dealers requiring customers to service or repair their cars exclusively at the respective dealers' authorised workshops, to retain the validity of their car warranties, restricted the ability of independent workshops to compete; and

⁷ www.ccs.gov.sg/resources/useful-links.

⁸ 'Lift Part Suppliers Provide Commitments To CCCS To Facilitate Lift Maintenance In HDB Estates', www.ccs.gov.sg/media-and-consultation/newsroom/media-releases/lift-suppliers-chevalier-fujitec-commitment-acceptance.

⁹ 'Major Car Dealers Amend Warranty Terms that Restrict Competition for Car Servicing and Repairs', www.ccs.gov.sg/media-and-consultation/newsroom/media-releases/major-car-dealers-amend-warranty-terms.

- b* in relation to its investigation into a complaint that an online food delivery provider had entered into exclusive arrangements with certain restaurants.¹⁰ The CCCS eventually concluded that, at the time of its investigation, the exclusive agreements had not harmed competition and the industry was competitive.

Significant decisions of the CCCS issued in 2019

Sector	Investigating authority	Conduct	Case opened
Maintenance	CCCS	Alleged refusal to supply lift spare parts for the maintenance of lifts by Chevalier Singapore Holdings Pte Ltd, Fujitec Singapore Corporation Ltd, BNF Engineering (S) Pte Ltd and C&W Services Operations Pte Ltd. The CCCS concluded its investigations following the acceptance of voluntary commitments from these companies.	July 2016

III MARKET DEFINITION AND MARKET POWER

The concept of dominance in Singapore is considered equivalent to an undertaking having substantial market power. Substantial market power, in turn, arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels, or to restrict output or quality below competitive levels.¹¹

The first step in the assessment of whether an undertaking holds a dominant position is for the CCCS to consider the relevant market. In doing this, the CCCS adopts the use of a hypothetical monopolist test to define markets conceptually. The test aims to identify products that buyers consider substitutable and then identify undertakings that can supply the focal product and its substitutes. In practical terms, the CCCS considers a number of demand-side considerations (including switching costs, patterns in price changes, own or cross-price elasticities and product characteristics, among other factors) and supply-side considerations (including the ease of supply-side substitution, evidence of existing capacity and buyer preferences, among other factors). The CCCS will also consider its own earlier decided cases (if any are relevant to the case at hand) and market definition assessments in overseas jurisdictions (where these may be relevant in light of the unique market circumstances in, and appropriate market definition for, Singapore).

Turning to the assessment of market power within the relevant market, once defined, the Section 47 Guidelines state that there are no market-share thresholds for determining dominance under the Section 47 Prohibition. Notwithstanding this, the Section 47 Guidelines also note that, as a starting point, the CCCS will generally consider a market share in excess of 60 per cent as a likely indication that an undertaking is dominant in the relevant market. However, the Section 47 Guidelines include a caveat that dominance can be established at lower market shares, depending on an assessment of all relevant factors. Moving from this starting point, the CCCS will conduct a detailed assessment of:

- a* existing competitors: The CCCS assesses the competitors to whom buyers might switch if the alleged dominant undertaking sustained prices above competitive levels. Due

¹⁰ 'CCS Investigation Finds Online Food Delivery Industry To Be Currently Competitive But Exclusive Agreements Could be Problematic In Future', www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/investigation-of-online-food-delivery-industry.

¹¹ As set out in Paragraph 3.3 of the Section 47 Guidelines.

consideration is also given to the positions of other undertakings operating in the same market and how market shares have changed over time. The CCCS also includes in its assessment factors such as barriers to expansion, the degree of innovation, product differentiation, the responsiveness of buyers to price increases and the price responsiveness of competitors;

- b* potential competitors: The CCCS notes that entry barriers are important in assessing the degree of competitive constraint posed by potential competition, which will in turn inform the assessment of whether an undertaking would have the ability to profitably sustain prices above competitive levels. In the Section 47 Guidelines, the CCCS indicates that such assessments require consideration of sunk costs, access to key inputs and distribution outlets, regulation, economies of scale, network effects and potential exclusionary behaviour by incumbents; and
- c* other factors, such as powerful buyers and economic regulation: The CCCS considers that a buyer's bargaining strength is affected by the buyer's knowledge of alternative supply sources, opportunities to self-sponsor or establish a procurement auction or competitive tenders, as well as whether the buyer is important to the seller. These factors again may influence whether an undertaking is effectively in a position to exercise market power.

Ultimately, the CCCS's consideration of whether a dominant position is held will require an objective assessment of all of the above criteria (and any other relevant facts and circumstances).

The Section 47 Prohibition also extends to abuses of collective dominant positions, which may be held when two or more legally independent undertakings present themselves or act together in a particular market as a collective entity. The CCCS considers that undertakings holding a collective dominant position are able to act largely independently of their competitors, customers and consumers. The CCCS will consider whether there are factors linking the undertakings together in its assessment. Once the CCCS establishes that the collective entity holds a dominant position, it will assess whether there has been an abuse of the collective dominant position.

IV ABUSE

i Overview

The test for abusive conduct was set out by the Singapore Competition Appeal Board (CAB) in its hearing of the appeal arising from *SISTIC*. Specifically, the CAB held that 'an abuse will be established where a competition authority demonstrates that a practice has, or [is] likely to have, an adverse effect on the process of competition'. In making this assessment, the CCCS conducts an economic effects-based assessment that will generally be centred on the degree to which the conduct in question forecloses (or has the potential to foreclose) the competitors of the dominant undertaking from being able to compete effectively in the relevant market. At present, there are no types of arrangements or conduct that are considered to constitute abusive conduct on a per se, or restriction by object, basis.

Where an undertaking can advance an objective commercial justification for its conduct, this will be taken into account in the CCCS's assessment, and may constitute a defence. However, the dominant undertaking is still required to demonstrate that it has behaved in a proportionate manner and should not take more restrictive measures than necessary.

With respect to intellectual property rights, legitimate exercise of these, even by a dominant undertaking, will not generally be regarded as an abuse. The CCCS cautions that the way in which an intellectual property right is exercised may give rise to concerns in relation to infringing the Section 47 Prohibition if, for instance, it is used to leverage market power from one market to another.

ii Exclusionary abuses

It is clear that exclusionary conduct is the primary conduct that the CCCS will investigate as potentially amounting to an abuse of dominance. To date, exclusive contracting by dominant undertakings has been a common feature in the cases pursued by the CCCS. However, the Section 47 Guidelines contemplate that the following types of conduct potentially amount to an abuse of dominance, depending on all the facts and circumstances:

- a* predatory behaviour;
- b* loyalty-inducing discounts or rebates;
- c* price discrimination;
- d* margin squeeze;
- e* refusal to supply access to an essential facility or good; and
- f* exclusive contracting.

The above list is not exhaustive, and the CCCS would not be restricted from finding an abuse that arises from any other form of exclusionary conduct.

iii Discrimination

Discrimination is not identified in the Section 47 Guidelines as an abusive practice in and of itself, but instead could constitute an abuse insofar as it results in an exclusionary or foreclosure effect. For example, a dominant undertaking providing discriminatory access pricing to an essential facility (favouring its own affiliates in a downstream market) could give rise to foreclosure concerns that may amount to abusive conduct.

iv Exploitative abuses

The Section 47 Guidelines are silent as to whether exploitative abuses can constitute the abuse of a dominant position. However, it is noteworthy that the Section 47 Prohibition makes no reference to unfair prices or unfair trading conditions (unlike Article 102 of the Treaty on the Functioning of the European Union on which the Section 47 Prohibition was modelled). In other words, references to unfair prices and trading terms were specifically removed (and replaced instead with an explicit reference to 'predatory behaviour towards competitors') when the Section 47 Prohibition was drafted.

It is also noteworthy that the CCCS has not publicly pursued any Section 47 cases involving purely exploitative conduct, and has also previously made public statements that it is not within the CCCS's purview to oversee or regulate prices.

V REMEDIES AND SANCTIONS

i Sanctions

Where the CCCS has determined that the Section 47 Prohibition has been infringed, it has the ability to issue directions as it considers appropriate to bring the infringement to an end, or to remedy, mitigate or eliminate any adverse effects of the infringement, and to prevent the recurrence of the infringement.¹² These directions can include prohibitory conduct remedies, affirmative conduct remedies, structural remedies or financial penalties, or a combination of these.

The CCCS calculates financial penalties in accordance with the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016,¹³ which specify an approach taking into consideration the relevant turnover of the undertaking, the seriousness of the infringement, the duration of the infringement and mitigating or aggravating factors. The ultimate financial penalty imposed may not exceed 10 per cent. of the turnover of the business of an undertaking in Singapore, for each year of infringement, up to a maximum period of three years.

ii Behavioural remedies

During an investigation, where the CCCS has reasonable grounds for suspecting that the Section 47 Prohibition has been infringed, and where the CCCS considers that it is necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of persons, or protecting the public interest, it may issue interim directions.¹⁴ While the nature of such directions are not specified within the Act explicitly, the CCCS would have the broad discretion to issue interim behavioural directions similar to those that can be imposed upon an infringement finding, such as directions to an undertaking to, *inter alia*:

- a* modify or cease its conduct;
- b* enter such legally enforceable agreements as may be specified by the CCCS and designed to prevent or lessen the anticompetitive effects that have arisen; and
- c* provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

iii Structural remedies

Where an infringement of the Section 47 Prohibition is found, the CCCS has the ability to issue directions requiring structural changes, such as the disposal of such operations, assets or shares of the undertaking in such a manner as may be specified by the CCCS.

12 As set out in Section 69 of the Act.

13 www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-appropriate-amount-of-penalty-in-competition-cases-2016.pdf?la=en&hash=8D88F4ACEB53FBE3E65FCF6CC2A09D29C8AE1F58.

14 As set out in Section 67 of the Act.

VI PROCEDURE

The CCCS has the power to conduct an investigation if there are reasonable grounds for suspecting that the Section 47 Prohibition has been infringed.¹⁵ These investigations are often triggered by third-party complaints, through completion of the complaint form available on the CCCS website. Thereafter, the CCCS typically seeks to gather information through the use of requests for information, or through dawn raids.

Section 63 of the Competition Act enables the CCCS to require that parties provide information in connection with the investigation. The information request is served on the relevant parties by way of a written notice. The CCCS typically issues multiple requests for information, with specified deadlines for providing responses, in the course of an investigation. In terms of dawn raids, the CCCS has the power to enter into any premises to carry out investigations, with or without warrants. On the premises, the CCCS has the power to require the production of documents relevant to the investigation and an explanation of such documents, and to take steps to preserve documents, among other things.

During the course of an investigation, the investigated parties have the right to consult legal advisers. In the case of a dawn raid, the CCCS investigating officers are able to exercise judgement, to the extent that they consider it reasonable, to allow the investigated party's legal advisers to arrive at the premises within a stipulated time period.

As mentioned above, the CCCS has the power to impose interim measures where it has not completed, but has commenced, its investigation and considers it necessary to act urgently. The CCCS has not imposed interim directions in any public case involving a suspected breach of the Section 47 Prohibition to date, but has done so in respect of investigations relating to suspected breaches of other prohibitions.

The CCCS generally cooperates with agencies in other jurisdictions on cases of an international nature. Historically, the CCCS has done so for cross-border cartel and merger cases in particular. Given the Singapore-centric nature of the abuse of dominance cases published by the CCCS so far, it is less likely that it has consulted other agencies on these specific cases. Nonetheless, should multi-jurisdictional abuse of dominance cases arise, the CCCS could be expected to follow its general consultative approach.

Thus far, investigations into infringements of the Section 47 Prohibition have most often been informally settled through the CCCS accepting voluntary commitments offered by the parties under investigation. The CCCS typically conducts a public consultation on the proposed commitments, to seek feedback on whether the likely proposed commitments will address the identified competitive harm, and any other feedback.

The CCCS does not have an indicative timeline for concluding its investigations into suspected breaches of the Section 47 Prohibition, unlike its indicative timelines for the assessment of notified mergers. Notwithstanding this, in December 2016, the CCCS introduced a 'fast track' procedure for investigations into infringements of the Section 47 Prohibition in the CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases.¹⁶ Under this procedure, parties that admit liability for infringing the Section 47 Prohibition can be eligible for a reduction in financial penalties to which they might otherwise be subject. The CCCS has indicated that it will use its discretion

15 As set out in Section 62 of the Act.

16 www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-fast-track-procedure-for-section-34-and-section-47-cases.pdf?la=en&hash=8F8B4CA2E1CA70DDDDA146A61A0FFA090AEC7973.

as to whether or not a case may benefit from this procedure, on the basis of factors including the predicted margin for argument and extent to which facts may be contested. Should the CCCS determine that the case is suitable for this procedure, it will initiate the process by engaging the parties, inviting them to respond within two weeks on whether they are interested in the offer. The parties are still able to appeal the final decision made by the CCCS should they accept the offer.

While there is no obligation on parties to notify the CCCS of conduct that may amount to an abuse of dominance, parties can apply to the CCCS for a notification for guidance or decision.¹⁷ The guidance provided by the CCCS may indicate whether the conduct in question would likely infringe the Section 47 Prohibition. In the case of a decision, the CCCS indicates whether the conduct has infringed the Section 47 Prohibition. A difference between guidance and a decision is that a decision cannot be reopened on the basis of a complaint by a third party.

Pursuant to Sections 71 and 72 of the Act, a decision of the CCCS finding an infringement of the Section 47 Prohibition, or a decision to impose interim measures, may be appealed to the CAB. The CAB may impose, revoke or vary a direction as long as the direction is one that the CCCS could have given. The decision by the CAB may be further appealed to the High Court and then to the Court of Appeal (but these subsequent appeals are limited to points of law, or appeals related specifically to the quantum of the financial penalty imposed).

The only appeal brought to the CAB for an abuse of dominance case to date in Singapore was *SISTIC.com Pte Ltd's* appeal of the *SISTIC* case in 2010.¹⁸ After hearing the appeal, the CAB issued its decision in 2012 upholding the CCCS's finding of liability, but at the same time ordering a reduction in the penalty imposed (from S\$989,000 levied by the CCCS to S\$769,000). This reduction was ordered on the basis that:

- a* the CAB disagreed with the CCCS's assessment that the involvement of the directors or members of senior management in the matter ought to be an aggravating factor;
- b* the CAB determined that *SISTIC* did entertain genuine uncertainty with regard to whether its conduct constituted an infringement, and accordingly disagreed with the CCCS's decision to aggregate the assessed penalty on the basis that the infringement had been committed 'intentionally, not just negligently'; and
- c* the CAB considered that an additional mitigating discount ought to be applied on the basis that *SISTIC* cooperated with the CCCS, and due to *SISTIC's* genuine uncertainty with regard to the legality of the conduct in question.

17 As set out in Sections 50 to 53 of the Act.

18 'CAB Upholds CCS' Decision Against *SISTIC* for Abusing its Dominance in the Open Ticketing Services Market', www.ccs.gov.sg/media-and-consultation/newsroom/media-releases/cab-upholds-ccs-decision-against-sistic-for-abusing-its-dominance-in-the-open-ticketing-services-market.

Further details on the CCCS's powers of investigation and enforcement are set out within the CCCS Guidelines on the Powers of Investigation in Competition Cases 2016,¹⁹ and within the CCCS Guidelines on Enforcement of Competition Cases 2016.²⁰

VII PRIVATE ENFORCEMENT

The right of private action for general competition law infringements in Singapore is set out in Section 86 of the Act. Unlike in jurisdictions such as the United States and Australia, the right of private action in Singapore exists by way of a follow-on claim, which precludes independent stand-alone action by claimants. Specifically, the right of private action only arises upon the issuance of a final determination that an undertaking has infringed the Section 47 Prohibition.²¹

As a matter of procedure, a final determination of infringement of the Act refers to an infringement decision of the CCCS, the CAB, Singapore High Court or Singapore Court of Appeal that is not subject to any right of further appeal. Private actions must be brought within two years of the final determination of the CCCS, the CAB, Singapore High Court or Singapore Court of Appeal (as the case may be).

Section 86 of the Act requires the claimant to have suffered loss or damage directly as a result of an infringement. While currently untested in the courts, the term 'directly' is generally understood to limit claims to direct purchasers (rather than end-purchasers, where there is an intermediate purchaser or purchasers).

In dealing with any private action claims, the court has the ability to grant relief by way of injunction or declaration, damages or such other relief as the court thinks fit.²² It is untested in Singapore whether damages claims would be compensatory, restitutionary or punitive (or could incorporate considerations of each).

At present, only representative proceedings are permissible in Singapore (rather than other forms of collective litigation, such as class actions), and such representative actions require the permission of the court to be brought. Generally, third-party funding of litigation is not prohibited outside the scope of international arbitration matters (or to a limited degree in insolvency cases).

To date, there have not been any private actions for damages initiated (either completed or pending) in Singapore as follow-on claims related to the breach of the Section 47 Prohibition.

19 www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-powers-of-investigation-in-competition-cases-2016.pdf?la=en&hash=B85CF6E2B81FE180852912891EB162640D47CE13.

20 www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-enforcement-of-competition-cases-2016.pdf?la=en&hash=CE326C57F0E4DF52226DBD01296EE8EE60FB9D14.

21 As set out in Section 86(2)(a) of the Act.

22 As set out in Section 86(8) of the Act.

VIII FUTURE DEVELOPMENTS

The CCCS, like authorities in many other jurisdictions, is taking an active interest in the implications of data issues on competition policy. For the CCCS, the interest in this area stems from a wider initiative in the Singapore government to adopt data analytics and data sharing.²³ In an interview for the April 2018 edition of the *Asia-Pacific Competition Update* (a publication by the OECD/Korea Policy Centre), Toh Han Li, the chief executive of the CCCS noted that 'with the rise of the digital economy, more sophisticated business models have emerged and CCCS is seeing an increase in the complexity of the cases handled'.²⁴

The CCCS collaborated with the Intellectual Property Office of Singapore and the Personal Data Protection Commission (PDPC) to publish a paper on data as an engine for growth in 2017.²⁵ In this paper, two issues with respect to market power in data-driven industries were considered. The first was whether data could be replicated reasonably by competitors; the second was whether the data could result in a significant competitive advantage. The paper noted that market power would generally be strengthened by network effects but could be weakened by multi-homing, ease of access, data substitutability and market dynamics. Types of abuse considered in this paper are discriminatory access (including through vertical integration), exclusive dealing and refusal to supply. The CCCS published a discussion paper on data portability, in conjunction with Singapore's PDPC, in February 2019.²⁶ A potential abuse of dominance issue that the CCCS has outlined in the paper is the refusal to supply data, where data may be considered an essential facility, and more scrutiny on data-driven companies could be expected moving forward.

The CCCS's recently expanded jurisdiction, as of April 2018, now includes consumer issues as enforced under the Consumer Protection (Fair Trading) Act. Accordingly, the CCCS is expected to focus on investigations in consumer-focused industries. In 2018, the CCCS stated that its sectors of interest then were transportation, logistics, hospitality and wholesale retail and trade.²⁷

23 'Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights', www.cccs.gov.sg/resources/publications/occasional-research-papers/data-engine-for-growth.

24 www.oecd.org/daf/competition/korea-centre-newsletter.htm.

25 See footnote 23.

26 'Discussion Paper on Data Portability: Personal Data Protection Commission In collaboration with Competition and Consumer Commission of Singapore', www.cccs.gov.sg/resources/publications/occasional-research-papers/pdpc-cccs-data-portability.

27 www.oecd.org/daf/competition/korea-centre-newsletter.htm.

SPAIN

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I INTRODUCTION

The key Spanish law provision regulating the abuse of a dominant position 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 abuse of a dominant position ‘in all or part of the national market’, the TFEU forbids abuse of a dominant position ‘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), Title V (sanctions) and Title VI of the LDC (private enforcement). 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 has adopted ‘soft law’ measures; in particular, Provisional Guidelines on the quantification of sanctions⁵ and Guidelines on the termination of infringement proceedings by means of commitments.⁶

These rules apply to private and public undertakings alike. 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

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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.

5 10 October 2018.

6 28 September 2011.

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 2019 for abuse of a dominant position, which is broadly in line with the levels of enforcement in this field in recent years.⁹

In *DAMA v. SGAE*,¹⁰ the NMCC imposed a €2.95 million fine on SGAE, a collecting society, for having abused its dominant position in several markets related to the management and exploitation of the intellectual property rights of authors and publishers of musical and audiovisual works. In particular, the NMCC concluded that SGAE had engaged in anticompetitive foreclosure by requiring that individual authors and publishers attribute the management of all their intellectual property rights to SGAE, thereby preventing them from attributing the management of a part of these rights to SGAE’s competitors. These exclusionary effects were strengthened by the fact that SGAE licensed intellectual property rights to end users in bundles and without a breakdown of the prices for musical works, on the one hand, and for audiovisual works, on the other, making it more difficult for end users to purchase the licences from SGAE’s competitors.

The following table shows the abuse of dominant position cases that are currently pending before the NMCC:

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- 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 and 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, 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 The NMCC did not adopt any fining decisions in 2018 for abuse of a dominant position. However, it imposed fines reaching a total of: (1) €17.06 million in three fining decisions in 2017 (case S/DC/0511/14, *Renfe Operadora*, 28 February 2017; case S/DC/0557/15, *Nokia*, 8 June 2017; and case S/DC/0580/16, *Criadores de Caballos 2*, 21 November 2017); (2) €638,770 in one fining decision in 2016 (case S/DC/0540/14, *Istobal*, 30 June 2016); (3) €2.79 million in one fining decision in 2015 (case S/0500/13, *AGEDI/AIE Radio*, 26 November 2015); (4) €12.62 million in four fining decisions in 2014 (case S/0373/11, *Correos 2*, 21 January 2014; case S/0446/12, *Endesa Instalación*, 10 July 2014; case S/0345/11, *Criadores de Caballos*, 17 July 2014; and case S/0460/13, *SGAE-Conciertos*, 6 November 2014); (5) €3.5 million in three fining decisions in 2013 (case S/0341/11, *Correos*, 22 April 2013; case S/0360/11, *AGEDI*, 26 August 2013; and case SAMAD/12/10, *Tanatorios Coslada*, 4 October 2013); and (6) €162.4 million in six fining decisions in 2012 (including several key decisions, such as case S/0207/09, *Transporte Televisión*, 8 February 2012; case S/0211/09, *Endesa Instalación*, 21 February 2012; and case S/0248/10, *Mensajes Cortos*, 19 December 2012).
- 10 Case S/DC/0590/16, *DAMA v. SGAE*, 30 May 2019.

Sector	Conduct	Case opened
Postal Services (case S/0041/19, <i>Correos 3</i>)	High discounts offered by Correos to large customers, potentially leading to the exclusion from the market of competing providers of postal services.	20 November 2019
Pharmaceuticals (case S/0026/19, <i>Merck Sharp Dome SA</i>)	Alleged use of litigation strategies related to industrial property law in order to delay and hinder entry into the Spanish market for combined hormonal contraceptives.	20 November 2019
Pharmaceuticals (case S/0644/18, <i>Radiofarmacos</i>)	Possible anticompetitive practices aimed at hindering entry into the Spanish market for the production and marketing of positron-emission tomography (PET) radiopharmaceuticals.	7 February 2019

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.¹¹ 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.¹²

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 modify prices or commercial conditions, or both, without taking account of the reactions of competitors or consumers.¹³ This definition has been repeated by the NMCC, with small variations, in its more recent decisions.¹⁴

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).¹⁵ 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.¹⁶

11 See, for example, case 677/05, *Distribuidoras Prensa Ciudad Real*, 24 April 2006, p. 10.

12 See, for example, *Mensajes Cortos*, pp. 129–139 (see footnote 9).

13 See, for example, case 441/98, *Electra Avellana*, 7 July 1999, p. 9.

14 See, for example, case S/0157/09, *EGEDA*, 2 March 2012, p. 52; case S/0220/10, *SGAE*, 3 July 2012, p. 37; *Correos*, p. 20 (see footnote 9); *AGEDI*, p. 41 (see footnote 9); *AGEDI/AIE Radio*, p. 48 (see footnote 9); *Criadores de Caballos 2*, p. 35 (see footnote 9).

15 Case R 362/99, *Bacardí*, 30 September 1999, p. 8.

16 Case 486/00, *McLane/Tabacalera*, 24 April 2002, pp. 20 and 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 abuse of a dominant position.¹⁷

IV ABUSE¹⁸

The NMCC has also adopted the definition of 'abuse' developed by the EU courts in numerous decisions, such as in *Retevisión/Telefónica*.¹⁹ Furthermore, the Supreme Court (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.²⁰ It has also been confirmed that Article 2 of the LDC does 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.²¹

In line with *Michelin I* and subsequent abuse of a dominant position 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.²² 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.²³

Abuse of a dominant position has generally been described by the NMCC as constituting an objective concept:²⁴ 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.²⁵ 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.²⁶

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.²⁷ It was stated,

17 See, inter alia, case 427/19, *Electra Caldense*, 19 February 1999, pp. 9 and 10; case 535/07, *Fonogramas*, 9 December 2008, p. 24; *Mensajes Cortos*, pp. 155–165 (see footnote 9); case S/DC/0602/16, *Can Pack contra Ball, Remax y Crown*, 21 December 2017, pp. 19 and 20.

18 See González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R (eds), *EU Competition Law*, Vol. V, *Abuse of Dominance Under Article 102 TFEU* (Claycs & Casteels: Daventer, 2013), pp. 115–158.

19 Case 456/99, *Retevisión/Telefónica*, 8 March 2000, p. 28.

20 TS judgment in appeal 4495/1998, 8 May 2003, point of law 7.

21 See, for example, *SGAE*, p. 37 (see footnote 14); *DAMA v. SGAE*, p. 40 (see footnote 10).

22 See, for example, case S/0003/07, *E.On*, 8 November 2011, p. 34; *SGAE-Conciertos*, pp. 30 and 31 (see footnote 9); *Criadores de Caballos*, pp. 28, 30, 32, 39, 41, 49, 59 and 61 (see footnote 9); *Criadores de Caballos 2*, p. 36 (see footnote 9). See also TS judgment in appeal 3042/2008, 10 February 2011, point of law 6.

23 TS judgment in appeal 4495/1998, point of law 7 (see footnote 20). See also *DAMA v. SGAE*, p. 40 (see footnote 10).

24 See, for example, *Retevisión/Telefónica*, p. 28 (see footnote 19); *DAMA v. SGAE*, p. 41 (see footnote 10).

25 See, for example, *Retevisión/Telefónica*, p. 29 (see footnote 19).

26 Case 464/99, *Aseguradoras Médicas Vizcaya*, 6 July 2000, p. 17.

27 TS judgment in appeal 9174/2003, 20 June 2006, point of law 8.

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.²⁸ 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 a specific case.²⁹ Recent NMCC decisions confirm this shift towards an effects-based approach.³⁰ 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,³¹ decisions such as *Transporte Televisión* suggest that the NMCC is increasingly willing to base its decisions on solid economic grounds and analysis.³²

i Exclusionary abuses

In its *Altadis* judgment on predatory pricing,³³ 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*,³⁴ 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

28 Gutiérrez, A, 'Artículo 2. Abuso de posición dominante', in: Massaguer, J, Folguera, J, Sala Arquer, J M, Gutiérrez, A (eds), *Comentario a la Ley de Defensa de la Competencia* (Civitas: Pamplona, 2010), pp. 203 and 204. See also González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R (eds), *EU Competition Law, Vol. V, Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 154–156.

29 Dorronsoro, C, 'Artículo 2. Abuso de posición dominante', in: Odriozola, M, Irissarry, B (eds), *Derecho español de la competencia: Comentarios a la Ley 15/2007, Real Decreto 261/2008 y Ley 1/2002* (Bosch: Barcelona, 2008), pp. 149 and 150. See also: González-Díaz, F E, Temple Lang, J, 'Chapter 3. The Concept of Abuse', in: González-Díaz, F E, Snelders, R (eds), *EU Competition Law, Vol. V, Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels: Daventer, 2013), pp. 154–156.

30 See, for example, *Transporte Televisión*, pp. 135–139 (see footnote 9); case S/0391/11, *Llamadas Móviles*, 6 March 2014, pp. 65–68; *AGEDI/AIE Radio*, pp. 73–76 (see footnote 9); *Nokia*, pp. 48–52 (see footnote 9).

31 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, L F (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar: Cheltenham, 2011), pp. 90–94.

32 See, for example, *Transporte Televisión*, pp. 77–92 and 118–135 (see footnote 9).

33 TS judgment in appeal 915/2002, 13 December 2004, point of law 7.

34 *Transporte Televisión* (see footnote 9).

applying the ‘as-efficient competitor test’, concluded that this conduct constituted abuse of a dominant position, 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 decisions in *Llamadas Móviles*, *Correos 2* and *Telefónica* confirmed that the key test to determine whether a margin squeeze has taken place is the ‘as-efficient competitor test’.³⁵ In *Llamadas Móviles*,³⁶ the NMCC established 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.³⁷

In its most recent margin squeeze case, *Nokia*, the NMCC fined Nokia for having abusively squeezed the margin between the wholesale prices for its support services for Global System for Mobile Communications-Railway (GSM-R) Nokia equipment and the retail prices for GSM-R network maintenance services. The NMCC held that Nokia’s support services were necessary to provide GSM-R network maintenance services downstream. The NMCC concluded that Nokia had abused its dominant position because the margins of an ‘as-efficient competitor’ would be negative and it was ‘likely’ that Nokia’s conduct had hindered competition.³⁸

The NMCC decision in *Iberia*³⁹ 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*,⁴⁰ 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,⁴¹ and as a result of the *de minimis* rule contained in Article 5 of the LDC.⁴²

As regards leveraging practices, in *BT/Telefónica*,⁴³ 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

35 *Llamadas Móviles*, p. 66 (see footnote 30); *Correos 2*, pp. 30, 31 and 36 (see footnote 9); case S/0409/12, *Telefónica*, 29 October 2015, pp. 6 and 7.

36 *Llamadas Móviles*, pp. 65–68 (see footnote 30).

37 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’ (Clays & Casteels: Daventer, 2013), pp. 229–317.

38 *Nokia*, pp. 44–52 (see footnote 1 9).

39 Case 514/01, *Iberia*, 1 April 2002.

40 TS judgment in appeal 4699/2003, 4 April 2006.

41 Case 413/97, *Airtel/Telefónica*, 26 February 1999, p. 40.

42 Gutiérrez, A, ‘Artículo 2. Abuso de posición dominante’, in: Massaguer, J, Folguera, J, Sala Arquer, J M, Gutiérrez, A (eds), *Comentario a la Ley de Defensa de la Competencia* (Civitas: Pamplona, 2010), pp. 205 and 206.

43 Case 412/97, *BT/Telefónica*, 21 January 1999.

engaged in leveraging practices. For instance, in *Endesa Instalación*,⁴⁴ 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).⁴⁵

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.⁴⁶ 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.⁴⁷ 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*,⁴⁸ 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.

In *Correos*, a more recent refusal-to-deal case, the NMCC fined Correos, the Spanish public postal services operator and owner of the public postal network, for ceasing to supply competitors with wholesale access services, and in particular, those related to the delivery of administrative notifications. The NMCC found that this conduct was abusive because access to the Correos network was necessary to effectively compete in the downstream market for the delivery of administrative notifications, this network could not be replicated and this conduct was not objectively justified.⁴⁹

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 abuse of a dominant position 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).⁵⁰ In *Renfe Operadora*, the NMCC fined Renfe, the state-owned railway company in Spain, for imposing discriminatory commercial conditions on certain purchasers of its railway traction services for the transport of goods (e.g., only some purchasers were subject to cancellation penalties).⁵¹

44 Case S/0211/09, *Endesa Instalación*, pp. 40–48 (see footnote 9).

45 See similarly case S/0089/08, *Unión Fenosa Instalación*, 20 September 2011; case 2795/07, *Hidrocantábrico Instalación*, 20 September 2011; *E.On* (see footnote 22).

46 See footnote 42, p. 184.

47 *McLane/Tabacalera*, p. 25 (see footnote 16).

48 Case 517/01, *Iasist/3M*, 5 April 2002.

49 *Correos*, pp. 21–36 (see footnote 9).

50 Case S/0153/09, *Mediapro*, 17 March 2011.

51 *Renfe Operadora*, pp. 64–68 (see footnote 9).

The NMCC has also focused on discrimination in several cases concerning collecting societies.⁵² For instance, in *AGEDII/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.⁵³

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. By far the largest fine in recent years was levied on three telecommunications companies for excessive pricing.⁵⁴

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 geographic markets). In recent cases, the NMCC has relied on a variety of benchmarks, such as, among others, those contained in regulatory prescriptions,⁵⁵ price levels in other EU Member States⁵⁶ and prices charged by the same undertaking to operators in other sectors.⁵⁷

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 short message service (SMS) and multimedia messaging service (MMS) users. In reaching these conclusions, it was noted, inter alia, that prices of termination services had been high and stable over the relevant period, despite considerable traffic increase and cost reductions; and wholesale termination services prices for short messages in Spain were among the highest in Europe.⁵⁸

In *Endesa Instalación*, the NMCC laid out a non-exhaustive list of the structural market conditions under which excessive pricing is likely, and of the benchmarks that may be used to determine whether prices are excessive.⁵⁹ 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.⁶⁰

In *SGAE-Conciertos*, the NMCC established that the fees charged by 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 SGAE were

52 See case 2785/07, *AIE*, 23 February 2011; case S/0297/10, *AGEDII/AIE*, 14 June 2012; *SGAE* (see footnote 14); *AGEDI* (see footnote 9); *AGEDII/AIE Radio* (see footnote 9).

53 *AGEDII/AIE Radio* (see footnote 9).

54 *Mensajes Cortos* (see footnote 9). The NMCC imposed a fine of €119.96 million on Telefónica, Vodafone and Orange.

55 Case S/0211/09, *Endesa Instalación*, p. 51 (see footnote 9).

56 *EGEDA*, pp. 41–44 and 55–60 (see footnote 14); *SGAE-Conciertos*, pp. 17, 18 and 22–26 (see footnote 9).

57 *EGEDA*, pp. 41–44 and 55–60 (see footnote 14).

58 *Mensajes Cortos*, pp. 141–154 (see footnote 9).

59 Case S/0446/12, *Endesa Instalación*, pp. 25 and 26 (see footnote 9).

60 See also, for example, case S/0501/13, *Continental Automotive*, 15 October 2015, p. 31.

significantly higher than the rates paid in 73 per cent of the EU Member States and in the United States.⁶¹ The NMCC concluded that these fees had an exploitative effect on concert promoters and could indirectly prejudice consumers by leading to higher ticket prices.⁶²

V REMEDIES AND SANCTIONS

i Sanctions

The key provisions concerning sanctions are Articles 61 to 70 of the LDC.

As a general rule, abuse of a dominant position 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 abuse of a dominant position 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 the 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: the LDC explicitly provides that the NMCC may reduce a fine due to the adoption of actions intended to repair the damage; and according to the Fining Guidelines, the Commission may reduce a 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 abuse of a dominant position cases. For instance, in the *SGAE* case, SGAE was ordered to withdraw a specific clause from its contracts that was deemed unfair and discriminatory.⁶³ 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.⁶⁴ In *Correos*, this company was given two months to grant private postal operators access to its network.⁶⁵

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 cease-and-desist orders or orders imposing specific obligations to prevent potential damage; or 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*.

61 *SGAE-Conciertos*, pp. 17, 18 and 22–26 (see footnote 9).

62 *SGAE-Conciertos*, pp. 25 and 26 (see footnote 9).

63 *SGAE*, p. 49 (see footnote 14).

64 *AIE*, pp. 42 and 43 (see footnote 52).

65 *Correos*, p. 41 (see footnote 9).

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 abuse of a dominant position 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: the Competition Directorate (CD), in charge of the investigation of the case and of making proposals to the Council; and the Council of the NMCC (CNMCC), with adjudicatory functions and power to issue sanctions.

Proceedings may be initiated *ex officio* by the CD, on its own initiative or on that of the CNMCC; or by a 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 of accessing premises without consent or a court order) and must respect legal professional privilege. The CNMCC may then adopt a decision either dismissing a 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: 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 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 the suspension of the decision. The adoption of interim measures, regulated

in the Law on Contentious Administrative Jurisdiction,⁶⁶ 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 that adopts the final decision accepting, rejecting or requesting new commitments. Commitment proceedings are regulated in the NMCC Guidelines on the termination of infringement proceedings by means of commitments.⁶⁷

As to the timing of proceedings, 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*.⁶⁸ 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, that is, 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

66 Law 29/1998, 13 July, Articles 129–136.

67 The NMCC has adopted several commitments decisions in Article 2 of the LDC or Article 102 of the TFEU cases in recent years. For instance, in *Estudios de Mercado Industria Farmacéutica*, the NMCC investigated whether 'multiple supply' clauses contained in some of IMS' contracts with wholesale pharmaceutical distributors for the purchase of sales data were exclusionary and gave rise to abuse of a dominant position. Pursuant to these clauses, if a distributor decided to supply sales data to competitors of IMS, (1) IMS had to be notified in advance, (2) IMS could terminate its contract with the distributor, and, in cases where IMS were not to terminate its contract with the distributor, (3) the amounts paid by IMS to the distributor would be reduced by 40 or 60 per cent depending on the number of competitors the data was sold to (price reduction clause), and (4) the terms and conditions of supply to IMS could not be less favourable than those offered to IMS' competitors (most-favoured customer clause). The NMCC terminated the proceedings after IMS committed to eliminate clauses (1), (2) and (4) from its current and future contracts, and not to increase the percentages of the price reduction clause. See case S/DC/0567/15, *Estudios de Mercado Industria Farmacéutica*, 13 July 2017, pp. 10, 11 and 31–33.

68 AN judgment in appeal 118/2014, 1 July 2015.

stressed that a finding of illegal margin squeeze requires proof of actual or at least potential exclusionary anticompetitive effects. The AN's judgment was upheld on appeal by the TS in a judgment of February 2018.⁶⁹

Additionally, in September 2017, the AN annulled the NMCC's decision in *Mensajes Cortos*, in which the NMCC imposed fines on Telefónica, Vodafone and Orange totalling approximately €120 million for excessive pricing in relation to SMS and MMS termination services.⁷⁰ The AN concluded that the NMCC had not demonstrated that the three companies held a dominant position in the wholesale SMS and MMS termination services markets for each of their respective networks. The AN noted, in particular, that the NMCC's market definition was based primarily on a report of CMT, the Spanish telecommunications authority, and that the NMCC had failed to carry out an *ex novo* analysis of the relevant markets based on updated economic data. The AN also outlined a series of inconsistencies in the NMCC's assessment of dominance, and concluded that the NMCC had failed to assess the relevance of countervailing buyer power. The AN's judgments were upheld on appeal by the TS in three judgments of December 2018 and January 2019.⁷¹

VII PRIVATE ENFORCEMENT

Although private enforcement in the form of actions for damages arising from abuse of a dominant position has traditionally been fairly limited, it is slowly becoming a reality, and more and more courts are ruling against competition law infringers and considering them to be civilly liable.⁷² 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. 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 Procedure⁷³ recognises the possibility for consumer protection organisations to bring collective actions in representation of these. This provision may be applicable by

69 TS judgment in appeal 2808/2015 (5 February 2018). In this judgment, the TS confirmed that Correos' conduct was not in breach of Article 2 of the LDC or Article 102 of the TFEU because the NMCC had not demonstrated that it could give rise to actual or potential foreclosure effects – the TS noted that Correos' main competitor had the ability to counter Correos' attempt to squeeze its margins. See, in particular, TS judgment in appeal 2808/2015, above, point of law 3.

70 AN judgments in appeals 36/2013 (1 September 2017), 40/2013 (1 September 2017) and 41/2013 (4 September 2017).

71 TS judgments in appeals 5720/2017 (21 December 2018), 5618/2017 (8 January 2019) and 6552/2017 (20 December 2018). In these judgments, the TS concluded, in particular, that the AN's judgments were consistent with the case law of the EU courts regarding the scope and intensity of judicial review, and that while the NMCC is entitled to take into account the reports of CMT when defining the relevant markets, this does not exempt the NMCC from its obligation to conduct its own assessment of the relevant markets based on all the available data. See, in particular, TS judgment in appeal 5720/2017, above, point of law 3, TS judgment in appeal 5618/2017, above, point of law 3, and TS judgment in appeal 6552/2017, above, points of law 2 and 4.

72 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.

73 Law 1/2000, 7 January.

analogy to other organisations or groups of individuals.⁷⁴ 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 a 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.⁷⁵

The new Title VI (Articles 71 to 81) of the LDC, in force since May 2017, transposes Directive 2014/104/EU into Spanish law.⁷⁶ Article 71 of the LDC establishes that undertakings that have infringed Article 2 of the LDC or Article 102 of the TFEU are responsible for damages. Article 71(2)(b) extends the doctrine of parental liability to private damages actions, and Article 73 clarifies that when two or more undertakings infringe competition law through joint behaviour, they are jointly and severally liable for the harm caused. Article 72 of the LDC establishes that any victim of an infringement of Article 2 of the LDC or Article 102 of the TFEU has the right to claim full compensation for the harm caused before the civil courts, including for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), as well as interest. Articles 72 and 78 clarify that the right to obtain full compensation may not lead to overcompensation, whether by means of punitive, multiple or other types of damages, and that a victim's compensation for actual loss must not exceed the overcharge borne by such victim. The burden of proof for the quantification of harm is on the plaintiff, who must bring an action for damages within a five-year period. Article 75 of the LDC establishes that a finding of a competition law infringement made in a final NMCC decision or judgment of the Spanish courts constitutes irrefutable evidence of an infringement for the purposes of an action for damages before the Spanish courts. If the national competition authority or the courts of another EU Member State have found a competition law infringement, there is a *iuris tantum* presumption that there has been an infringement for the purposes of an action for damages before the Spanish courts. Finally, Articles 77 and 81 regulate the effects of consensual dispute resolution.

VIII FUTURE DEVELOPMENTS

In 2013, the Spanish authorities merged a number of regulatory authorities, including the former National Competition Commission, into a single institution, the NMCC. The aim of this institutional reform was, primarily, to maximise economies of scale, attain synergies and reduce public expenditure. While this reform gave rise to a new institutional structure, it did not bring about any substantive changes to antitrust enforcement. In December 2016,

74 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 and 14.

75 Rodríguez-Sastre, I, 'Disposición adicional primera', in: Odriozola, Irissarry, p. 1196 (see footnote 29).

76 See Brokelmann, H, 'La Directiva de daños y su transposición en España', *Revista General de Derecho Europeo*, No. 37, 2015, and Gascón Inchausti, F, 'Aspectos procesales de las acciones de daños derivados de infracciones de las normas sobre defensa de la competencia: apuntes a la luz de la Directiva 2014/104 y de la Propuesta de Ley de transposición', *Cuadernos de Derecho Transnacional*, Vol. 9, No. 1, 2017.

however, a proposal was tabled in the Spanish Parliament to divide the NMCC into two independent bodies, namely the Independent Markets Regulation Authority, which would be in charge of sector-specific market regulation; and the Independent Competition Authority, which would be in charge of competition law enforcement. The aim of this proposal was to guarantee the independence of and separation between the regulatory authority and the competition authority. In March 2017, the Ministry of Economy launched a public consultation process regarding the possible division of the NMCC into two independent bodies, namely the Independent Administrative Authority for the Supervision and Regulation of the Markets, and the Independent Administrative Authority for Competition. The Ministry of Economy stated that the aim of this proposal is to adapt the institutional architecture for competition law enforcement to international best practices, to strengthen the independence of the regulatory and competition authorities, and ultimately to improve governance. At this stage, it remains unclear whether or when such a reform will take place, despite recent reports in the Spanish press pointing in this direction.

Additionally, in its Action Plan for 2020, the NMCC announced, *inter alia*, that it intends to:

- a* adopt additional measures to strengthen the NMCC's ability to detect potentially anticompetitive conduct *ex officio* (e.g., through the use of technology); and
- b* strengthen the NMCC's supervision in the digital sector, in particular with regard to online platforms, algorithmic pricing, data access and usage, e-commerce and online advertising.⁷⁷

Finally, in the context of the covid-19 pandemic, the NMCC has announced increased scrutiny of possible abuses that may hinder supply or lead to higher prices for essential products and services, including in particular those related to the healthcare and funeral sectors.

77 See Plan de Actuación 2020 de la Comisión Nacional de los Mercados y la Competencia, pp. 20–22.

SWEDEN

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I INTRODUCTION

Chapter 2, Article 7 of the Swedish Competition Act² prohibits the abuse of a dominant position. The provision reads as follows: ‘Any abuse by one or more undertakings of a dominant position on the market shall be prohibited.’

The abuse may, in particular, consist in:

- 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; or
- 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 the contracts.

The Competition Act entered into force on 1 November 2008. The prohibition against the abuse of a dominant position has remained intact since it was introduced in the former Competition Act³ in 1993. It corresponds to Article 102 of the Treaty on the Functioning of the European Union (TFEU), which applies in parallel to the Swedish provision if the dominant position covers a substantial part of the internal market and the abuse may affect trade between EU Member States.

The Competition Act is enforced by the Swedish Competition Authority (SCA). Neither the legislator nor the SCA has issued any formal guidance on the interpretation of the prohibition. In practice, the SCA and the Swedish courts interpret Swedish and EU case law.

II YEAR IN REVIEW

i Judgments from the Swedish courts

Last year,⁴ the Patent and Market Court of Appeal (PMCA) delivered final judgments in *Nasdaq* and *FTI*.

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2 The Swedish Competition Act (2008:579).

3 The former Competition Act (1993:20).

4 1 April 2019 to 31 March 2020.

Swedish Competition Authority v. Nasdaq AB et al⁵

On 28 June 2019, PMCA delivered the final judgment in the high-profile *Nasdaq* case, concluding that Nasdaq's actions to prevent Burgundy from moving its trading system to the same data centre as Nasdaq did not constitute abuse of a dominant position.

Nasdaq is the operator of the Swedish, Danish and Finnish stock exchanges. Shortly after a new multilateral trading platform (MTF), Burgundy, was established in the Nordics, it wanted to move its matching engine to the same location where Nasdaq already had its matching engine along with the trading equipment of a large number of customers. For a new MTF, achieving a critical mass of liquidity is crucial. One category of customers that may increase liquidity is high-frequency traders. For these traders, physical proximity to the matching engine of the marketplace is often important to reduce risk caused by time lag in the execution of transactions.

When Nasdaq was informed in October 2010 that Burgundy had finalised negotiations with data centre supplier Verizon concerning the rental of a neighbouring space, Nasdaq contacted Verizon, expressed its dissatisfaction and informed them that, if Burgundy moved in, Nasdaq would move its matching engine from the data centre. Eventually, Verizon decided to withdraw from the negotiations with Burgundy.

The SCA requested that four different companies in the Nasdaq group pay fines totalling 29 million kronor.

The action was dismissed by the Patent and Market Court. The PMD found Nasdaq had acted in accordance with its contractual rights, rather than abusing power derived from its dominant position, and that the conduct amounted to competition on the merits.⁶

The PMCA dismissed the action on the basis of a different, and more questionable, motivation. It noted that the purpose of the prohibition against abuse of a dominant position is not to protect less efficient competitors. At the time of the disputed conduct, Burgundy used a trading system that was slower than Nasdaq's trading system. It was not until six months after the disputed conduct that Burgundy got a trading system with the same latency as Nasdaq's. On this basis, the PMCA concluded that Nasdaq's conduct was not even capable of restricting competition in the way alleged by the SCA. It noted that fines of a penal nature cannot be imposed based on circumstances that occurred after the disputed conduct.

The judgment implies that it is lawful for dominant companies to harm less efficient competitors, which is unfortunate and questionable from an EU competition law perspective. The purpose of the AEC standard (i.e., 'as efficient competitor') is to establish whether the (pricing) practices of a dominant undertaking could drive an equally efficient competitor from the market. The assessment is based on the cost and price structures of the dominant company. As such, it serves as a useful tool for distinguishing between legitimate price competition and conduct liable to result in anticompetitive foreclosure (reducing the risk of false positives and false negatives). Expanding the AEC concept in a useful way to non-price-based conduct is not entirely straightforward. In the case at hand, a relevant question could have been whether the disputed conduct was capable of foreclosing a hypothetical competitor with the same efficiency (or latency) as Nasdaq. Regrettably, this question was not addressed by the PMCA.

5 Case PMÖD PMT 1443-18, *SCA v Nasdaq AB et al*.

6 Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018.

Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA⁷

On 28 February 2020, the PMCA set aside an order issued by the SCA against Svenska Förpacknings- och Tidningsinsamlingen AB (FTI) to recall a termination of an agreement with its competitor, TMResponsibilities (TMR).

Swedish rules on producer responsibility require producers to ensure that their packaging materials are collected and recycled. FTI and TMR offer producers the services needed to comply with this responsibility. In 2012, FTI agreed to give TMR access to its nationwide collection system for household packaging. When FTI terminated the agreement without stating any reason for doing so in 2016, the SCA found that the termination constituted an abuse of a dominant position and ordered FTI to recall the termination.

The PMCA set aside the SCA's order. Unlike the PMC,⁸ the PMCA found that it was not proven that it was impossible or unreasonably difficult for a competitor to duplicate the infrastructure within a reasonable timeframe. The PMCA did not explicitly state that the *Bronner* criteria must be fulfilled in cases regarding refusal to supply to existing customers. However, the Court noted that it follows from the European Commission's guidance paper on exclusionary abuse that the refusal must concern an input that is 'objectively necessary' in order for the refusal to constitute an abuse, regardless of whether the refusal concerns a new or an existing customer. Based on the way the SCA argued its case (that there were no actual or potential alternatives) and that the ECJ, neither in *Bronner* nor in any subsequent cases, has stated that the indispensability criterion is not applicable when the refusal concerns existing customers, the PMCA decided to apply the indispensability criteria in the case at hand.

ii SCA cases

Last year,⁹ the SCA did not adopt any infringement decisions regarding abuse of a dominant position. The SCA ended three investigations without finding an infringement; one regarding access to online advertisement and sale of train tickets,¹⁰ one regarding private app providers' access to public car parks,¹¹ and one regarding use of trademarks in the gambling industry.¹² Currently,¹³ the SCA has one active ongoing investigation, which concerns suspected predatory pricing in the insurance industry.¹⁴

III MARKET DEFINITION AND MARKET POWER

i Market definition

Neither the legislator nor the SCA have adopted guidelines on how to define the relevant market. In its decisions and judgments, the SCA and the courts regularly refer to EU case law and the Commission's notice on the definition of the relevant market.¹⁵

⁷ Case PMÖÄ 1519-19, *Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA*.

⁸ Case PMÄ 2741-18, *Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA*, 21 January 2019.

⁹ 1 April 2019 to 31 March 2020.

¹⁰ Decision dated 4 June 2019 in cases 230/2018 and 380/2018.

¹¹ Decision dated 26 September 2019 in cases 304/2018 and 327/2018.

¹² Decision dated 13 March 2020 case 128/2019.

¹³ 31 March 2020.

¹⁴ Case 446/2019.

¹⁵ See, for instance, the PMCA's judgments in PMÖÄ 1519-19, *Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA*, 28 February 2020, p. 10; the Market Court's judgment in MD 2013:5,

The purpose of the market definition in abuse cases is to assess whether the undertaking in question has the possibility to prevent effective competition from being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors.¹⁶

The small but significant and non-transitory increase in price (SSNIP) test has been accepted by the courts as an established method for defining the relevant market.¹⁷ A SSNIP test may, however, be misleading in cases regarding abuse of dominance if the test is based on a price that is already above the competitive level (the ‘cellophane fallacy’), or if the market is characterised by strong network effects.¹⁸ In practice, the assessment is based on a number of circumstances, including not only quantitative evidence of substitution, but also qualitative aspects such as the qualities of the products and their intended use.¹⁹ Market definitions in previous cases may provide guidance, but are not precedential.²⁰

ii Market power

The term ‘dominant position’ is interpreted the same way as it is in Article 102 TFEU. As regards a definition of the term, the preparatory works to the previous Competition Act (preparatory works)²¹ refer to the judgment of the CJEU in *United Brands*, in which a dominant position was defined as:

*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*²²

TeliaSonera AB v. SCA, 12 April 2013, p. 38; and the PMC’s judgments in case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 134; case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 22; and case PMÄ 2741-18, *Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA*, 21 January 2019, p. 16. Even the preparatory works refer to the said notice, see Government Bill 2007/08:135, p. 71.

- 16 Judgment from the Market Court, MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38.
- 17 See, for instance, MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38; and the PMC’s cases PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 135 and PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 22 (not changed by the PMCA in PMÖD PMT 1443-18, *SCA v. Nasdaq AB et al*).
- 18 Judgment from the PMC, PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 23 (not changed by the PMCA in PMÖD PMT 1443-18, *SCA v. Nasdaq AB et al*).
- 19 See, for instance, MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013, p. 38.
- 20 See, for instance, the PMC’s judgment in case PMT 7000-15, *SCA v. Nasdaq AB et al*, p. 26, which referenced OECD, Market Definition, DAF/COMP(2012)19, p. 87.
- 21 Government Bill 1992/93:56, p. 85.
- 22 Case C-27/76, *United Brands Company et al v. Commission of the European Communities*, EU:C:1978:22, pp. 65 and 66.

The term ‘dominant position’ includes both single and collective dominance.²³

The assessment of dominance is based on a number of circumstances that are not individually decisive. A company’s market shares are a natural starting point for the analysis. Market shares above certain thresholds may lead to presumptions of dominance.²⁴

Despite the existence of market share presumptions, the assessment of dominance is usually based on a full assessment of all the relevant facts in the case, including, in particular:

- a* barriers to entry and expansion;
- b* advantages (financial, technological, regulatory, historical, etc.);
- c* vertical integration;
- d* presence in neighbouring markets;
- e* whether the company is an unavoidable trading partner; and
- f* whether customers have counterweighing buyer power.

In two recent cases, *Swedish Match*²⁵ and *Nasdaq*,²⁶ the PMC refrained from relying on a market share presumption, despite high market shares. However, following an appeal of the judgment in *Swedish Match*, the PMCA stated that market shares of more than 70 per cent in volume and value was a strong indication that Swedish Match had a dominant position, and that it would have to be exceptionally easy for new players to enter the market, or expand, in order for Swedish Match not to be deemed to have a dominant position.²⁷

The courts have also referred to the European Commission’s guidance paper on exclusionary abuses for further guidance on the term ‘dominant position’.²⁸

IV ABUSE

i Overview

The prohibition against the abuse of a dominant position does not define the term ‘abuse’; the type of abuses mentioned in the prohibition are only examples, and do not constitute an exhaustive list. For a definition of abuse, both the SCA and the Swedish courts regularly refer to the CJEU’s judgment in *Hoffman-La Roche*, in which an abuse was defined as:

an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of markets where, as a result of the very presence of the undertaking

23 Like Article 102 TFEU, the prohibition covers abuse by ‘one or more undertakings’. In MD 2011:28, *Uppsala Taxi 100 000 AB v. Europark Svenska AB et al*, 23 November 2011, the Market Court considered that Europark and Swediavia, by virtue of their agreement concerning the taxi allocation system at Arlanda Airport, had a collective dominant position.

24 According to the preparatory works to the former Competition Act (Government Bill 1992/93:56, pp. 85 and 86), market shares above 40 per cent constitute a clear sign of dominance; market shares above 50 per cent lead to a presumption of dominance; and market shares above 65 per cent lead to a presumption that is almost impossible to rebut; in particular, if the competitors are relatively small.

25 Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 144.

26 Case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018, p. 85. The judgment was upheld by the PMCA in PMÖD PMT 1443-18, *SCA v Nasdaq AB et al*, but the PMCA did not assess whether Nasdaq had a dominant position.

27 Case PMT 1988-17, *Swedish Match North Europe AB v. SCA*, 29 June 2018, p. 7.

28 See, for instance, the PMC’s judgment in case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 140.

*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 operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*²⁹

The prohibition covers both exclusionary and exploitative abuses.

Over the past decade, the enforcement of the prohibition has gradually shifted from being rather legalistic to being more effect-based. In 2016, the SCA adopted a new prioritisation policy for its enforcement, which states that the most important factor for prioritising cases is the potential harm to competition and consumers.³⁰ It may also be noted that the PMC in a recent judgment questioned the existence of ‘naked restrictions’, that is, unilateral restrictions that are so harmful to competition that there is no need to show anticompetitive effects to establish an abuse.³¹

Evidence of an anticompetitive strategy is not sufficient per se to establish an abuse, but in practice it has sometimes seemed to play a rather important role.³² The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,³³ and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.³⁴ The PMC has taken evidence of anticompetitive intent into account in its assessment of a conduct’s effects on competition.³⁵

ii Exclusionary abuses

Although the prohibition covers both exclusionary and exploitative abuses, the SCA’s enforcement focuses on exclusionary abuses. The SCA’s enforcement policy states that the SCA prioritises unilateral conduct that is capable of excluding effective competition. When deciding whether conduct is sufficiently harmful to warrant an investigation, particular consideration is given to the share of the market affected by the conduct and, in cases where the foreclosure concerns an input, to what extent the input is essential to enable effective competition. When it comes to price-based conduct, the SCA considers whether the pricing

29 Case C-85/76, *Hoffman-La Roche & Co AG v Commission*, ECLI:EU:C:1979:36, p. 91.

30 The prioritisation policy, which was updated on 12 February 2020, is available at the SCA’s website, www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf.

31 The PMC’s judgment in case PMT 7000-15, *SCA v. Nasdaq AB et al*, 15 January 2018. The judgment was upheld by the PMCA in PMÖD PMT 1443-18, *SCA v Nasdaq AB et al*, 28 June 2019.

32 In case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, several pages of the PMC’s judgment are devoted to the question of whether Swedish Match’s conduct was based on an anticompetitive strategy but with a different motivation. The judgment was set aside by the PMCA in case PMT 1988-17, *Swedish Match North Europe AB v. SCA*, dated 29 June 2018 because the conduct was deemed objectively motivated. It was thus not necessary to determine whether the conduct was based on an anticompetitive strategy.

33 See the SCA’s summons application in case 815/2014, *SCA v. Swedish Match North Europe AB*, 9 December 2014, p. 383 with further references.

34 *ibid*, p. 385 with further references.

35 See the PMC’s judgment in case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 183. The judgment was set aside by the PMCA in case PMT 1988-17, *Swedish Match North Europe AB v. SCA*, dated 29 June 2018, as the conduct was deemed to be objectively justified.

is capable of foreclosing as efficient competitors.³⁶ Therefore, although as-efficient competitor tests are not strictly necessary to establish an abuse, the SCA regularly performs such tests in cases regarding price-based abuse to decide whether an intervention is warranted.³⁷

iii Exploitative abuses

Exploitative abuses are covered by the prohibition. Cases regarding pure exploitative conduct are, however, rare, in particular in public enforcement. During 2016–2020, the SCA's prioritisation policy did not even mention exploitative abuse, and the SCA has not initiated any investigations or legal proceedings regarding pure exploitative conduct. In the latest version of the Prioritisation Policy, which was adopted on 12 February 2020, an amendment was made regarding exploitative abuse stating that the SCA may prioritise exploitative abuse if there are clear signs that a dominant firm is directly exploiting customers or consumers as a result of non-functioning competition.³⁸ Cases regarding exploitative abuse occasionally occur in private litigation.³⁹

iv Discrimination

Like Article 102 TFEU, the Swedish provision prohibits the application of 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The prohibition applies not only to discriminatory prices, but also to other discriminatory terms. It covers discrimination of a dominant company's competitors (first-line discrimination) as well as discrimination of its customers (second-line discrimination). The latter form of discrimination (sometimes referred to as pure discrimination) is less likely to lead to foreclosure of effective competition, and thus less likely to be prioritised by the SCA.⁴⁰ These cases are more likely to occur in private litigation.⁴¹

³⁶ See footnote 30.

³⁷ See, for instance, the SCA's decision in case 494/2013, *Asa AB et al*, 22 November 2017.

³⁸ See footnote 30.

³⁹ The most recent example of a case regarding pure exploitative abuse is a case from 2011 concerning a 'sign fee' imposed by the airport operator Swedavia for pre-ordered taxis at Arlanda Airport. The fee was imposed on taxis that picked up customers in the arrival hall with a sign with the customer's name on it. When the complaint was rejected by the SCA on priority grounds, the complainant brought successful private actions to the Market Court. In a judgment delivered on 23 November 2001, MD 2011:28, the Market Court found that there was no 'necessary connection' between the fee and the pre-ordered taxi traffic. Without considering whether the fee was excessive, the Court found that the fee was 'unfair' and thus abusive. Following the judgment, the SCA submitted a summons application with a request for fines. In its judgment delivered on 9 June 2016 in case T 9131-13, the request was dismissed by Stockholm City Court. The Court agreed that the fee was anticompetitive but found that it was objectively justified by capacity issues at the airport. The SCA chose not to appeal the judgment.

⁴⁰ See footnote 30.

⁴¹ See, for instance, MD 2011:2, *Stockholm Transfer Taxi in Stockholm AB v. Swedavia AB*, 2 February 2011, concerning the alleged discriminatory allocation of taxi lanes at Arlanda Airport. When the complaint was rejected by the SCA on priority grounds, the complainant brought private actions in the Market Court. Considering that the taxi space outside Arlanda was limited, the Market Court agreed that Swedavia was obliged to ensure that the allocation of taxi lanes was neutral from a competition perspective, but it did not agree that the allocation was discriminatory. The Court found that the allocation was based on customer demand and that it did not lead to a competitive disadvantage for the complainant. Accordingly, the conduct did not constitute an abuse.

V REMEDIES AND SANCTIONS

i Overview

The main remedies and sanctions against abuse of a dominant position are:

- a* administrative fines;
- b* fine orders;
- c* orders imposing obligations (under threat of a fine for default);
- d* commitment decisions;
- e* nullity; and
- f* damages.

Following the implementation of Directive (EU) 2019/1 (the ECN+ Directive) to empower the competition authorities of the Member States to be more effective enforcers, the SCA will also have the power to issue infringement decisions.

ii Administrative fines

An undertaking that intentionally or negligently infringes the prohibition against abuse of a dominant position may be ordered to pay administrative fines. The SCA does not have the authority to impose fines itself, but the PMC may do so at the SCA's request.⁴² In connection with the implementation of the ECN+ Directive, the Ministry of Trade has submitted a proposal to give the SCA decision-making powers in cases regarding fines.⁴³

When determining the amount of the administrative fines, account shall be taken of the gravity and duration of the infringement, and possible aggravating or mitigating circumstances.⁴⁴ The gravity is based primarily on the nature of the infringement, the size and significance of the market, and the infringement's actual or potential impact on competition.⁴⁵ The amount may be increased if there are aggravating circumstances (if the company has persuaded other companies to participate, or has played a leading role in the infringement) and reduced if there are mitigating circumstances (if the company's participation has been limited).⁴⁶ Besides circumstances referable to the infringement, particular account shall be taken of the undertaking's financial status, whether the undertaking has previously infringed any of the competition prohibitions and whether it has quickly discontinued the infringement.⁴⁷

The SCA has published a memorandum describing its method of setting administrative fines.⁴⁸ The purpose of the memorandum is to provide greater clarity on how the SCA interprets and applies the provisions on administrative fines in the Competition Act. The memorandum does not pre-empt the interpretations made by the courts.

42 Chapter 3, Article 5 of the Competition Act.

43 Ds 2020:3 p. 57.

44 Chapter 3, Article 8 of the Competition Act.

45 *ibid.*

46 Chapter 3, Articles 9–10 of the Competition Act.

47 Chapter 3, Article 11 of the Competition Act.

48 The memorandum is published at the SCA's website, www.konkurrensverket.se/globalassets/english/competition/method-of-setting-administrative-fines.pdf.

The fines may not amount to more than 10 per cent of the undertaking's total annual turnover.⁴⁹ The highest fine ever imposed by final judgment in a Swedish case concerning abuse of dominance is 35 million Swedish kronor.⁵⁰

iii Fine order

Instead of bringing legal proceedings requesting administrative fines, the SCA may in some cases issue a fine order with the same effect as a legally binding judgment. These orders may only be issued if the undertaking consents thereto and the SCA considers that the material circumstances regarding the infringement are clear.⁵¹ According to the preparatory works, fine orders should not be used in cases with legal questions of precedential interest.⁵²

The SCA's power to issue fine orders has only been used in a limited number of cases. To date, the SCA has not issued any fine orders in cases regarding abuse of a dominant position. If the SCA receives decision-making powers in cases regarding fines, the power to issue fine orders may be removed.⁵³

iv Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse.⁵⁴ According to the preparatory works, such orders may not be more far-reaching than what is necessary to eliminate the anticompetitive effects of the infringement.⁵⁵ The SCA may impose behavioural obligations, such as the obligation to end an agreement or stop a certain conduct, but it may not impose structural obligations.⁵⁶

If there are 'particular grounds', the SCA may issue an interim order for the period until a final decision is adopted.⁵⁷ According to the preparatory works, interim measures should be taken in cases where the infringement is 'more serious' and may lead to 'significant negative effects' if the company is not ordered to terminate the conduct immediately. Account shall also be taken of the effects on the company addressed by the order.⁵⁸

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.⁵⁹

49 Chapter 3, Article 6 of the Competition Act.

50 MD 2013:5, *TeliaSonera AB v. SCA*, 12 April 2013.

51 Chapter 3, Articles 16–19 of the Competition Act.

52 Government Bill 2007/08:135, p. 261.

53 Ds 2020:3 p. 57.

54 Chapter 3, Article 1 of the Competition Act.

55 Government Bill 1992/93:56, p. 90.

56 Following the implementation of the ECN+ Directive, the SCA will also have the power to impose structural obligations.

57 Chapter 3, Article 3 of the Competition Act.

58 Government Bill 1997/98:130, p. 62.

59 Chapter 6, Article 1 of the Competition Act.

v Commitment decision

If the undertaking investigated offers commitments, the SCA may adopt a commitment decision stating that there are no longer grounds for action.⁶⁰ As long as the decision applies, the SCA may not issue orders imposing obligations regarding the conduct covered by the decision.⁶¹

vi Special right to legal action

If the SCA decides not to investigate a complaint, or to end an investigation without issuing an order, undertakings affected by the conduct are entitled to institute private proceedings before the PMC, and to request that the court orders the company to end the abuse.⁶²

vii Nullity

An agreement that infringes the prohibition against abuse of a dominant position is considered null and void.⁶³ This means that the agreement, or at least the infringing provisions thereof, cannot be enforced by a court.

viii Damages

An intentional or negligent abuse of a dominant position may lead to liability to pay damages.⁶⁴

VI PROCEDURE

i Overview

The Swedish procedural rules differ significantly from the EU's procedural rules and from those of other EU Member States. In particular, the decision-making powers of the SCA are less extensive than those of the European Commission and most other European competition authorities. As regards decisions to impose administrative fines, a pure judicial model applies, meaning that the first instance decision (both on substance and fines) is taken by the court.⁶⁵ The SCA may take decisions requiring that an infringement be brought to an end, but if these orders are appealed, the courts are entitled to make a full review of the case.

60 Chapter 3, Article 4 of the Competition Act.

61 See, for instance, the SCA's decisions dated 3 May 2017 in cases 630/2015 and 210/2017, *Arla Foods amb.* In February 2016, Arla introduced restrictions in the right for members of the Arla group to supply organic milk to other dairies than Arla. The SCA initiated an investigation regarding abuse of a dominant position (case 630/2015). Considering that the members' right to supply milk to competing dairies was subject to a commitment decision from 2010, which was unlimited in time, the SCA found that it was not entitled to issue an order against the restrictions introduced in 2016. The new restrictions were, however, deemed to constitute a violation of the said commitment decision. For the SCA to be able to intervene against the new restrictions, the SCA revoked the commitment decision (case 210/2017).

62 Chapter 3, Article 2 of the Competition Act.

63 This does not follow directly from the Competition Act, but is stated in the preparatory works, Government Bill 2003/04:80, p. 54.

64 The liability to pay damages for competition law infringements is described further under Section VII.

65 As described above, the Ministry of Trade has submitted a proposal to give the SCA decision-making powers in cases regarding fines.

ii SCA investigations

SCA investigations are governed by the Competition Act and the Administrative Act.⁶⁶ Subject to certain limitations set out in the Public Access to Information and Secrecy Act,⁶⁷ a party to an investigation has extensive rights of access to files.

Most SCA investigations regarding abuse of a dominant position start with a tip-off or a complaint from a customer, supplier or competitor. *Ex officio* investigations occur but are quite rare. The SCA does not investigate all tips and complaints that it receives: the process of selecting cases for investigation is described in the SCA's Prioritisation Policy for Enforcement.⁶⁸ If the SCA decides not to open an investigation, the case is closed with no further explanation other than a short reference to the Authority's prioritisation policy. If the SCA decides to open an investigation, the case is allocated to the Market Abuse Unit, a specialised unit that handles cases regarding abuse of dominance, vertical restraints and competition neutrality.

The SCA has extensive investigative powers. It may order parties and third parties to provide information and documents, conduct interrogations and, upon prior authorisation from the PMC, conduct unannounced inspections at the premises of companies.⁶⁹ Unlike the Commission, the SCA is not entitled to impose sanctions for the submission of incorrect, incomplete or misleading information, but the right to impose (or request the Court to impose) such sanctions will be introduced as a result of the ECN+ Directive.

Before the SCA institutes proceedings with a request for fines, the party must be given the opportunity to comment on the SCA's draft summons application.⁷⁰ The Competition Act contains no corresponding provision regarding orders to impose obligations, but the SCA has nonetheless developed a practice of communicating draft orders before adopting a final decision.

A party that receives a draft summons application or a draft order may request an oral hearing of the case. The main purpose of the oral hearing is to complete the party's written submissions with oral comments and ensure that the SCA's decision is well-supported.⁷¹

When the investigation is completed, the main findings and a proposed decision are presented to the Director General, who makes the final decision on whether to intervene or close the case.

The SCA does not have the opportunity to give negative clearance. Thus, when the SCA decides to close a case, the closing decision normally states that the SCA has not taken a final stand on whether the conduct constitutes an infringement.

The duration of the SCA's investigations varies from case to case, depending on the complexity of the case and whether the investigation leads to the finding of an infringement.

⁶⁶ The Administrative Act (2017:900).

⁶⁷ The Public Access to Information and Secrecy Act (2009:400).

⁶⁸ See footnote 30.

⁶⁹ Chapter 5, Articles 1 and 3 of the Competition Act.

⁷⁰ Chapter 3, Article 5 of the Competition Act.

⁷¹ The oral hearing is described on the SCA's website (Swedish only), www.konkurrensverket.se/omossmeny/om-oss/konkurrensverkets-uppdrag/sa-arbetar-vi/kvalitetssakring-av-beslut/muntligt-forfarande/.

Investigations regarding abuse of dominance tend to take longer than investigations of other competition infringements. In cases that lead to the finding of an abuse, the investigation may take several years.⁷²

iii Early resolutions and settlement procedures

The SCA does not have the possibility to make settlement agreements. If a party consents thereto, the SCA may issue a fine order with the same effect as a legally binding judgment, but the SCA is not entitled to grant reductions in the fines in return for such consent.

iv Appeals and judicial review

The right to appeal decisions adopted by the SCA is governed by Chapter 7, Article 1 of the Competition Act. Orders by the SCA to impose obligations may be appealed. Decisions not to investigate a case may not be appealed, but undertakings affected by the conduct may institute private proceedings and request that the court issues an order to end the conduct.⁷³ Fine orders may, under certain circumstances, be set aside.⁷⁴

As of 1 September 2016, the competent court in competition law cases is the PMC, a division of Stockholm District Court that specialises in competition, patent and market law.⁷⁵

Judgments and decisions by the PMC may be appealed to the PMCA, which is a division of Svea Court of Appeal. Leave to appeal is required. Decisions and judgments by the PMCA in competition cases may normally not be appealed. The PMCA may, however, allow the judgment to be appealed to the Supreme Court if the Supreme Court's review is important from a precedential perspective.⁷⁶ To date, this opportunity has only been used in cases concerning procedural rights.

The courts' review is not limited to a legal review: both the PMC and the PMCA make a full review of the case.

The number of judgments regarding abuse of a dominant position delivered by the courts following the introduction of the new court system is too limited to make any general conclusions regarding the length of the court proceedings. In the three cases in which final judgments have been handed down, the total proceedings lasted from two to four years.⁷⁷ Considering the complexity of this type of case, it is fair to assume that court proceedings will take at least two years and most often several years (appeals included).

72 From recent investigations leading to the finding of an abuse, it may be noted that the SCA's investigation of FTI, Swedish Match and Nasdaq took approximately one and a half years, two and a half years and four and a half years, respectively.

73 Chapter 3, Article 2 of the Competition Act.

74 According to Chapter 3, Article 19 of the Competition Act, a fine order for which consent has been given shall upon appeal be set aside under the preconditions in Chapter 59, Section 6, First Paragraph of the Code of Judicial Procedure.

75 Chapter 8, Article 1 of the Competition Act.

76 Chapter 1, Article 3 of the Act on Patent and Market Courts (2016:188).

77 Following the entry into force of the new court system, final judgments from the PMCA has been delivered in three cases; *Swedish Match* (PMT 1988-17), in which the court proceedings lasted for three and a half years, *Nasdaq* (PMT 1443-18) which took approximately four years and *FTI* (PMÖÅ 1519-19), which took approximately two years. The proceedings in the PMC are somewhat lengthier than in the PMCA.

VII PRIVATE ENFORCEMENT

A company that intentionally or negligently abuses a dominant position may be held liable to pay damages for the harm caused. The right to claim damages is governed by the Competition Damages Act,⁷⁸ which implements the EU Directive on Competition Damages into Swedish law.⁷⁹ When the Competition Damages Act entered into force on 27 December 2016, it replaced the previous provisions on competition damages in the Competition Act.

The liability covers compensation for actual loss, loss of profit and interest. The claimant has to demonstrate the existence of an abuse, the extent of the harm, and the existence of a causal link between the abuse and the harm. In contrast to cartels, abuse of a dominant position is not presumed to cause harm. Following the entry into force of the Competition Damages Act, final infringement decisions of the SCA or Swedish courts constitute full proof that an infringement has actually occurred.⁸⁰

Collective actions are available and governed by the Swedish Group Proceedings Act,⁸¹ which is based on an opt-in system.

To our knowledge, there are no Swedish court cases in which a claimant has been awarded damages for abuse of a dominant position.

Last year,⁸² the PMCA delivered its final judgment in *Net at Once v. Gothnet*,⁸³ rejecting Net at Once's stand-alone claim for damages against Göteborg Energi (Gothnet) for alleged abuse of a dominant position.⁸⁴

There are no general prohibitions against third-party funding of private litigation.

VIII FUTURE DEVELOPMENTS

A key aspect for the future will be how the SCA's defeats in the PMCA will affect the authority's priorities going forward. Following the entry into force of the new court system on 1 September 2016,⁸⁵ three cases on abuse of dominance have been finally decided. Two of the cases were upheld by the PMC, but all three were ultimately dismissed by the PMCA.

78 The Competition Damages Act (2016:964).

79 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.

80 The Competition Damages Act applies to infringements conducted and harm that arose after the Act entered into force on 27 December 2016.

81 The Swedish Group Proceedings Act (2002:599).

82 1 April 2019 to 31 March 2020.

83 PMT 2216-18, *Net at Once Sweden AB v. Göteborg Energi Gothnet AB*, 22 November 2019.

84 The case stems from 2009, when the city of Gothenburg procured data communication services. Gothnet, a municipally-owned data communication services provider, which owned fibre connections to many of the addresses specified in the procurement, charged a competitor in the procurement – the telecommunication operator Net at Once – a wholesale access price that was higher than the price Gothnet offered in its own tender. Net at Once brought an action for damages and argued that Gothnet had abused its dominant position by way of discrimination, margin squeeze and unfair trading conditions. Unlike the PMC, the PMCA found that the relevant market could be defined by the fibre addresses specified in the procurement. Yet, despite Gothnet's special position in this 'market', Gothnet was not considered to have a dominant position, and the case was dismissed.

85 The new court system is described in Section VI.

Considering the time and extensive resources the SCA has invested in these cases, the outcome is concerning and likely to affect future priorities. Even outside the scope of Article 102, the PMCA has sided with the defendants in all competition law cases it has heard.

From an outside perspective, without access to all facts, it is difficult to judge the outcome of the cases. However, the fact that two out of three judgments from the lower court have been changed by the court of last instance is notable per se and raises important questions regarding predictability and legal certainty, the effectiveness of the enforcement and the competence of the courts.

SWITZERLAND

*Marcel Dietrich, Franz Hoffet and Yves Bianchi*¹

I INTRODUCTION

i General legal framework

In Switzerland, unilateral practices of dominant undertakings are regulated by the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act). Similar to Article 102 of the Treaty on the Functioning of the European Union (TFEU), Article 7 of the Cartel Act contains both a general clause (Paragraph 1) and a non-exhaustive list of examples of potentially abusive practices (Paragraph 2).

According to Article 7, Paragraph 1 of the Cartel Act, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or if they disadvantage trading partners. Dominant undertakings are defined as one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market (Article 4, Paragraph 2 of the Cartel Act).

Article 7, Paragraph 2 of the Cartel Act further enumerates a (non-exhaustive) list of practices that can in particular be considered as unlawful, as follows:

- a* any refusal to deal (e.g., refusal to supply or to purchase goods);
- b* any discrimination between trading partners in relation to prices or other conditions of trade;
- c* any imposition of unfair prices or other unfair conditions of trade;
- d* any undercutting of prices or other conditions directed against a specific competitor (predatory pricing);
- e* any limitation of production, supply or technical development; and
- f* any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

Article 7 of the Cartel Act has been conceived on the basis of Article 102 of the TFEU. As a result, although Article 7 of the Cartel Act constitutes independent Swiss law, the case law developed in the European Union in regard to Article 102 of the TFEU may serve as an interpretative source for the assessment of certain abusive practices. Nevertheless, there are several differences between EU and Swiss law in the context of abuse of dominance, mainly with regard to the sanctioning regime for abusive practices.

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In addition to the Cartel Act, the Federal Price Surveillance Act of 20 December 1985, which aims at the avoidance of abusive pricing, may be relevant for dominant undertakings.

Finally, in the context of abusive pricing, the Federal Act against Unfair Competition of 19 December 1986 should be taken into consideration, in particular as regards dumping prices (Article 3, Paragraph 1, Letter f of the Unfair Competition Act).

ii Interplay between the Cartel Act and other statutory provisions

The interplay between the Cartel Act and other regulations is governed by Article 3 of the Cartel Act: according to Article 3, Paragraph 1 of the Cartel Act, statutory provisions that do not allow for competition in a certain market take precedence over the provisions of the Cartel Act. This is particularly the case for provisions that establish an official market or price system, as well as provisions that grant special rights to specific undertakings to enable them to fulfil public duties. In practice, such statutory provisions usually do not establish a fully comprehensive market or price system. The extent of the applicability of the Cartel Act thus needs to be assessed on a case-by-case basis.

Regarding intellectual property, the Cartel Act does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions based on intellectual property rights are covered by the Cartel Act (in Article 3, Paragraph 2).

iii Sector-specific regulations

Special rules apply to certain industry sectors.

In the telecommunications sector, the Federal Telecommunications Act of 30 April 1997 provides for specific *ex ante* obligations for dominant telecommunication providers. In particular, providers of telecommunications services that have a dominant position in the market must provide access to their facilities and services to other providers in a transparent and non-discriminatory manner at cost-oriented prices. If the question of dominance in the market must be assessed, the Federal Office of Communications shall consult the Competition Commission (ComCo). The latter may publish its position. While bundling of services is as such permissible for dominant telecommunication providers, they must also offer the services included in the bundle individually.

In the radio and television sector, the Federal Radio and Television Act of 24 March 2006 lays down an obligation for dominant undertakings active in the radio and television market to provide the licensing and supervisory authorities, free of charge, with certain information. Moreover, the Act allows for measures to be taken if, as a result of its abuse of a dominant position, an undertaking has jeopardised diversity of opinion and programming.

In the electricity and postal sectors, specific regulations govern historic monopolist providers to ensure access to other suppliers.

Despite the special rules applicable to certain industry sectors, these rules do not preclude the application of the Cartel Act. Rather, sector-specific regulations shall be taken into account in the application of the Cartel Act.² Exceptionally, sector-specific provisions effectively aiming at excluding competition may lead to the non-applicability of the Cartel Act.³

2 Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Mobilfunkterminierungspreise*.

3 Federal Supreme Court, RPW/DPC 2015/1, p. 131, *Hors-Liste Medikamente*.

II YEAR IN REVIEW

In December 2018, the ComCo handed down its decision against two Berne-based companies active in the supply and transportation of sand, gravel and ready-mix concrete, Alluvia Holding AG and Kästli Bau AG. The ComCo found that the two companies had abused their collective dominant position towards purchasers and competitors and prevented the latter from entering the market by concluding price agreements on the joint quantity rebate and thus, restricting sales and impeding the exercise of competition. The ComCo held that the quantity rebates were such that a construction company that did not purchase the entirety of its products from one of the two concerned undertakings, lost discounts to an extent that made it unattractive to source from other competitors. The greater the quantity purchased during a year from a party's concrete plant, the higher the discount per cubic metre. If a customer decided not to make part of his or her purchases from a plant of the parties, the discount for the other purchases was also reduced. The ComCo found that the quantity rebates made it more difficult for new suppliers to enter the market and foreclosed the area supplied by the parties from third-party suppliers. Accordingly, there were no new market entries during the period under review. By making the products and services of competitors less marketable without this being a consequence of their higher-value services, the dominant parties behaved abusively. Lacking a legitimate business reason, the ComCo concluded that the dominant parties abused their joint dominant position and infringed Article 7, Paragraph 1 in conjunction with Article 7, Paragraph 2, letter e Cartel Act and sanctioned the parties with a fine of approximately 22 million Swiss francs. However, the decision is not final as at the time of writing, since the parties filed an appeal before the Federal Administrative Court where the case is pending at the time of writing.

Further, in the end of 2019, the ComCo granted interim relief for Sellita against the Swiss watch manufacturer Swatch Group and ordered that Swatch Group had to continue to supply mechanical movements and assortments (parts of a mechanical watch) to independent watch manufacturers that were initially ordered to end as of 31 December 2019. The background of this interim relief is an initial investigation of the ComCo in 2013 in which Swatch Group planned supply stops of movement components, namely mechanical movements of ETA SA Manufacture Horlogère Suisse (100 per cent subsidiary of Swatch Group) and assortments by Nivarox-FAR SA (also a wholly-owned subsidiary of Swatch Group). At that time, Swatch Group planned to completely stop the supply of ETA products by the end of 2012 and of Nivarox products by the end of 2014, with the first reduction steps to be implemented by the end of 2011. The ComCo found that both ETA (on the market for mechanical Swiss-made movements produced in Switzerland) and Nivarox (on the market for mechanical assortments produced in Switzerland) are dominant within the meaning of Article 4, Paragraph 2 Cartel Act. In its assessment, the ComCo came to the conclusion that the cessation of supplies of mechanical movements until 2012 or of assortments until 2014 is to be qualified as abusive behaviour within the meaning of Article 7 Cartel Act. It was clear to ComCo that the planned delivery stop by Swatch Group would severely impede effective competition in the market for mechanical watch movements as well as in the downstream market for finished mechanical watches, since market participants would still be dependent on deliveries from ETA or Nivarox for the foreseeable future. However, the ComCo also stated that in the medium to long term, due to potential competition, it was likely that ETA's dominant position would be weakened and that other players would be active to a sufficient extent in the market for mechanical movements. In the meantime, it had to be ensured that Swatch Group would continue to supply mechanical movements to third parties to a certain

extent. Otherwise there would be a strong impediment to effective competition and most likely market exits. Swatch Group reached an amicable settlement with the ComCo in which it committed itself mainly to continue supplying third-parties until the end of 2019 while gradually decreasing the supply. In November 2018, the ComCo opened a reconsideration proceeding. The opening of proceedings was prompted by indications that the market conditions have not developed in the manner that was apparent at the time of the original decision and that alternative sources of supply may not be available to a sufficient extent from 2020 onwards to meet the demand of watch manufacturers for mechanical movements. The purpose of the present proceedings is to examine whether the indications described above are substantiated and, if so, to consider revoking or amending the initial decision. However, the ComCo could not finish its investigation on the market before the end of 2019 and decided to order interim relief to guarantee the continuation of the supply until the ComCo is able to decide on the merits. However, the decision on the interim relief is not final as at the time of writing, since Swatch Group filed an appeal before the Federal Administrative Court where the case is currently pending.

In December 2018, the Federal Administrative Court ruled on SIX Group's appeal against the 2010 decision of the ComCo concerning the refusal to deal on the market of payment transactions with credit and debit cards. In 2005, payment cards were equipped with new security features, and merchants, therefore, had to purchase new payment terminals. At that time, the 'dynamic currency conversion' had already been introduced. This enabled cardholders to make payments abroad not only in the local currency but also in the currency of their home country. Card acquirers offered merchants special conditions for the use of currency conversion as part of additional contractual agreements. This enabled the merchants to reduce the commissions they had to pay. At the beginning of 2005, SIX launched new payment card terminals that could both process cards with the new security features and perform dynamic currency conversion. In addition to payment transaction services, merchants were offered currency conversion and payment card terminals. At the same time, SIX refused to disclose the necessary interface information to other terminal manufacturers to enable them to connect their devices to the dynamic currency conversion. As a result, until 2007, merchants could only use SIX terminals if they wanted to use SIX's payment and currency conversion services. The Court held that SIX held a dominant position as card acquirer and abused its position by refusing to supply necessary interface information to competitors and thus rendering their products incompatible with the SIX card payment terminals and confirmed the fine of 7 million Swiss francs.

On appeal of Swisscom, the Federal Administrative Court confirmed in December 2019 a decision of the ComCo of 2009 regarding the abuse of a dominant position in the market for broadband internet through price or margin squeeze behaviour. Swisscom, as a former monopolist of network based communication, provided ADSL services and broadband connectivity services (BBCS). Competitors, in order to provide ADSL services, had to receive access to Swisscom's network. The competitors had no influence on the technical design of the BBCS, but were merely resellers of these services. Swisscom's BBCS, therefore, represented a broadband product at wholesale level that served other providers as an upstream product for their retail broadband products. At the same time, Swisscom offered its own DSL products to end customers. The ComCo concluded that Swisscom charged its competitors such high prices on the wholesale market that those competitors were not able to profitably offer their services on the retail market. The Federal Administrative Court upheld these findings and confirmed the fine of approximately 186 million Swiss francs.

Further a (potential) abuse of dominance case published in 2019 was closed after a preliminary investigation by the Secretariat of the ComCo (Secretariat). No fines were imposed. Nevertheless, this case is briefly discussed below.

In a preliminary investigation, the Secretariat examined the question whether IWB Industriellen Werke Basel, a natural gas network operator and other network operators abused their dominant position by unjustifiably charging different fees for the network use to its end customers and third-party suppliers. IWB operates both as a local gas network operator and as a gas supplier. The preliminary investigation has shown that IWB calculates the fees for the network use for end customers supplied by itself locally in a different way from the calculation in relation to end customers supplied by third parties. This could mean that self-supplied end customers might have to pay a lower price for network usage than a third-party end customer with the same consumption, due to IWB's approach. The Secretariat examined therefore, whether IWB abused its dominant position in order to discriminate against trading partners (i.e., third party suppliers). The Secretariat held that the different pricing for the same service depending on whether the end customer is supplied by the company itself or by third parties cannot be justified by objectively comprehensible criteria. Further, the Secretariat considered that this behaviour might hinder third-party suppliers from entering the market for the supply of natural gas to end customers. IWB proposed several behavioural commitments in order to address the Secretariat's concern.

The Secretariat deemed the proposed commitments suitable for eliminating concerns of possible unlawful restrictions of competition and found the discontinuation of the investigation appropriate.

i Significant decisions and cases in 2019

Sector	Investigating authority	Conduct	Fine levied
Construction	ComCo	Abuse of a collective dominant position by Alluvia Holding AG and Kästli AG in the market of supply and transportation of sand, gravel and ready-mix concrete by concluding price agreements on the joint quantity rebate and thus, restricting sales and impeding the exercise of competition. Further, the parties restricted competition with unlawful agreements.	Approximately 22 million Swiss francs for both parties combined (the fine takes also into consideration the unlawful agreements)
Manufacturing of watches	ComCo	Interim relief on the question whether Swatch Group had to continue supplying its parts of watches to third-parties. The background of this interim relief was an investigation of 2013 in which the ComCo found Swatch Group to be dominant and that a supply stop to third parties would constitute an abusive behaviour. The ComCo and Swatch Group hence concluded to continue the supply, however by continuously decreasing the supply, until the end of 2019.	None (decision on the merits still outstanding)
Payment transactions	ComCo	Abuse of dominance by SIX in the market of payment transactions by refusing to supply necessary interface information to competitors and thus rendering their products incompatible with the SIX card payment terminals	7 million Swiss francs
Broadband internet	ComCo	Abuse of dominance by way of margin squeeze by Swisscom in the market of broadband internet by demanding such high prices on the wholesale market that competitors on the retail level were not able to profitably offer their services on the retail market to end customers	186 million Swiss francs
Natural gas supply	ComCo	Preliminary investigation on the question of whether IWB, a natural gas network operator, abused its dominant position by applying different fees for the network use to its end customers. Such behaviour was deemed to be unlawful, however no investigation was opened due to the proposed behavioural commitments	None (preliminary investigation closed without further action)

ii Current cases

Sector	Investigating authority	Conduct	Case opened
Construction	ComCo	Suspected abuse of a dominant position by a pavement company by giving preferential treatment to its shareholders and established a long-term customer loyalty mechanism to the detriment of other pavement companies	March 2019
Natural gas supply	ComCo	Suspected abuse of a dominant position by two natural gas network operators (Erdgas Zentralschweiz AG and ewl Energie Wasser Luzern Holding AG) by refusing to grant other (foreign) natural gas suppliers access to their network, thereby disabling them to reach certain end customers	January 2019
Manufacturing of watches	ComCo	Investigation on the question of whether Swatch Group still has a dominant market position and is obliged to supply third parties with its mechanical parts for watches. The background of this interim relief was an investigation of 2013 in which the ComCo found Swatch Group to be dominant and that a supply stop to third parties would constitute an abusive behaviour. The ComCo and Swatch Group hence concluded to continue the supply, however by continuously decreasing the supply, until the end of 2019.	November 2018
Mobile payments	ComCo	Investigation against several Swiss banks and credit card issuers based on a suspected boycott of Apple Pay and another mobile payment solution	November 2018
Online hotel booking platforms	Price Surveillance Authority	Suspected excessive commissions perceived by Booking.com in Switzerland	February 2017
Pay TV	ComCo	Investigation concerning the alleged abuse of a dominant position by UPC Schweiz GmbH in the Swiss market for the transmission of ice hockey on pay TV through refusal to grant access to the transmission of ice hockey games to competing TV platform operators	May 2017

III MARKET DEFINITION AND MARKET POWER

i Definition of the relevant market

In abuse of dominance cases, the rules applicable in merger control cases are being used by analogy for the purpose of defining the relevant market. According to Article 11 of the Merger Control Ordinance of 17 June 1996, the relevant product market comprises those goods and services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other with regard to their characteristics and intended use. The relevant geographic market is defined as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market. This provision also serves as the basis for defining the relevant market in dominance cases.⁴ From a temporal perspective, it must be examined whether any goods or services that allow for substitution in terms of product and geography are available all year round or just for a certain period of time.

The Swiss authorities generally rely on the test of cross-price elasticity and the small but significant and non-transitory increase in price (SSNIP) test to determine the relevant product market.⁵ In the context of an abuse of dominance case, it needs to be assessed whether the allegedly disadvantaged opposite side of the market (i.e., the trading partners

⁴ RPW/DPC 2012/1, pp. 103 and 105, *Vertrieb von Tickets im Hallenstadion*.

⁵ Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*.

of the dominant undertaking) could switch to alternative offers from a product, geographic and temporal perspective.⁶ If there are reasonable alternative offers for the opposite side of the market, it is likely that the undertaking considered is not dominant on a certain market.

The ComCo has previously considered cases in which the market has incorrectly been defined too broadly due to the presence of already monopolistic prices ('cellophane fallacy').⁷

ii Definition of dominance

According to Article 4, Paragraph 2 of the Cartel Act, an undertaking is dominant if it can to an appreciable extent behave independently of other market participants (competitors, suppliers or buyers). In the course of the amendment of the Cartel Act in 2003, the text in brackets defining other market participants was added. According to the Message of the Federal Council, the aim of this amendment is to ensure that authorities do not rely only upon market structure data to determine whether an undertaking is dominant, but also take into consideration the actual relations of dependence on the market. The ComCo has had the occasion to discuss the amended wording of Article 4, Paragraph 2 of the Cartel Act.⁸ It has generally confirmed the previous understanding of dominance (i.e., the capacity to behave independently on the market), but has, in addition, specified under which circumstances actual relations of dependence would also fall under Article 4, Paragraph 2 of the Cartel Act (and thus be subject to abuse of dominance rules). Based on the wording of Article 4, Paragraph 2 of the Cartel Act, market dominance may exist both on the supply as well as on the demand side.

There is no statutory threshold above which an undertaking must be considered as dominant under Swiss law. As a rule of thumb, market shares below 20 per cent are not considered to confer a dominant position to an undertaking. Market shares of between 20 and 40 per cent generally do not confer a dominant position to an undertaking, unless special circumstances are present. Market shares of 40 per cent and above are an indicator of dominance,⁹ unless there are special circumstances that allow denying this dominance.

In any event, market shares constitute mere indicators and are never in themselves sufficient proof of dominance. In practice, the ComCo performs an in-depth analysis of the market characteristics, such as the situation of competitors (current competition), the market entry barriers (potential competition) and the position of the other side of the market (countervailing market power). Such an analysis is made even in cases where the definition of the relevant market reveals market shares of 100 per cent.¹⁰ In accordance with the practice of the EU Commission, the ComCo assesses the competitive pressure and market position of the potentially dominant undertaking and its competitors. It also takes into consideration the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of new suppliers. Finally, the ComCo assesses the competitive

6 Regarding the substitutability of offer and demand, see RPW/DPC 1997/3, p. 364 st, *Migros/Globus* and RPW/DPC 1998/3, p. 394 ff, *Belli/SEG-Poulets*.

7 See, for example, RPW/DPC 2015/1, p. 105, *Valora Holding/LS Distribution Suisse*.

8 See RPW 2005/1, p. 149 ff, *CoopForte*; RPW 2008/1, p. 129 ff, *Migros/Denner*.

9 See, for example, RPW/DPC 2003/1, p. 84, *Plakatierung in der Stadt Luzern*, in which case a market share above 50 per cent was considered as sufficient to confer dominance. In a more recent decision of the Federal Supreme Court, market shares above the 50 per cent threshold were considered as an indicator for market dominance (Federal Supreme Court, RPW/DPC 2013/1, p. 130, *Publigroupe*).

10 RPW/DPC 2008/2, p. 242, *Terminierungsgebühren beim SMS-Versand via Large Account*.

pressure due to the negotiating strength of the other side of the market (i.e., the countervailing buying power). In its more recent practice, the ComCo has analysed the competitive position of the opposite side of the market only in cases of collective dominance. In fact, the ComCo seems to consider that, although the disciplinary effect of countervailing buyer power may prevent abuses in individual cases, it does establish or re-establish the dynamic functions of effective competition.

Market dominance may only be achieved by 'undertakings'. This corresponds to the personal scope of application of the Cartel Act. According to Article 2, Paragraph 1 *bis* of the Cartel Act, undertakings are all buyers or suppliers of goods and services active in commerce, regardless of their legal or organisational form. The concept of an undertaking follows an economic approach, based on the entrepreneurial activity of an entity. Therefore, it also covers undertakings governed by public law, as well as private commercial companies that are part of a public body (e.g., the federal government, cantons or communes).¹¹ In the case of groups of companies, the entire group is considered as a single economic entity to the purpose of assessing market dominance.

Collective dominance

According to the definition of dominance contained in Article 4, Paragraph 2 of the Cartel Act, a dominant position may be held by one or more undertakings. Thus, collective dominance is also covered by the law. In 1998, the ComCo held for the first time that there was a case of collective dominance.¹² Collective dominance requires two (duopoly) or several (oligopoly) undertakings deliberately adopting a parallel (i.e., collusive) behaviour. If the collusive element in the parallel behaviour is lacking, such behaviour is generally legal, as it constitutes the normal reaction of competitors to exogenous market developments.

In its decisional practice, the ComCo has developed several indicators taken into account in the assessment of potential collective dominance:

- a* high market concentration (the fewer companies are active in a certain market, the more likely it is for collusion to occur);
- b* similar and stable market shares;
- c* similar cost structures, as well as a personal and financial intertwining between competitors, and the resulting symmetry of interests;
- d* high market entry barriers;
- e* similarity of products offered (price remains the sole competitive factor); and
- f* most importantly, high market transparency.¹³

Taking these indicators into consideration, it is necessary to perform an overall assessment of the competitive landscape on the relevant market as well as on the upstream and downstream markets thereof to determine whether the relevant market offers sufficient incentives for durable collective dominance.

In the planned merger between France Télécom SA and Sunrise Communications SA, the ComCo applied the aforementioned criteria.¹⁴ It found that the envisaged merger between these two companies needed to be prohibited since the newly created entity would, together

11 Federal Supreme Court, BGE 137 II 199, c. 3.1.

12 RPW/DPC 1998/3, p. 400 ff, *Bell/SEG-Poulets*.

13 See, more recently and instead of many others, RPW/DPC 2008/4, p. 630 ff, *Coop/Carrefour*.

14 RPW/DPC 2010/3, p. 499, *France Télécom/Sunrise Communications*.

with Swisscom, have held a collectively dominant position in the mobile communications market and, in the absence of new competitors entering said market, would have had no incentive to compete by reducing its prices.

When assessing the planned merger between Switzerland's two largest ticketing providers, Ticketcorner and Starticket, the ComCo considered potential collective dominance. However, in the case at issue, the ComCo did not find sufficient evidence for the existence of a collectively dominant position.¹⁵

More recently, the ComCo investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. While it did not formally conclude that the undertakings concerned hold a single or joint dominant position, the ComCo did not rule out the existence of such dominant position, either.¹⁶

IV ABUSE

i Overview

The application of Article 7 of the Cartel Act requires three cumulative pre-conditions to be met: an undertaking is dominant on a certain market; through abusing this dominant position, this undertaking hinders other undertakings from starting or continuing to compete, or disadvantages trading partners; and there are no legitimate business reasons for the abusive behaviour of the dominant undertaking.

These pre-conditions need to be met even for the (non-exhaustive) list of examples of conduct that may be considered as abusive. In other words, the examples of Article 7, Paragraph 2 of the Cartel Act need to be applied in conjunction with its Paragraph 1.¹⁷ Article 7 of the Cartel Act covers both exclusionary and exploitative practices. The first mainly concern competitors while the second aim at harming commercial partners or consumers.

When assessing a potentially abusive behaviour, it is necessary to consider the specific circumstances of the case at hand. The Cartel Act does not contain any per se prohibitions. An assessment on a case-by-case basis is required, taking into consideration the specific market conditions. In particular, it needs to be analysed whether the conditions of a specific (contractual) relationship significantly diverge from those that could be expected in the context of effective competition. In practice, the authorities examine the competitive and anticompetitive effects of a certain conduct on the market, in particular when a conduct does not fall under one (or several) of the abuses listed in Article 7, Paragraph 2 of the Cartel Act, but is covered by the umbrella clause of Paragraph 1. The intent of an undertaking to abuse its dominant position is not a necessary requirement for an abusive behaviour to be considered as illegal. However, the presence of such intent facilitates the assessment of a certain competitive behaviour.

As mentioned, the enumeration of abuses contained in Article 7, Paragraph 2 of the Cartel Act is not exhaustive. Other types of conduct not covered by one of the examples listed

15 RPW/DPC 2018/3, pp. 672 and 673, *Ticketcorner/Starticket*.

16 RPW 2016/1, p. 67, *Online-Buchungsplattformen für Hotels*.

17 Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*.

but meeting the pre-conditions enumerated in Article 7, Paragraph 1 of the Cartel Act fall into the scope of application of this umbrella clause. This is, for example, the case for margin squeeze behaviour.¹⁸

Abusive behaviour needs to be distinguished from competition on the merits. This distinction is particularly important to bear in mind when assessing the existence of legitimate business reasons for a certain behaviour. Even a dominant undertaking needs to be allowed to protect its own legitimate business interests by competing on the merits in order to maintain its leading market position. As a result, if a certain practice simply aims at improving the quality of a product (e.g., by requiring from suppliers the respect of a specific standard), such practice shall be considered legitimate even if it may eliminate certain suppliers or competitors.

ii Exclusionary abuses

Exclusionary abuses may take various forms, such as exclusionary pricing, exclusive dealing and refusal to deal or to license, as well as tying and bundling practices.

Refusal to deal

Refusal to deal is the first type of abusive conduct mentioned in the list of examples of Article 7, Paragraph 2, Letter a of the Cartel Act. This provision does not imply a general obligation to contract for dominant undertakings. According to the law, refusal to deal (e.g., refusal to supply or to purchase goods) is only unlawful if it has as its effect (or is likely to have as its effect) the anticompetitive foreclosure of the market and if it cannot be justified by legitimate business reasons (e.g., lack of quality of a certain supplier; precarious financial situation of a prospective franchisee). In particular, a refusal to deal is likely to be considered illegal if a dominant undertaking, by refusing to enter into a business relationship, intends to boycott its business partner or aims at forcing its business partner to behave in a certain way. Moreover, refusal to deal may, under certain circumstances, be considered unlawful if a dominant undertaking refuses to grant access to an essential facility. The concept of refusal to deal includes both the refusal to continue existing business relationships as well as the refusal to enter into new relationships.

One of the first major cases in which the ComCo applied the 'essential facilities doctrine' concerned the refusal of an electricity distribution network company with a local monopoly to transport through its network the electricity from a third-party provider to a customer located in the monopolist's territory.¹⁹ In another significant case, the ComCo fined SIX Group 7 million Swiss francs for refusing to supply interface information to other competitors and thus rendering their products incompatible with the SIX card payment terminals.²⁰ In a decision of 2013, the ComCo accepted an amicable settlement between the Secretariat and Swatch Group, according to which the latter may gradually reduce the supply of third-party customers with mechanical watch movements.²¹ Swatch Group thereby committed to supply certain minimum amounts per year and to treat all customers equally

18 See, for example, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*, in which the Federal Administrative Court imposed a heavy fine on Swisscom for its margin squeeze practices in the broadband internet sector (asymmetric digital subscriber line).

19 RPW/DPC 2001/2, p. 255, *Watt v. Migros-EEF*.

20 RPW/DPC 2011/1, p. 96, *SIX v. Terminals mit Dynamic Currency Conversion*.

21 RPW/DPC 2014/1, p. 215 ff, *Swatch Group Lieferstopp*.

(see also Section II). In 2016, the ComCo fined Swisscom approximately 72 million Swiss francs for having refused to supply certain competitors with broadcasts of live sports for their platforms and for having granted only partial access to a reduced range of sport contents to others.²² An appeal against the ComCo decision is currently pending.

As far as refusal to license is concerned, such refusal would generally not be considered as abusive if no standard essential patents are concerned. In fact, it is inherent to intellectual property (IP) rights that the holders of these rights enjoy some form of exclusivity, which will allow them to act independently on the market to a certain extent. Article 3, Paragraph 2 of the Cartel Act explicitly exempts the effects on competition that result exclusively from the legislation governing IP from its scope of application. It is only the modalities to exercise an IP right that may be considered abusive, namely if they go beyond the scope of protection conferred by the IP legislation (e.g., registration of patents for the sole purpose of blocking the technical development of competitors). However, the line is difficult to draw.

Exclusive dealing

Exclusive dealing practices are not enumerated in the list under Article 7, Paragraph 2 of the Cartel Act. They may fall under the umbrella clause of Article 7, Paragraph 1. In a 2016 decision, the Federal Administrative Court found likely abuses of the dominant positions held by the ticketing provider Ticketcorner and the operator of the event location Hallenstadion in Zurich through exclusive dealing practices.²³ In fact, the operator of the event location imposed an obligation upon event organisers to sell at least 50 per cent (*de facto* resulting in 100 per cent) of all tickets for events in the Hallenstadion via Ticketcorner. The case was upheld by the Federal Supreme Court and referred back to the ComCo for the determination of necessary administrative sanctions or measures.²⁴

Rebates

Discrimination between trading partners in relation to prices or other conditions of trade may be unlawful under the Cartel Act (Article 7, Paragraph 2, Letter b). Rebates can be considered as practices discriminating between trading partners, namely where only bigger customers above a certain turnover threshold may benefit from special (more favourable) agreements.²⁵ In particular, fidelity rebates are illegal if they reward customers for procuring their entire demand from the same dominant undertaking, independently of the actual quantity procured.²⁶ Such rebate systems are considered to impede the market entry of potential competitors since customers are reluctant to switch away from the dominant undertaking granting fidelity rebates.²⁷ Target rebates are also illegal if they are granted under the condition that the customers achieve certain turnover targets set by the dominant undertaking. Their effect is considered to be comparable to the one of fidelity rebates. On the other hand, quantitative rebates based on cost efficiencies (e.g., economies of scale) are generally legitimate.

22 RPW/DPC 2016/4, p. 920 ff, *Sport im Pay-TV*.

23 Federal Administrative Court, decision of 24 November 2016, B-3618/2013.

24 Federal Supreme Court, decision of 12 February 2020, 2C_113/2017.

25 RPW/DPC 2008/3, p. 385 ff, *Publikation von Arzneimittelinformationen*.

26 RPW/DPC 1997/4, p. 506 ff, *Telecom PTT-Fachhändlerverträge*.

27 RPW/DPC 1998/4, pp. 675 and 676, *Beschwerdeentscheid der REKO/WEF*.

By a 2014 decision, the ComCo imposed a fine of approximately 1.9 million Swiss francs on the leading Swiss news agency Schweizerische Depeschagentur (SDA) for offering exclusivity rebates (which were qualified as fidelity rebates) to a certain group of customers.²⁸ The ComCo found that, by granting discounts of 20 per cent to customers who agreed to exclusively subscribe to SDA's news service (without also being subscribed to a competitor news service), SDA had abused its dominant position. In the absence of any legitimate business reasons, the exclusivity rebates were considered illegal.

Predation

According to the law, any undercutting of prices or other conditions directed against a specific competitor may be unlawful (Article 7, Paragraph 2, Letter d of the Cartel Act). These pricing strategies are, however, only illegal if they aim at driving competitors out of the market or preventing new competitors from entering the market (predatory pricing).²⁹ Typically, a dominant undertaking would, in a first step, undercut prices of competitors until they leave a certain market, and then in a second step re-increase its prices once the competitive pressure has been decreased (or eliminated). In general, the ComCo is likely to infer that prices under average variable costs are aimed at driving competitors out of the market or preventing new competitors to enter the market. In contrast, low price strategies pursued by a dominant undertaking in order to access new markets or to sell off outdated products are legitimate business practices that shall not be considered as unlawful.

The ComCo has investigated presumed predatory pricing strategies on different occasions³⁰ without having issued any decisions. In its previous practice, the ComCo has, however, developed some guidance on the conditions under which a pricing practice is likely to be considered abusive:

- a* the price cutting strategy needs to be systematic and occur over a certain period of time;
- b* it is aimed at one or several weaker (actual or potential) competitors;
- c* there is no possibility to increase profits in the short term (as would be the case if outdated remaining stock was sold at low prices); and
- d* the low prices may be re-increased at a later stage.

Price or margin squeeze

As a special form of price discrimination between trading partners (see Article 7, Paragraph 2, Letter b of the Cartel Act), price or margin squeezes may be considered an abuse of a dominant position. The ComCo defines price squeeze as a situation where a vertically integrated dominant undertaking sets its retail prices at a level that is so low compared to its wholesale prices that equally efficient competitors on the retail market, dependent on procuring a certain good or service from the dominant undertaking on the wholesale market, are not able to compete and make profits in the retail market.³¹

In 2009, the ComCo fined the telecommunications provider Swisscom approximately 220 million Swiss francs for abuse of its dominant position in the market for broadband

28 RPW/DPC 2014/4, p. 670 ff, *Preispolitik und andere Verhaltensweisen der SDA*.

29 RPW/DPC 2004/4, p. 1,002, *Cornèr Banca SA v. Télékurs AG*.

30 RPW/DPC 2002/3, p. 431, *Radio und TV-Markt St Gallen*; RPW/DPC 2003/1, p. 62 ff, *Espace Média/ Berner Zeitung v. Solothurner Zeitung*.

31 RPW/DPC 2010/1, p. 146 ff, *Preispolitik Swisscom ADSL*; RPW/DPC 2015/3, p. 636 ff, *Sanktionsverfügung – Preispolitik Swisscom ADSL*.

internet through margin or price squeeze behaviour.³² The ComCo found that, until the end of 2007, Swisscom, which also offered its asymmetric digital subscriber line (ADSL) broadband internet services to end customers on the retail market, charged its competitors such high prices on the wholesale market that those competitors were not able to profitably offer their services on the retail market. The abusive and anticompetitive behaviour was corroborated by the fact that Swisscom generated large profits on the wholesale market, whereas its subsidiary active on the retail market incurred losses. On appeal by Swisscom, the Federal Administrative Court confirmed the ComCo decision in its substance, but reduced the fine imposed to approximately 186 million Swiss francs.³³ This decision was ultimately upheld by the Federal Supreme Court.³⁴ More recently, the ComCo imposed a fine of approximately 7.9 million Swiss francs on Swisscom for a price squeeze (and other abusive practices) in the wide area network (WAN) sector.³⁵ A WAN is a telecommunications or computer network that extends over a large geographical distance. In a public tender process organised by Swiss Post in 2008, Swisscom offered a price for its WAN services that was approximately 30 per cent below its next competitor's price, the latter having to acquire prior facilities from Swisscom on a wholesale level before being able to offer its WAN services to Swiss Post. Swisscom's wholesale price for the prior facilities allegedly was significantly above the price with which Swisscom won the public tender, which did not allow any competitor to compete on the retail market. An appeal against the ComCo decision is currently pending before the Federal Administrative Court.

Tying and bundling

According to the Cartel Act, any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services is unlawful (Article 7, Paragraph 2, Letter f of the Cartel Act). By such tying practices, a dominant undertaking aims at forcing its trading partners to procure unwanted goods or services in order to be able to procure the goods or services actually wanted. Trading partners are thus restricted in their freedom to take business decisions, whereas competitors are pushed out of the market. Tying practices may be legal if the tied good or service is a necessary prerequisite for the main good or service to be procured. There needs to be a factual link between the two items. Such factual link may exist for technical or safety reasons (e.g., if a licensor requires its licensee to procure certain raw materials for the production of the licensed product from the licensor, given the specific quality or characteristics of the raw materials needed). An indicator for the existence of a factual link between the main product or service and the tied one is the fact that they both belong to the same product markets. Conversely, if separate product markets exist, a factual link requiring tying of both products and services is unlikely.

The ComCo has investigated tying practices on several occasions, usually denying the finding of an abusive behaviour. In a 2002 case, for example, the Secretariat found that the Swiss national railway company, SBB, holding a dominant position in the main relevant market (but being non-dominant in the tied market), had abused its position through an illegal tying practice.³⁶ In fact, a company called Lokoop requested an offer from SBB for

32 RPW/DPC 2010/1, p. 116 ff, *Preispolitik Swisscom ADSL*.

33 RPW/DPC 2015/3, p. 561 ff, *Sanktionsverfügung – Preispolitik Swisscom ADSL*.

34 Federal Supreme Court, decision of 9 December 2019, 2C_985/2015.

35 RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*.

36 RPW/DPC 2002/1, p. 72 ff, *Lokoop v. SBB*.

the use of its railway system on certain routes to transport parcels. In addition, Lokoop requested a separate offer for various extra services at specific train stations (e.g., for the shunting of trains). In response to this request, SBB insisted on offering a bundle of services to Lokoop, which was considered unlawful by the Secretariat. Ultimately, the ComCo closed the investigation without a sanction since SBB agreed to abandon its allegedly abusive tying practice.

iii Discrimination

Under the Cartel Act, any discrimination between trading partners in relation to prices or other conditions of trade is considered unlawful (Article 7, Paragraph 2, Letter b of the Cartel Act). As mentioned above, discriminatory practices may appear in different forms, such as loyalty or target rebates granted or accessible only to customers achieving a certain turnover threshold, as well as margin or price squeezes. The term ‘in relation to other conditions of trade’ used by the law is to be interpreted broadly. It covers any contractual provisions entailing an economic advantage or disadvantage (e.g., in regard to discounts or payment terms). However, the prohibition to discriminate between trading partners does not imply a general obligation of equal treatment. Unequal treatment shall be considered unproblematic as long as it can objectively be justified (e.g., quantity rebates, justified by corresponding economies of scale).

iv Exploitative abuses

The imposition of unfair prices or other unfair conditions of trade is considered unlawful (Article 7, Paragraph 2, Letter c of the Cartel Act). To determine if a price is ‘unfair’, it is necessary to examine the market value of the product or service offered and the ability of the dominant undertaking to behave independently in setting its prices. This ability is likely to be a given if customers lack alternatives. The imposition of unfair prices (implying an element of coercion) by a dominant undertaking is thus facilitated. It is unclear whether, under Swiss law, it is necessary to prove the ‘imposition’ as a coercive element under Article 7, Paragraph 2, Letter c of the Cartel Act, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.³⁷

The prohibition on imposing unfair prices does not imply an obligation to set fair prices. Neither does this prohibition aim at protecting customers from paying unduly high prices. Rather, this provision shall promote effective competition and ensure that prices are the result of an interplay between offer and demand. In this context, the ComCo considers that the Federal Price Surveillance Act of 20 December 1985, which aims at the avoidance of abusive pricing, may be applied in parallel.³⁸

In a decision of 2007, the ComCo imposed a record fine of approximately 333 million Swiss francs on Swisscom as it considered its termination rates in the mobile network sector

37 In a decision of 2011, the Federal Supreme Court found that, contrary to EU law, the ‘imposition’ as coercive element was a separate requirement under Swiss law that needed to be established (Federal Supreme Court, decision of 11 April 2011, BGE 137 II 199, c. 4, *Terminierung Mobilfunk*). However, in a more recent case, the Federal Supreme Court amended its previous statement by holding that the Swiss Cartel Act was strongly geared towards EU competition law and that, therefore, the case law under Article 102 TFEU needed to be taken into account (Federal Supreme Court, decision of 29 June 2012, BGE 139 I 72, c. 8.2.3, *Publigroupe*).

38 RPW/DPC 2016/1, p. 190, *Swisscom WAN-Anbindung*.

as unfair.³⁹ However, the decision was annulled by the Federal Administrative Court and the annulment confirmed by the Federal Supreme Court.⁴⁰ The latter considered that, due to the regulatory framework applicable in the telecommunications sector, Swisscom could not exert any coercion on its trading partners. More recently, the ComCo also fined Swisscom for imposing unfair prices on its competitors when offering its WAN connection services on a wholesale level.⁴¹

V REMEDIES AND SANCTIONS

i Sanctions

An undertaking abusing its dominant position risks a fine of up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years (Article 49a, Paragraph 1 of the Cartel Act). The amount of the fine is dependent on the duration and severity of the unlawful behaviour, taking into account the likely profit that resulted from it. For the calculation of the turnover, all reductions such as discounts, rebates, VAT and other consumption taxes as well as other taxes directly related to turnover shall be deducted from the amounts derived by the undertakings concerned from the sale of products and the provision of services within the ordinary business activities of the undertakings concerned (Article 4, Paragraph 1 of the Merger Control Ordinance of 17 June 1996, which is applicable by analogy).

The calculation method for fines is regulated in detail by the Cartel Act Sanctions Ordinance of 12 March 2004. The imposition of a fine is mandatory in the case of an established abuse of a dominant position. Contrary to the laws of other jurisdictions, the Swiss Cartel Act does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking having abused its dominant position (unless the individual itself qualifies as an undertaking in the sense of the Cartel Act).

The largest fine imposed by the ComCo so far, amounting to 333 million Swiss francs, was cancelled by the Federal Administrative Court and subsequently also by the Federal Supreme Court upon appeal by Swisscom.⁴² Another fine of 220 million Swiss francs imposed on Swisscom for margin-squeeze behaviour in the ADSL market was ultimately reduced by the Federal Administrative Court to approximately 186 million Swiss francs.⁴³ An appeal against this decision was unsuccessful before the Federal Supreme Court.⁴⁴ For further examples of recent fines imposed, see above.

39 RPW/DPC 2007/2, p. 241 ff, *Terminierung Mobilfunk*.

40 RPW/DPC 2010/2, p. 242 ff, *Urteil des Bundesverwaltungsgerichts vom 24 Februar 2010 iS Kartellrecht: Terminierungspreise im Mobilfunk – Sanktion*; RPW/DPC 2011/3, p. 440 ff, *Kartellrecht: Terminierungspreise im Mobilfunk – Sanktionen. Beschwerden gegen das Urteil des Bundesverwaltungsgerichts vom 24 Februar 2010*.

41 RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*.

42 RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*.

43 RPW/DPC 2015/3, p. 561, *Sanktionsverfügung – Preispolitik Swisscom ADSL*.

44 Federal Supreme Court, decision of 9 December 2019, 2C_985/2015.

ii Behavioural remedies

Other than imposing a fine, the ComCo has a wide range of decision-making and remedial powers at its disposal. In particular, the ComCo may order injunctions (measures) to cease or desist from an unlawful practice (e.g., order that a contract be entered into in the case of an abusive refusal to deal) (Article 30, Paragraph 1 of the Cartel Act). The ComCo may also, under certain conditions, grant interim relief to terminate a certain abusive conduct or modify specific business practices.⁴⁵ In a recent case, however, the ComCo refused to grant interim relief requested by Swisscom in the context of an investigation opened against the largest cable network operator in Switzerland, UPC Schweiz GmbH.⁴⁶ The latter is suspected of having abused of its dominant position by the (alleged) refusal to grant access to its ice hockey coverage, for which UPC held exclusive rights, to other competitors (including Swisscom). The ComCo rejected Swisscom's request for interim measures on the grounds that such measures required, inter alia, that, in their absence, competition would suffer a disadvantage that could not easily be rectified. According to the ComCo, this requirement was not fulfilled in the case at hand since it seemed likely that Swisscom would remain active on the relevant market and be able to win back customers at the end of the investigation proceedings.⁴⁷

iii Structural remedies

In abuse of dominance cases, the Cartel Act does not explicitly provide for the possibility for the ComCo to order structural remedies.

VI PROCEDURE

Under the Cartel Act, the investigation procedure for (suspected) restraints of competition, including abuse of dominance cases, follows two stages: a preliminary investigation and an investigation. The Secretariat may open a preliminary investigation *ex officio*, at the request of undertakings involved or in response to a complaint from third parties (Article 26, Paragraph 1 of the Cartel Act). During this preliminary stage, the Secretariat usually gathers information by sending out questionnaires to the undertaking or undertakings concerned. It may also propose measures to eliminate or prevent restraints of competition (Article 26, Paragraph 2 of the Cartel Act). If the Secretariat concludes that there are indications of an unlawful restraint of competition, it shall, in consultation with a member of the presiding body of the ComCo, open an investigation (Article 27, Paragraph 1 of the Cartel Act). The opening of an investigation is published in the Swiss Official Gazette of Commerce (Article 28 of the Cartel Act), as well as (generally) in a press release.

In the context of an investigation, the Secretariat has broad investigative powers. It may hear third parties as witnesses and require the parties to an investigation to give evidence (Article 42, Paragraph 1 of the Cartel Act). It may also perform searches (i.e., dawn raids) and seize evidence (Article 42, Paragraph 2 of the Cartel Act). The parties have an obligation to cooperate and a duty to provide information (Article 40 of the Cartel Act). In particular, they must provide the Secretariat with all the information required for the conduct of an

45 There is no explicit provision in the Cartel Act allowing for the possibility to request interim relief. However, based on the general reference of Article 39 of the Cartel Act, the Administrative Procedure Act of 20 December 1968 is applicable, which contains such provision.

46 RPW/DPC 2017/3, p. 410 ff, *Vorsorgliche Massnahmen – Eishockey im Pay-TV*.

47 id. at p. 419.

investigation and produce the necessary documents. A limit to the obligation to cooperate is the legal principle *nemo tenetur se ipsum accusare* (right against self-incrimination).⁴⁸ Non-compliance with the obligation to provide information or produce documents can entail an administrative fine of up to 100,000 Swiss francs (Article 52 of the Cartel Act). The Secretariat has published its best practices relied upon in investigations, in particular for searches, seizure of evidence and hearings, in an explanatory note of 6 January 2016 on selected instruments of investigation.⁴⁹

During the investigation procedure, it is possible to reach an amicable settlement with the Secretariat (and approved by the latter) (Article 29 of the Cartel Act). Moreover, a leniency application may be filed if the undertaking concerned assists in the discovery and elimination of an unlawful restraint of competition (Article 49a, Paragraph 2 of the Cartel Act), which may allow for a full or a partial waiver of fines.

Further, recently, the Secretariat increasingly seems to use its preferred tool of market investigations in order to detect abuse of dominance cases.

VII PRIVATE ENFORCEMENT

The Cartel Act contains explicit provisions empowering civil courts to issue measures in the case of unlawful hindrance of competition. A person hindered by an unlawful restraint of competition from entering or competing in a certain market is entitled to request the elimination of or desistance from the hindrance; damages and satisfaction in accordance with the Swiss Code of Obligations; and surrender of unlawfully earned profits (Article 12, Paragraph 1 of the Cartel Act). Hindrances of competition include in particular the refusal to deal and discriminatory measures (Article 12, Paragraph 2 of the Cartel Act). Moreover, a plaintiff may request civil courts to rule that any contracts are null and void in whole or in part, or that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (Article 13 of the Cartel Act).

To date, private enforcement against unlawful practices of dominant undertakings has not been a very successful tool in Switzerland. This is due to various reasons, namely procedural hurdles and an unfavourable standard of proof to claim damages. Nevertheless, in a few specific circumstances, civil court proceedings may be more favourable than administrative proceedings before the ComCo. For example, in cases of a refusal to deal (Article 7, Paragraph 2, Letter a of the Cartel Act), there may be situations in which only a civil court judgment can order a certain business relationship to be entered into in an enforceable way (e.g., order to grant access to a trade fair).⁵⁰ Moreover, particularly for cases with a smaller economic significance, civil court proceedings may be preferable since civil courts are obliged to treat each case whereas the ComCo, guided by the discretionary principle, may decide not to consider a case of minor importance. As a result, the ComCo's reluctance to take cases may mean that civil court proceedings are relatively frequent. In the car industry, for example, it may occur that a garage accredited for a certain brand of cars,

48 RPW/DPC 2015/3, p. 590 ff, *Sanktionsverfügung – Preispolitik Swisscom ADSL*.

49 The explanatory note of 6 January 2016 from the Secretariat on selected instruments of investigation is available (in English) at www.weko.admin.ch/weko/en/home/documentation/communications.html.

50 RPW/DPC 1997/4, p. 626 ff, *Teilnahme an einer Fachmesse (Handelsgericht des Kt Aargau)*.

whose accreditation is withdrawn, sues the general importer or the car manufacturer, or both, before the civil courts, claiming that there is a certain obligation to continue existing business relationships.

By way of example, in a 2013 decision, the Federal Supreme Court confirmed an order of a lower instance civil court that obliged a cooperative managing a cheese-maturing cellar to grant access to its maturing cellar to a cheese producer.⁵¹

VIII FUTURE DEVELOPMENTS

Following the rejection by the Swiss Parliament of the proposed revision of the Cartel Act, several individual reform proposals were filed. For example, the parliamentary initiative ‘Excessive import prices. End the Compulsory Procurement on the Domestic Market’ has been filed and admitted by the Commission for Economy. The initiative aims at introducing the concept of ‘relative market power’ (already known under German competition law) into the Swiss legislation. In a nutshell, this shall prevent foreign undertakings from abusing their relative market power by charging higher prices in Switzerland as compared to their prices abroad, subject to legitimate business reasons.

Moreover, in December 2017, the Fair Price Initiative (‘Stop the Swiss Island of High Prices – Pro Fair Import Prices’), which is a federal popular initiative, was filed and admitted. This initiative is also based on the introduction of the concept of ‘relative market power’ in Swiss law. It aims at ensuring fair prices for consumers in Switzerland, including non-discriminatory purchasing conditions for online sales. In October 2018, the Federal Council issued an indirect counterproposal to the popular initiative, which is currently being deliberated upon. The Federal Council submitted a statement on the counterproposal to the parliament in May 2019. However, the parliament decided in March 2020 not to adopt the Fair Price Initiative but to implement the indirect counterproposal into the Cartel Act. The precise embodiment and the legal text is still under review.

51 Federal Supreme Court, decision of 23 May 2013, BGE 139 II 316, *Ertivaz*.

TURKEY

Gönenç Gürkaynak¹

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: 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

Further, 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 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 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)

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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.

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. Therefore, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, in 2017, the Turkish Competition Board rejected the acquisition of Ulusoy Ro-Ro by UN Ro-Ro, as it concluded that the transaction would strengthen UN Ro-Ro's dominant position in the market for Ro-Ro transport between Turkey and Europe; and that UN Ro-Ro would be in a dominant position in the market for port management concerning Ro-Ro ships upon consummation of the transaction, making the decision the third rejection decision issued by the Competition Board in its decisional history.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 statistics for 2019, the Competition Board rendered a decision in 26 pre-investigations or investigations, out of a total of 69, 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 thereof. Further, 26 finalised (including preliminary and full) investigations were 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 13 investigations that were initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to state that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.⁵

3 *Ulusoy Ro-Ro/UN Ro-Ro*, 17-36/595-259, 9 November 2017.

4 See, for example, *Biryay*, 00-26/292-162, 17 July 2000.

5 In 2017, the Competition Board decided on a total of 80 pre-investigations or investigations. Of these, 37 concerned violations of Article 4 of Law No. 4054, 29 concerned violations of Article 6 of Law No. 4054, 13 cases were evaluated from the aspect of both Articles 4 and 6 of Law No. 4054 and one case related to Articles 4, 6 and 7 of Law No. 4054.

Over the past few years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. With regard to cases on abuse of dominance, the Competition Board focused on cases where the focal point predatory pricing conducting multiple pre-investigations.⁶

With regard to the fight against cartels, during the course of the year in review, there has not been any significant cartel decision where the Board imposed significant administrative monetary fines. In fact, while there have been 36 cases that were related to the violations under Article 4 of Law No. 4054 in terms of horizontal agreements, the Board decided on 23 cases on that front. One of these decisions is related to the Board's decision on the fully fledged investigation against five undertakings and an association of undertakings active in cabotage Ro-Ro transportation lines in Turkey where the Board decided that the undertakings (i.e., Tramola Gemi İşletmeciliği ve Ticaret AŞ, Kale Nakliyat Seyahat ve Turizm AŞ, İstanbullun Denizcilik Yatırım AŞ, İstanbul Deniz Nakliyat Gıda İnşaat Sanayi Ticaret Ltd Şti and İstanbul Deniz Otobüsleri Sanayi ve Ticaret AŞ) had violated Article 4 of Law No. 4054 through collectively determining prices.⁷ Overall, the total amount of the administrative monetary fine imposed on all undertakings is 7.4 million lira including the reduced fine imposed on the leniency applicant (i.e., Kale Nakliyat) and the fined imposed on İstanbullun for the submission of incomplete information to the Competition Authority.

The Board's decision on Turkish traditional 'raw' meatball producers is also one of the landmark decisions with regard to price fixing agreements. The decision concerned the preliminary investigation conducted against raw meatballs producers in Gaziantep regarding the allegations that the relevant undertakings had violated Article 4 of Law No. 4054. The decision carries importance given that although there was concrete evidence showing (1) a price fixing agreement, (2) a mechanism for monitoring that agreement, (3) a punishment mechanism for cheating and (4) the effects of this agreement on the market, the Board found the price fixing agreements regarding the sale price and conditions of raw meatballs concluded between undertakings and acknowledged the presence of a restrictive agreement in the market. The Board decided to issue an opinion letter pursuant to Article 9(3) of Law No. 4054 indicating the termination of any behaviour that may have led to a competition law violation.⁸

The following table shows the Competition Board's most recent landmark decisions regarding abuse of dominance.

High-profile investigations of the Competition Authority regarding abuse of dominance that are ongoing at the time of writing are provided in the table below.

Investigated party	Alleged abuse of dominance activity	Date of initiation
Biletix Bilet Dağıtım Basım ve Ticaret AŞ	Restricting competition	20 June 2019
Unilever Sanayi ve Ticaret Türk AŞ	Restricting competition through <i>de facto</i> exclusivity	24 July 2019
Ortadoğu Antalya Liman İşletmeleri AŞ	Excessive pricing	11 April 2018

6 *Kamil Koç*, 19-40/658-283, 14 November 2019; *Topya Mağazacılık*, 19-40/664-285, 14 November 2019; *Çaykur*, 14 November 2019, 19-40/645-272; *LB Börekçilik & Levent Börekçilik*, 14 November 2019, 19-40/646-273; *EAE Elektrik*, 19-39/603-257, 12 November 2019; *Huawei*, 30 May 2019, 19-20/286-122; *Habaş Sınai ve Tibbi Gazlar*, 19-11/125-53, 7 March 2019; *Sony*, 7 February 2019, 19-06/47-16.

7 *Ro-Ro*, 19-16/229-101, 18 April 2019.

8 *Raw Meatball*, 19-03/13-5, 10 October 2019.

Recent significant decisions of the Competition Board regarding abuse of dominance are provided below.

Investigated party and case information	Case Type	Conclusion
Medsantek Laboratuvar Malzemeleri San ve Tic Ltd. Şti (19-13/182-80, 28 March 2019)	Refusal to supply/ abuse of dominance	The Board concluded that Medsantek is dominant with a dominant position in the market of sanger sequence analysis device produced by Thermo regarding the procurement of the authorisation certificate of the relevant device it sells and abused its dominance by refusing to supply the authorisation certificate to its competitors operating in the kit market. The Board imposed an administrative monetary fine on Medsantek in the amount of 504,534 lira.
Sony Eurasia Pazarlama AŞ (19-06/47-16, 7 February 2019)	Predatory pricing	The Board cleared Sony Eurasia from the allegation that it had applied predatory prices on digital games sold online.
Maysan Mando Otomotiv Parçaları San ve Tic AŞ 19-22/353-159, 20 June 2019)	Refusal to supply	The Board concluded that Maysan did not abuse its dominant position by refusing to supply as its products were not essential for reselling automotive spare parts.

III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, as ‘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.⁹

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. To establish a dominant position, first the relevant market has to be defined, and second 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 the market definition. Therefore, the undertakings concerned have to be in a dominant position in the 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 point 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 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, and the portfolio power and financial power of the incumbent firm. Therefore, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or other quantitative elements; other market conditions, as well as the overall structure of the relevant market, should also be assessed in detail.

⁹ See, for example, *Anadolu Cam*, 04-76/1086-271, 1 December 2004; *Warner Bros*, 07-19/192-63, 8 March 2007.

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.¹⁰

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, 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 fallback to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) if it has been reviewed under Article 4 (restrictive agreement rules). The *Booking.com* and *Trakya Cam* decisions are the latest examples of this trend. In *Booking.com*,¹¹ the Competition Board analysed whether Booking.com, which was found to be in a dominant position in the online accommodation reservation platform services market, lessened competition in the said market through the 'best price guarantee' practices in terms of the booking services they offer. Booking.com was fined for violation of Articles 4 and 6 of Law No. 4054. In *Trakya Cam*,¹² the Competition Board assessed that Trakya Cam Sanayii AŞ *de facto* implemented distribution agreements in 2016 that had been determined to be in violation of Articles 4 and 6 of Law No. 4054 through a Competition Board decision of 2 December 2015,¹³ and revoked the individual exemption granted to Trakya Cam's industrial customer purchasing agreement that it signed with its industrialist customers. Trakya Cam was fined 17,497,141.63 lira, and was ordered to provide 18 of its distributors with written notices stating the absence of regional exclusivity, and advising them that they may conduct sales activities throughout Turkey.

10 See, for example, *Turkcell/Telsim*, 03-40/432-186, 9 June 2003; *Biryay*, 00-26/292-162, 17 July 2000.

11 *Booking.com*, 17-01/12-4, 5 January 2017.

12 *Trakya Cam*, 17-41/641-280, 14 December 2017.

13 No. 15-42/704-258.

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 forms a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. These examples are as follows:

- 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;
 - acceptance by intermediary purchasers of the display of 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. Further, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6.¹⁴ On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as:

- a* strategic capacity construction;
- b* predatory product design or product innovation;
- c* failure to pre-disclose new technology;
- d* predatory advertising; or
- e* excessive product differentiation.

14 See, for example, *Türk Telekom*, 16-20/326-146, 9 June 2016; *Volkan Metro*, 13-67/928-390, 2 December 2013; *Turkey Maritime Lines*, 10-45/801-264, 24 June 2010; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *Türk Telekom*, 02-60/755-305, 2 October 2002; *Turkcell*, 01-35/347-95, 20 July 2001.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board.¹⁵ That said, complaints on this basis are frequently dismissed by the Competition Authority owing to its welcome reluctance to micromanage 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.¹⁶

Further, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.¹⁷

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 6.¹⁸

On a separate note, Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share of above 40 per cent. Therefore, 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. In *Turkcell*,¹⁹ the Competition Board condemned the defendant for abusing its dominance by, inter alia, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors. The Competition Board also 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.²⁰ In 2017, the Competition Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors' activities through its rebate systems.²¹

15 See, for example, *TTNet*, 07-59/676-235, 11 July 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; *Feniks*, 07-67/815-310, 23 August 2007.

16 *UN Ro-Ro*, 12-47/1412-473, 1 October 2012.

17 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.

18 See, for example, *Mey İçki*, 14-21/410-178, 12 June 2014.

19 *Turkcell*, 09-60/1490-37, 23 December 2009.

20 *Doğan Holding*, 11-18/341-103, 30 March 2011.

21 *Luxottica*, 17-08/99-42, 23 February 2017.

Leveraging

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board has 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 make them avoid tying and leveraging.²²

Refusal to deal

Refusal to deal and grant access to essential facilities are forms of abuse that are frequently brought before the Competition Authority, and there have been various decisions by the Competition Board concerning these matters.²³

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.²⁴

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 Competition Board has condemned excessive or exploitative pricing by dominant firms.²⁵ That said, complaints on this basis are frequently dismissed by the Competition Authority because of its above-mentioned reluctance to micromanage pricing behaviour.

V REMEDIES AND SANCTIONS

i Sanctions

The sanctions that can 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 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. Following amendments in 2008, the new

22 See, for example, *TTNET-ADSL*, 09-07/127-38, 18 February 2009; *Türk Telekomünikasyon AŞ*, 16-20/326-146, 9 June 2016.

23 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; *Çukurova Elektrik*, 03-72/874-373, 10 November 2003; *Congresium Ato*, 16-35/604-269, 27 October 2016; *BOTAŞ*, 17-14/207-85, 27 April 2017.

24 See, for example, *TTAŞ*, 02-60/755-305, 2 October 2002; *Türk Telekom/TTNet*, 08-65/1055-411, 19 November 2008; *MEDAŞ*, 16-07/134-60, 2 March 2016; *Türk Telekom*, 16-20/326-146, 9 June 2016.

25 See, for example, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 02-60/755-305, 2 October 2002; *Belko*, 01-17/150-39, 6 April 2001; *Soda*, 16-14/205-89, 20 April 2016 (the Competition Board did not initiate a full investigation in *Soda*).

version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

- a* the level of fault and amount of possible damage in the relevant market;
- b* the market power of the undertakings within the relevant market;
- c* the duration and recurrence of the infringement;
- d* the cooperation or driving role of the undertakings in the infringement;
- e* the financial power of the undertakings; and
- f* compliance with commitments.

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*,²⁶ where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the 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 to the condition they were in before the infringement.

ii Behavioural and structural remedies

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on a matter in cases where there is a possibility of serious and irreparable damage.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to adhere to certain conduct standards, 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 result in a finding of infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation 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 a notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not

26 *Tüpraş*, 14-03/60-24, 17 January 2014.

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 for 2020 is 31,903 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 7.55 million lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.²⁷

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can:

- a examine the books, paperwork and documents of undertakings and trade associations, and, if need be, take copies of the same;

²⁷ *Türk Telekom*, 16-15/255-110, 3 May 2016.

- b request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- c 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, including deleted items, are fully examined by the experts of the Competition Authority.

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 is written on the deed of authorisation). Refusal to grant Competition Authority staff 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 for 2020 is 31,903 lira. It may also lead to the imposition of a fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, as above, the turnover generated in the financial year nearest to the date of the fining decision) for each day of the violation. The Board has recently fined Mosaş Akıllı Ulaşım Sistemleri AŞ 89,650 lira for hindering on-site inspections.²⁸ Also, in its recent *Unilever* and *Groupe SEB* decisions, the Board imposed an administrative fine of 0.5 per cent of their gross revenues in 2018 pursuant to Article 16 of Law No. 4054 on the basis of hindering on-site inspection.²⁹

Final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to judicial review before the administrative courts by filing a lawsuit within 60 days of 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).

After the recent legislative changes, administrative litigation cases (and private litigation cases) are now subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeals for private cases). The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. A decision of a regional court will be subject to the Council of State's review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In these cases, a decision of a regional court will not be considered as a final decision, and the Council of State may decide to uphold or reverse the regional court's decision. If a decision is reversed by the Council of State, it will be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State's decision. As the regional courts are only newly established,

28 *Mosaş*, 18-20/356-176, 21 June 2018.

29 *Unilever*, 19-38/584-250, 7 November 2019; *Groupe SEB*, 20-03/31-14, 9 January 2020.

it is not yet known how long it will take for a regional court to finalise its review on a file. Accordingly, the Council of State's review period (for a regional court's decision) within the new system also needs to be tested before an estimated time frame can be provided.

Third parties can also challenge a Competition Board 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 entitles 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 damage 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 allegations of refusal to supply.

VIII FUTURE DEVELOPMENTS

Other than the amended Guidelines on Vertical Agreements published in 2018, there have not been any significant recent developments, including in the Turkish cartel regime. The amended guidelines included provisions concerning internet sales and most favoured customer clauses.

Although a draft competition law, which was issued by the Turkish Competition Authority in 2013, was officially submitted to the Presidency of the Turkish Parliament on 23 January 2014, it is now null and void. The Draft Law aimed to further comply with the EU competition law legislation on which it is closely modelled. At this stage, it remains unknown as to whether the Turkish Parliament or the government will renew the draft law.

UNITED KINGDOM

Paul Gilbert and John Messent¹

I INTRODUCTION

On 31 January 2020, the United Kingdom ceased to be an EU Member State and withdrew from the EEA. European competition law, including the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU), will continue to apply in the UK only until the end of an implementation period, which is currently expected to end on 31 December 2020. From that date, EU competition law will no longer apply in the UK, although conduct that took place before that date may still be investigated and subject to private claims under EU law. Most pre-existing EU competition law will nevertheless continue to have binding effect under UK domestic law as ‘retained EU law’ and will do so unless and until specific provisions are overturned by the Supreme Court or repealed by other legislation.

Domestic UK competition law on abuse of dominance substantially mirrors the provisions of Article 102 TFEU. The UK provisions are set out 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. From the end of the implementation period, this principle will be limited to ensuring consistency with retained EU law (i.e., EU law that was in force on 31 December 2020 and that has not since been overturned or repealed in the UK).

Public enforcement of UK and EU competition law is carried out primarily by the Competition and Markets Authority (CMA). In addition to the CMA, the following sectoral regulators have the power to enforce competition law in their sectors:

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.² 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 or injunctive relief, or both. The civil courts can also hear competition claims, but may transfer cases to the CAT.

1 Paul Gilbert is counsel and John Messent is an associate at Cleary Gottlieb Steen & Hamilton LLP. They are grateful for the assistance of their colleagues, Laura Hellwig and Rohan Mandumula.

2 Section 46 of the Act.

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'.³ The CMA also has regard to its own substantive and procedural guidance (including previous OFT guidance that the CMA has formally adopted).⁴ These include:

- a* 'Abuse of a dominant position', December 2004;
- b* 'Assessment of market power', December 2004; and
- c* 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases', January 2019.

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 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 Levels of public enforcement

The CMA and its predecessor have investigated relatively few dominance cases, albeit with a modest increase in activity since 2016. Two main reasons are usually cited to explain this relative lack of enforcement: (1) cross-border cases affecting the United Kingdom often fall to be investigated by the European Commission, depriving the CMA of jurisdiction to investigate the same conduct in parallel (which is likely to change now that the United Kingdom has left the EU); and (2) cases involving natural monopolies generally fall to be investigated by the concurrent sectoral regulators. In addition to this, the CMA can investigate unilateral behaviour through market studies and investigations, which allow it to address perceived competition concerns in a market without the need for formal enforcement action.

Government reforms have sought to encourage greater use of competition law enforcement by the sectoral regulators in particular. These regulators 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, and the Secretary of State retains a right to remove concurrent powers from sectoral regulators if they are not used.

3 2009/C 45/02.

4 The investigation procedures followed by the sectoral regulators differ in some respects from the CMA's procedures.

In February 2016, the National Audit Office (NAO) published a critical report into the UK competition regime, which strongly encouraged the CMA and the concurrent sectoral regulators to find ways to increase levels of competition enforcement. CMA enforcement activity (in dominance cases and more generally) increased following the publication of the NAO report, including three dominance cases opened in the 12 months after the NAO's report was published. In 2019, however, the CMA opened only one new dominance case, the number of ongoing dominance cases has fallen, and three of its four ongoing investigations are in the pharmaceutical sector. This relative lack of activity likely reflects: (1) a focus on resolving cases opened during the flurry of activity immediately after the NAO report; and (2) the diversion of CMA resources to deal with planning for the UK's withdrawal from the EU and proposals for reform discussed in more detail in Section VIII below. Although the CMA states in its 2020 Annual Plan that its enforcement caseload is 'at a record level,' the majority of these cases relate to enforcement of the Chapter 1 prohibition (cartels and anticompetitive agreements) rather than Chapter 2. Moreover, the 2020 Concurrency Report shows that three of the ongoing nine investigations in the regulated sectors are being pursued by the CMA, rather than the concurrent regulators (although none of these relates to suspected abuse of dominance).

ii Major developments in public enforcement

The CMA and sectoral regulators issued statements of objections in two dominance cases, accepted commitments in two cases, and closed two cases in 2019 and early 2020. There were no infringement decisions in dominance cases in 2019. There were also developments in three appeals of CMA and regulator decisions: the CAT upheld an abuse of dominance decision by Ofcom against Royal Mail; the European Court of Justice (ECJ) issued a judgment on a Preliminary Reference made by the CAT in the context of CMA's infringement decision against GSK and others; and the Court of Appeal upheld the CAT's judgment quashing the CMA's infringement decision against Pfizer and Flynn Pharma.

Infringement decisions, statements of objections and commitments decisions

Concordia

In January 2019, the CMA issued a supplementary statement of objections in relation to alleged excessive pricing by Advanz Pharma (formerly Concordia) of liothyronine tablets in the UK. The supplementary statement reduced the period under investigation to around eight years (two years shorter than in the statement of objections issued in November 2017) and reduced the allegation of price increase from 6,000 per cent to 1,605 per cent. These amendments reflect the judgment issued by the CAT in June 2018 in the *Pfizer/Flynn* case, which found that the CMA had misapplied the legal test for determining excessive prices.

In June 2019, the High Court dismissed Advanz Pharma's application for a judicial review of the CMA's decision not to suspend its investigation. Advanz Pharma argued that the CMA's refusal to suspend its investigation was procedurally unfair as Advanz Pharma would have to address two different legal tests in its submissions to the CMA, pending further appeal of CAT's judgment in *Pfizer/Flynn* to the Court of Appeal. In dismissing the application, the High Court found that the public interest in continuing to investigate unfair prices outweighed any prejudice that may be caused to Advanz Pharma.

EPEX Spot SE

In June 2019, Ofgem announced that it had accepted commitments from EPEX Spot and its parent company, EPEX. EPEX is a power exchange. It operates a number of markets in Great Britain (GB) that allow trading parties to buy and sell electricity the day prior to (or on the day of) delivery. It is one of (currently) two nominated electricity market operators (NEMOs) in GB that are designated to perform day-ahead and intraday coupling with other European electricity markets. Ofgem's investigation examined whether EPEX Spot was abusing a dominant position in the provision of cross-border intraday electricity trading platforms and related services concerning the trading of electricity between GB and Ireland.

EPEX Spot was the sole provider of intraday auction trading platform services at the relevant time. Ofgem suspected that EPEX Spot, therefore, held a dominant position in this market. Ofgem suspected EPEX Spot of abusing this dominant position by failing to take steps that were necessary to allow potential competitors access to the intraday auctions via its trading platform, foreclosing competition from the market. Ofgem accepted commitments from EPEX Spot under which EPEX Spot undertook an agreed programme of actions designed to allow other NEMOs access to its trading platform.

Fludrocortisone acetate tablets

In October 2019, the CMA accepted commitments from Aspen relating to the supply of fludrocortisone acetate tablets in the UK. Aspen is the sole UK supplier of these tablets, a prescription-only medicine used to treat Addison's Disease.

In November 2015, Tiofarma obtained authorisation to supply an 'ambient storage' version of the tablets as an alternative to Aspen's 'cold storage' tablets. The CMA found that the two versions were substitutable and that Tiofarma represented 'a significant competitive threat to Aspen'. In October 2016, Aspen acquired the worldwide rights over Tiofarma's product and withdrew its 'cold storage' product from the market. The CMA provisionally concluded that the acquisition constituted an abuse of dominance, removing the only threat to Aspen's position and preventing (or considerably delaying) the emergence of a rival. The CMA found that the acquisition 'left Aspen free to price above competitive levels'.

To address the CMA's concerns, Aspen committed to divest UK rights over 'ambient storage' fludrocortisone tablets to an independent third party and reintroduce its own 'cold storage' version of the product. Aspen also agreed to pay the NHS £8 million in compensation as well as ensuring that there will be at least two suppliers of fludrocortisone in the UK in the future. This is the first time the CMA has accepted commitments to pay compensation to victims of the suspected anticompetitive conduct.

The CMA's related investigation under the Chapter 1 prohibition and Article 101 TFEU, concerning allegations that Aspen unlawfully agreed to pay two other firms, Amilco and Tiofarma, to stay out of the UK market for fludrocortisone acetate tablets, is ongoing.

Hydrocortisone tablets

In February 2020, the CMA issued a supplementary statement of objections in relation to its hydrocortisone investigations. Hydrocortisone tablets are the primary treatment for people suffering from Addison's Disease. The CMA had been conducting three separate investigations into alleged excessive and unfair pricing, anticompetitive agreements and abusive conduct in relation to the supply of hydrocortisone tablets, and had issued statements of objections in all three cases.

The supplemental statement of objections combined these investigations and revised certain aspects of the CMA's allegations, taking into account the further evidence it had subsequently obtained. The CMA continues to allege that Auden Mckenzie charged excessive and unfair prices for 10mg and 20mg hydrocortisone tablets between October 2008 and July 2018. In addition, the CMA alleges that Auden Mckenzie entered into an anticompetitive agreement with Waymade from 2011 to 2015 under which Auden Mckenzie made monthly payments to Waymade to stay out of the market for 20mg hydrocortisone tablets. Thirdly, the CMA alleges that Auden Mckenzie entered into similar agreements with Waymade and Advanz Pharma relating to 10mg hydrocortisone tablets. The CMA has provisionally found that these payments constitute an abuse of a dominant position by Auden Mckenzie.

Conclusion of cases without adopting infringement or commitments decisions

Remicade

In March 2019, the CMA closed its investigation of a volume-based discount scheme by Merck Sharp & Dohme Ltd (MSD) for its biologic infliximab drug Remicade, finding no grounds for action. The CMA had opened its investigation in December 2015 and issued a statement of objections in May 2017. The CMA concluded that MSD's discount scheme, introduced following the expiry of its patent for Remicade in early 2015, was unlikely to impede competition from biosimilar infliximab products.

Generic Pharmaceutical Product (Case 50780)

In November 2019, the CMA closed its investigation relating to alleged anticompetitive agreements, concerted practices and suspected abuse of dominance in relation to a generic pharmaceutical product. The CMA decided to close this investigation on administrative priority grounds having considered its prioritisation principles and information available at the time. The case was initially opened in October 2017.

Appeals

Pfizer and Flynn

In 2016, the CMA imposed record fines on Pfizer and Flynn for charging excessive prices for phenytoin sodium capsules, an anti-epileptic drug. In July 2018, that decision was quashed by the CAT on the basis that the CMA had applied the wrong legal test and had failed to consider appropriately the economic value of the product. The CMA (and, on one ground, Flynn) appealed the CAT's judgment to the Court of Appeal. In March 2020, the Court of Appeal upheld the CAT's judgment that the case should be remitted to the CMA, though it agreed with the CMA on some issues (which will affect the remitted investigation) and the CMA welcomed the judgment as a 'good result'.

The CMA's first ground of appeal related to the legal test for establishing excessive prices established by the European Court in *United Brands*. The CMA had submitted that the need to show that prices were 'unfair', one limb of the test, provided the competition authority with two alternative methods of assessment: either the price was 'unfair in itself' or the price was 'unfair when compared to competing products'. The CAT and Court of Appeal rejected this approach, holding that the CMA could not ignore prima facie relevant evidence that the price was fair based upon the approach not used by the authority. While the competition authority enjoys a margin of discretion, it is under a duty to evaluate such evidence. The Court of Appeal accepted, however, that there is no general duty to perform a

'full' investigation (a term the CAT had used inconsistently in its judgment) in all cases; the extent of the duty will be affected by the nature, extent and quality of the evidence adduced by the company under investigation.

Secondly, the CMA argued that the CAT had erred in requiring the CMA to use a hypothetical benchmark price or range of prices as part of its evaluation of whether an actual price is excessive. The Court of Appeal agreed with the CMA, holding that 'the choice of benchmark is for the competition authority to choose and can be based upon the costs of the undertaking being investigated or it can be based upon comparables such as the prices charged by the same or different undertakings in the same or different geographical markets or indeed any other benchmark or combinations thereof capable of providing a 'sufficient' indication that the prices charged are excessive and unfair.'

The CMA's third ground of appeal concerned the limits on the CAT's jurisdiction to reject findings or conclusions that amounted to 'judgment calls' of the authority. The Court of Appeal rejected the CMA's arguments, holding that while the CMA has a margin of discretion, the CAT 'has a merits jurisdiction as to both law and fact and upon the basis of established case law it is not bound to defer to the judgment call of a competition authority. It is empowered under the legislation to come to its own conclusions on issues of disputed fact and law and can hear fresh evidence, not placed before the CMA, to enable it to do so.'

Fourthly, the CMA argued that the CAT was wrong to find that the CMA had attributed a nil value to patient benefit in its assessment. The Court of Appeal rejected this ground as it amounted to the challenge of a finding of fact (which could not therefore be appealed), although Green LJ disagreed with the CAT's view that assessing the 'economic value' of the product was a discrete requirement of the *United Brands* test. The CMA could determine how it factored this assessment into its analysis.

Finally, Flynn appealed certain of the CAT's findings out of concern (according to the Court) that the CMA in its remitted investigation would treat various ostensible findings by the CAT as definitive and binding. The Court of Appeal rejected Flynn's arguments because the entire issue of abuse had been remitted to the CMA.

Royal Mail

In November 2019, the CAT upheld Ofcom's August 2018 decision to fine Royal Mail £50 million for unlawful discrimination against postal operators competing with Royal Mail in delivery services. Whistl (formerly TNT Post), the UK's largest active bulk mail operator, used Royal Mail for final sorting and delivery of business mail to the parts of the UK where it did not have its own delivery operations. Whistl complained to Ofcom about Contract Changes Notices (CCNs) issued by Royal Mail that outlined variations to its wholesale customers' contracts that would come into effect in March 2014. Ofcom opened an investigation in April 2014, at which point Royal Mail suspended the CCNs.

In its decision, Ofcom found that Royal Mail's planned price changes discriminated against wholesale customers for whom Royal Mail delivered only to areas in which the customer did not have its own delivery operations. Companies using Royal Mail to deliver mail to only parts of the UK had to pay Royal Mail 0.25p more per letter than companies engaging Royal Mail to deliver to the whole of the UK.

Ofcom found that Royal Mail was not legitimately justified in such discrimination and that Royal Mail's internal documents suggested that the CCNs were designed to limit delivery competition from its first and only significant competitor, Whistl. The price differential was

found to have a material impact on the profitability of an end-to-end entrant, and to make entry and expansion in bulk mail delivery more difficult. It therefore constituted an abuse of Royal Mail's position as a dominant provider of delivery services.

Royal Mail appealed this decision arguing that: (1) Ofcom was wrong to conclude that Royal Mail's new prices fell within Article 102(c) TFEU; (2) Ofcom was wrong to conclude that the price differential could amount to undue or improper discrimination; (3) Ofcom was wrong to conclude that the price differential resulted in a competitive disadvantage under the 'as efficient competitor' test; (4) Ofcom should anyway have concluded that the price differential was objectively justified; (5) that Ofcom had committed a fundamental procedural error by withholding parts of its analysis during the administrative procedure that it later relied on in its decision; and (6) the fine imposed was anyway disproportionate and should be reduced.

The CAT rejected Royal Mail's appeal on all grounds and, in January 2020, refused Royal Mail permission to appeal to the Court of Appeal.

GlaxoSmithKline (GSK), Generics (UK) and others

In January 2020, the ECJ issued its judgment in response to the CAT's request for a preliminary ruling in GSK's appeal of the CMA's February 2016 decision to impose a £45 million fine on GSK and other pharmaceutical manufacturers.

GSK was the patent holder for paroxetine, an antidepressant. The CMA found that, between 2001 and 2004, GSK paid generic pharmaceutical manufacturers to delay their entry into the market. The CMA found this conduct infringed both Articles 101 and 102, as well as the Chapter 1 Prohibition. GSK and the generic manufacturers appealed this decision to the CAT in April 2016. In March 2018, the CAT issued an intermediate judgment and also requested a preliminary ruling from the ECJ. On matters related to the infringement of Article 102, the CAT asked the ECJ: (1) how to define the relevant product market; (2) whether entry into these agreements constituted an abuse; and (3) whether the benefit brought about through price reductions could outweigh any anti-competitive effects.

In response to question (1), the ECJ found that the appropriate product market encompassed suppliers not already in the market provided they had a firm intention and inherent ability to enter. The ECJ also found that patents did not present an 'insurmountable barrier' to entry. In response to question (2), the ECJ found that entering into these agreements could constitute an abuse of dominance if the dominant entity's conduct damaged the competitive structure of the market beyond the effects of the specific agreements. In response to question (3), the ECJ found that this conduct could in principle be justifiable and that the beneficial effects on competition must be taken into consideration regardless of the dominant's firm's objectives. The case will now be considered further by the CAT in light of the ECJ's judgment.

iii Current abuse of dominance investigations

The CMA and sectoral regulators are currently investigating five suspected abuse of dominance cases, summarised in the table below.

Sector	Investigating authority	Conduct	Case opened*
Entertainment and recreation services	CMA	Alleged anti-competitive agreements and suspected abuse of dominance in the entertainment and recreation services sector	August 2019
Water	Ofwat	Suspected abuse of dominant position by Thames Water Utilities Limited as a result of the approach that Thames Water has taken when installing digital smart meters and the impact that this has had on providers of data logging services and their customers	June 2019
Energy	Ofgem	Suspected abuse of a dominant position by a company providing services to the energy industry	August 2017
Pharmaceuticals	CMA	Suspected unfair pricing in the supply of liothyronine tablets by Concordia	October 2016
Pharmaceuticals	CMA	Suspected abuses of dominance by Auden McKenzie and Actavis UK (inducement to delay entry and excessive pricing) in relation to hydrocortisone tablets, as well as suspected anticompetitive agreements between Concordia and Actavis UK	March 2016
Pharmaceuticals	CMA	Remitted investigation into alleged excessive pricing in the supply of phenytoin sodium capsules	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.			

iv Major developments in private actions in 2019

TfL Travelcards

In March 2019, the CAT announced that it had received two applications to commence collective proceedings on behalf of affected rail passengers holding Transport for London (TfL) zonal tickets (Travelcards). The applications allege that three UK train operators have abused their positions of dominance. Both applications were made on a standalone basis; they do not benefit from a prior infringement decision by a competition authority.

The proceedings arise out of 'boundary fares', which are fares for travel to and from the outer boundaries of TfL's rail zones, and allegations that the rail companies failed to make boundary fares sufficiently available for sale and/or failed to ensure customers avoided paying for parts of their journeys twice. The proposed class of claimants consists of rail passengers who were effectively compelled to pay twice for the parts of their rail journeys that overlapped with the validity of their Travelcards. They are collectively represented by the applicant, Mr Justin Gutmann. The respondent rail companies are First MTR South Western Trains Limited and Stagecoach South Western Trains Limited, and London and South Eastern Railway Limited.

In June 2019, the CAT granted the defendants' application for a stay of the main hearing pending the appeal to the Supreme Court in *Merricks v. Mastercard Inc*, which concerns the certification of collective proceedings.

Unlocked v. Google

In May 2019, the CAT issued a ruling which consented to the withdrawal of a claim by Unlocked. The claim had alleged that Google held a dominant position in the markets for: (1) licensable operating systems for mobile devices; (2) distribution of apps for use on Android devices; and (3) supply of advertisements for use by app developers on Android devices. Unlocked claimed that Google's decision to withdraw Google Admob services from Unlocked's app and to remove the app from the Google Play Store constituted an abuse of dominance. The case had originally been lodged in the High Court, which imposed an interim injunction on Google before the proceedings were transferred to the CAT in 2018. The claim was withdrawn by consent in 2019 and the CAT awarded costs to Google.

Achilles Information Limited v. Network Rail Infrastructure Limited

In July 2019, the CAT ruled that Network Rail's requirement that those persons seeking to access its infrastructure must obtain supplier assurance exclusively through the Railway Industry Supplier Qualification Scheme (RISQS) constituted a breach of the Chapter 1 and Chapter 2 Prohibitions. Network Rail is the owner and operator of most of the mainline rail infrastructure in Great Britain. Achilles provides supplier assurance services in the UK. Achilles argued that the 'RISQS-only' assurance process was abusive because it obliged all suppliers who needed access to Network Rail infrastructure to use RISQS, even if they are not working on the infrastructure itself (for example, contractors who merely require trackside access).

The CAT's judgment was premised on the assumption that Network Rail holds a dominant position in the market for the operation and provision of access to national rail infrastructure in Great Britain. The CAT concluded that the 'RISQS-only' rule causes significant foreclosure of demand in a significant segment of the market for supplier assurance services (a related market). The CAT dismissed Network Rail's arguments that a tender process held 2016 was evidence of sufficient competition and that its conduct was consistent with normal conditions of competition as evidenced in the European rail industry. The CAT also rejected Network Rail's argument that its conduct was objectively justified. The CAT was unconvinced that the safety purposes of the 'RISQS-only' rule could not be met by less restrictive requirements or that the rule generated sufficient cost efficiencies to offset any loss of competition.

Network Rail appealed the CAT's judgment to the Court of Appeal. Network Rail argued that CAT erred in law in finding that there was an abuse of dominance, in particular, because: (1) the CAT's anticompetitive effects analysis was flawed; (2) the evidence was contrary to its conclusion in relation to the effects of the periodical tender process; (3) it erred in law in finding that a dominant company need not benefit commercially from the conduct complained of for it to be found to be abusive; and (4) it erred in law in finding that the conduct was an abuse without finding that Network Rail's taking supplier assurance from Achilles was indispensable or essential to enable Achilles to be active in supplier assurance in the GB rail sector or safety-critical industries in the United Kingdom.

In March 2020, the Court of Appeal rejected Network Rail's appeal on all six grounds. Only one ground of appeal, comprising four separate arguments, related to the Chapter 2 Prohibition (abuse of dominance) findings.

- a* First, Network Rail argued that the CAT's anticompetitive effects analysis was flawed. Consistent with its approach to Network Rail's appeal of the Chapter 1 infringement decision, the Court of Appeal held that 'the CAT was clearly entitled . . . to come to the conclusion it did on the basis of the evidence'.
- b* Second, Network Rail contended that the evidence was contrary to the CAT's conclusion in relation to the effects of the periodical tender process. The Court of Appeal held that Network Rail had failed to show that 'there was no evidence capable of sustaining the conclusion reached, or that the conclusion is plainly wrong, in the sense that it is one that no reasonable judge or tribunal could have reached'.
- c* Third, Network Rail argued that the CAT erred in law in finding that a dominant company need not benefit commercially from the conduct complained of for it to be found to be abusive. The Court upheld the CAT's application the principles in *Aéroports de Paris* and *Arriva the Shires* and rejected Network Rail's argument that 'a person on a separate market from that of the dominant supplier can only complain of abuse of that dominant position if it is in a situation of economic dependence on the supplier'.

- d Finally, Network Rail argued that the CAT had erred in law by failing to recognise that the present case was one of refusal by Network Rail to supply a new customer, as opposed to a refusal to contract with an existing customer (meaning that a higher legal test should apply). The Court of Appeal cursorily rejected this argument as it was ‘completely unrealistic to treat Achilles as if it were a wholly new customer of Network Rail’s. . . . What Achilles now wishes to do, in substance, is to resume its long-standing position as a substantial supplier of such services to companies requiring access to Network Rail’s infrastructure, which it is currently prevented from doing by the existence of the RISQS-only rule.’

Secretary of State for Health and others v. Servier Laboratories Ltd and others

In May 2011, the Secretary of State for Health brought an action in the High Court against Servier for damages for breach of Articles 101 and 102. Servier successfully applied for a stay of those proceedings as the European Commission (EC) had initiated an investigation in 2009 relating to a similar breach of competition law. In July 2014, the EC found that Servier had infringed both Articles 101 and 102 by paying generic pharmaceutical manufacturers to delay their entry into the market for the supply of perindopril. On appeal, the General Court found in December 2018 that the EC had erred in finding an abuse of dominance as it had not established the relevant product market. The General Court found that the EC wrongly considered that perindopril differed from other ACE inhibitors and that the EC had erred in defining a market limited to the perindopril molecule alone.

Trial on the preliminary issues in the High Court case was due to be heard in October 2019. In advance of this trial, Servier sought to rely on the findings and statements in the General Court’s judgment which it argued were binding on the High Court as *res judicata*. In Servier’s submission, adducing evidence and arguments that were inconsistent with these findings would constitute an abuse of process. The High Court held that findings of fact made by the General Court that were inseparable from the operative part of its judgment were binding as *res judicata*. As such, the finding that the relevant product market cannot be limited to the perindopril molecule alone was binding. Other findings of fact which Servier sought to rely on, however, were not binding; it is therefore not an abuse of process to adduce evidence inconsistent with these findings. Servier appealed the High Court’s judgment to the Court of Appeal which dismissed the appeal in its entirety.

In July 2019, Servier was granted permission to appeal to the Supreme Court.

Vestel v HEVC Advance and Philips

In October 2019, the High Court ruled that it did not have jurisdiction to hear a claim brought by Vestel against HEVC Advance and Philips.

Vestel is a television manufacturer based in Turkey. HEVC Advance is a company that manages standard essential patents (SEPs) relating to High Efficiency Video Coding, a technology that is essential for televisions which are made to display high definition broadcasts. Philips is one of the participating patentees. Vestel alleged that HEVC Advance and Philips were dominant in the worldwide market for licences under their SEPs and that they had abused their dominant positions by failing to offer licences on fair, reasonable, and non-discriminatory (FRAND) terms and, further, by threatening to seek injunctions against Vestel. Although Vestel manufactures televisions in Turkey, Vestel argues that it would suffer

damage in the UK as a result of the alleged abuse as it sells televisions in the UK through its UK subsidiary. Any cost increase due to an increase in royalties from non-FRAND terms would be passed down the chain to this UK subsidiary.

With regards to Philips, the High Court found that none of the evidence filed disclosed any credible basis on which to conclude that Vestel's UK subsidiary had suffered or would suffer damage and that there was no other basis for jurisdiction in the English courts.

Strident Publishing Limited v Creative Scotland

In April 2020, the CAT handed down its judgment on jurisdiction in a claim for damages under Section 47A of the Competition Act 1998. Strident Publishing Limited, a book publisher, claimed that Creative Scotland had abused its dominant position by providing 'investment finance' to three publishers as part of its mandate to support artistic projects.

The CAT found that the Creative Scotland's provision of grants to the publishers in exercise of its statutory function did not amount to an economic activity carried on by an undertaking and the CAT, therefore, did not have jurisdiction. First, the CAT was not convinced that Creative Scotland had engaged in an activity that was different from its activity of awarding grants to other applicants. The CAT found that the function of providing public funding to the arts involved the exercise of powers which are typically those of a public authority, suggesting that the activity was not an economic activity carried on by an undertaking. In addition, the CAT found that that the defendant did not operate for profit and that no private entity could carry out the same function. Finally, the CAT found that the defendant's power derived directly from legislation and it was accountable to, and under the control of, Scottish Ministers.

Other cases before the CAT and the High Court

Case	Allegation	Status
<i>UKRS Training Limited v. NSAR Limited</i>	Alleged abuse of dominance on the market for accreditation services to providers of training to work on Network Rail infrastructure.	Pending. Claim stayed in October 2017 pending the conclusion of the appeal of a decision of Network Rail to suspend UKRS from providing accredited training.
<i>NVIDIA Corporation and others v. Qualcomm Inc and others</i>	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
<i>Sportradar and others v. Football DataCo and others</i>	Alleged abuse of dominance by Football DataCo, 'sole supplier' of live data relating to high-level football matches, by granting Betgenius five-year exclusive rights to use live match data for supply of 'sports data and sports betting services'	Pending: claimed launched in March 2020
<i>Infederation Ltd v Google Inc and others</i>	Alleged abuse of dominance on the market for the provision of internet search services and/ or the market for the provision of online search advertising services.	Pending: claim issued In 2012

III MARKET DEFINITION AND MARKET POWER

The substantive assessment of market definition and market power in the United Kingdom is consistent with EU law. The 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 (although this obligation will be more limited after the implementation period for the UK’s withdrawal from the EU). There is no exhaustive list of abuses under Section 18 of the Act (the equivalent of Article 102).⁵ Any conduct by a dominant undertaking that excludes competitors or exploits customers is potentially abusive,⁶ 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’.⁷

ii Exclusionary abuses

Enforcement action in the United Kingdom has generally focused primarily on exclusionary abuses (although, more recently, the CMA has pursued a number of exploitative abuse cases relating to suspected excessive pricing).

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

5 This point was underlined by the High Court in *Purple Parking Limited v. Heathrow Airport Limited* [2011] EWHC 987 (Ch).

6 In *Strident Publishing Limited v Creative Scotland* [2020] CAT 11, the CAT found that the defendant, a public authority exercising powers derived directly from legislation and under the control of the Scottish government, was not carrying out an economic activity as an undertaking when providing grants to publishers.

7 *National Grid plc v. GEMA*, [2010] EWCA Civ 114.

‘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.

In *Remicade* the CMA considered whether a volume-based discount scheme had exclusionary effects on the market for infliximab (a class of biologic pharmaceutical products). The CMA considered whether the pricing model prevented manufacturers of biosimilar products from entering the market after MSD’s patent protection on Remicade expired. The CMA carried out an analysis of the impact of the pricing model on competition and new entry, and concluded that the scheme was unlikely to result in anticompetitive effects.

The focus on exclusionary conduct is borne out by a number of other investigations, including the following.

- a* 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 2019, the ORR reviewed these commitments. It found them to have been effective and concluded there was no reason to reopen its investigation into Freightliner.
- b* In September 2014, the CMA closed an investigation into a 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 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, but the OFT found 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.

iii Discrimination

Discrimination cases in the United Kingdom have also tended to focus on exclusionary conduct, and also demonstrate a focus on analysing economic effects, at least in public enforcement cases by the competition authorities. 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. More recently, in *SSE*, Ofgem accepted binding commitments to address the provisional concern that an upstream supplier was offering discriminatory terms that favoured its own downstream business over those of competitors.

Similar concerns were considered by Ofwat in 2015 in *Bristol Water* and *Anglian Water*, and by Ofcom in 2018 in *Royal Mail* (discussed above). 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' 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.

In December 2015, Ofwat closed an investigation into Anglian Water, finding no grounds for action. This followed 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), which 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.

The English courts have adopted a less economic approach to the analysis of discrimination cases.

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.⁸ 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 of rival providers placed them at a competitive disadvantage, and that this was sufficient to demonstrate 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* the High Court proceeded on the assumption that, at least in principle, a dominant undertaking might commit an abuse by promoting its own products

8 *Purple Parking Limited v. Heathrow Airport Limited* [2011] EWHC 987 (Ch).

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 justified⁹. 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 at the time overlapped with questions 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*.¹⁰ 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. The decision by the European Court of Justice in *MEO/GDA* also confirmed that discrimination can be abusive even where the dominant firm is not active in the downstream market in which the discrimination is felt.¹¹

iv Exploitative abuses

While the focus of UK enforcement action has mostly 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 grappled with the concept of excessive pricing in 2007 in *Attheraces Limited v. British Horseracing Board Limited*.¹² 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. In assessing economic value, however, 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 (the betting public) from the alleged excessive pricing.

More recently, the CMA has pursued a series of cases concerning excessive pricing in the pharmaceutical sector. In December 2016, the CMA fined Pfizer £84.2 million and

9 *Streetmap.EU Limited v Google Inc. and Google Ireland Limited and Google UK Limited* [2016] EWHC 253 (Ch).

10 *Sel-Imperial Ltd v. The British Standards Institution* [2010] EWHC 854 (Ch).

11 *Case C-525/16, MEO/GDA*.

12 [2007] EWCA Civ 38.

Flynn £5.2 million for imposing unfair prices for phenytoin sodium capsules in the UK. As described above, however, the CAT quashed the decision in June 2018, remitting the case to the CMA, and the CAT's judgment was largely upheld by the Court of Appeal in March 2020. The CMA is currently investigating allegations of excessive pricing in two other cases, also mentioned above, concerning liothyronine tablets and hydrocortisone tablets.

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.¹³ 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).¹⁴ 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.¹⁵

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 (as well as concurrent regulators and the CAT) must have regard to that guidance when imposing penalties.¹⁶ The OFT published new guidance in September 2012, following a series of successful appeals against its fining decisions before the CAT.¹⁷ The guidance, which was updated by the CMA in April 2018,¹⁸ 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 leniency or settlement discount and/or approval of a voluntary redress scheme.

The CMA's guidance states that it will generally apply a starting point percentage between 21 and 30 per cent of relevant turnover when considering the most serious abuses of a dominant

13 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).

14 *Napp Pharmaceutical Holdings Limited and Subsidiaries v. Director General of Fair Trading* [2002] CAT 1, paragraph 457.

15 Section 40 of the Act.

16 Section 38(8) of the Act.

17 In connection with the OFT's infringement decisions concerning: (1) bid-rigging arrangements in the construction sector; and (2) cartel behaviour by recruitment agencies.

18 CMA's guidance as to the appropriate amount of a penalty, CMA73.

position. Seriousness will be assessed by reference to the nature and extent of the demand for that product, the structure and size of the market, the effect on competitors (and others), the need for deterrence and the damage caused to consumers.

ii Behavioural remedies

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.¹⁹

The CMA and regulators also have the power to impose interim measures.²⁰ 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 OFT imposed interim measures only once (in 2006), and those measures were subsequently withdrawn. 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 was intended to make it easier for the CMA to impose interim measures in future. Until now, parties seeking interim relief have generally found it more effective to apply to the courts.²¹

The CMA is yet to impose interim measures. It considered and rejected an application by Worldpay to impose interim measures against Visa UK Limited in 2014.²² The CMA came close to imposing interim measures in its investigation of ATG Media’s supply of live online bidding services to auction houses. In that case, the CMA received an application for interim measures relating to allegedly exclusionary practices in November 2016. In June 2017, however, shortly before the CMA was due to make a final decision on whether to impose interim measures, the CMA accepted an offer of commitments from ATG Media and closed its investigation. Dr Michael Grenfell, the CMA’s Executive Director for Enforcement, referred to this case as ‘an example of how, when faced with an interim measures application in a fast-moving market, we were able to resolve the problem within just over 6 months.’²³

There may be greater use of interim measures, particularly in the digital sector, in future. A 2018/19 Digital Competition Expert Panel inquiry into competition law in the digital sector, commissioned by the UK Government and chaired by Professor Jason Furman, recommended more frequent and quicker use of interim measures. It identified interim measures as particularly appropriate in digital markets because cases in the digital sector ‘are likely to be complex but markets can move fast and tip to a winner before a final decision

19 Sections 33 and 34 of the Act.

20 Section 35 of the Act.

21 See, for example, *Dababshil 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 the services to continue providing 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).

22 See CMA press release of 27 March 2015.

23 ‘UK competition enforcement – where next?’, 29 November 2017, available at <https://www.gov.uk/government/speeches/uk-competition-enforcement-where-next>.

is reached.²⁴ Lord Tyrie, Chair of the CMA, also stated in a public letter to the Secretary of State for Business, Energy and Industrial Strategy that increased usage of interim measures ‘will be essential if the CMA is to respond to the challenges thrown up by rapidly changing markets, and to do so sufficiently quickly to prevent irreversible harm to consumer trust’.²⁵

iii Structural remedies

It is unclear whether the CMA and regulators would have the power to impose structural remedies following a finding of abuse of dominance, and this has never been attempted. It is possible for a dominance investigation to be closed on the basis of structural, and quasi-structural, commitments. This has happened on four occasions.

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 commitments included the divestment of Severn Trent Laboratories. 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.

In *Bristol Water* and *SSE* (mentioned above), Ofwat and Ofgem (respectively) accepted quasi-structural commitments under which the suppliers agreed to introduce functional separation between their upstream and downstream businesses.

In *Fludrocortisone acetate tablets* (discussed above), the CMA accepted structural commitments from Aspen that involved the divestment of its rights over ‘ambient storage’ fludrocortisone tablets to an independent third party and the reintroduction of its own ‘cold storage’ product.

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 by the CAT and, after further investigation, the CMA ultimately concluded in September 2016 that ordering a divestiture would be disproportionate).
- 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.

24 Report of the Digital Competition Expert Panel, Unlocking digital competition, 13 March 2019, page 14.

25 Letter from Andrew Tyrie of 21 February 2019, page 8.

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. This is not always the case, however, 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.²⁶ The CMA has no power to use formal investigation powers unless this legal threshold is met. Therefore, 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.²⁷ 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.²⁸
- 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. In exceptional circumstances, the CMA can decide to publish the names of the parties in its initial public notice. Exceptional circumstances 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 CAT 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 the 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

26 Section 25 of the Act.

27 CMA16, April 2014.

28 *R (ex p. Citybook) v. OFT* [2009] EWHC 57.

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.²⁹ ‘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, in exchange for a reduction in financial penalty. 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. 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 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 grounds for action. Final decisions are published (in redacted form) on the CMA’s website.
- j* CMA infringement decisions are subject to full-merits appeal to the 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.

²⁹ In the past, settlement was formally referred to as ‘early resolution’.

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 the 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. In 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).³⁰ 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).³¹ 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 aimed to reverse this trend, and has arguably done so. 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.³² 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

30 As clarified in *The Secretary of State for Health and others v Servier Laboratories Limited and others* [2019] EWCA Civ 1096, factual findings made by the General Court that are not integral to the General Court's judgment are not binding as *res judicata* on UK courts.

31 Before October 2015, the CAT did not have jurisdiction to hear stand-alone actions.

32 See, for example, *Socrates Training Limited v. The Law Society of England and Wales* [2016] CAT 10, judgment (costs capping) of 21 June 2016.

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 of 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.³³ Following a 2010 Court of Appeal judgment,³⁴ however, it seems unlikely that mass representative actions will be brought in competition cases under these provisions in future, 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 remedy, damages might be awarded on a restitutionary basis (i.e., accounting for the profits earned unjustly by the defendant). While the Court of Appeal has accepted in principle that restitutionary damages may apply,³⁵ they have never been awarded in practice.

UK Regulations implementing the EU Damages Directive (described in more detail in the EU chapter) came into force on 9 March 2017.³⁶ Although many of the provisions of the Damages Directive did not require amendment of the UK regime, and many changes relate primarily to cartel infringements, the Regulations contain several provisions that may have a bearing on UK claims for damages from abuse of dominance. For example, the Regulations: (1) address the burden of proof with respect to the passing-on defence; (2) suspend the limitation period while competition authority investigations or consensual dispute resolution processes are ongoing; (3) exclude the award of exemplary damages reversing the principle

33 Civil Procedure Rule 19.6.

34 *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ. 1284.

35 *Devenish Nutrition Ltd v. Sanofi-Aventis SA (France) & Ors* [2008] EWCA Civ. 1086.

36 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (No. 385).

established in the *Cardiff Bus* case that exemplary damages were possible in dominance cases where no administrative fine had been imposed;³⁷ (4) exempt small and medium-sized enterprises, as well as defendants that settle with the claimant, from the principle of joint and several liability; and (5) amend rules on disclosure.³⁸

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 a 'loser-pays' basis. A successful claimant is therefore likely to recover a significant proportion of his or her costs from the defendant.

Public funding is generally unavailable for competition law actions. Other funding options are available, however. 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 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, although, 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 in High Court actions 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 but, in collective proceedings, the representative claimant's lawyers and/or funder may be allowed a share of any unclaimed damages.

VIII FUTURE DEVELOPMENTS

The public enforcement and private litigation regimes in the United Kingdom have undergone considerable reform in recent years. While these reforms are significant from an institutional and procedural perspective, the substantive rules on dominance are unchanged. The reforms were 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 and an increase in private litigation. The expected boost to public enforcement and private litigation (and collective actions in particular) has been slow to materialise. CMA enforcement activity increased following criticism by the National Audit

37 See *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* [2012] CAT 19, judgment of 5 July 2012. 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.

38 For further detail and analysis, see *The UK implements the EU Antitrust Damages Directive*, Cleary Gottlieb Alert Memorandum, 10 January 2017, available at: <https://www.clearygottlieb.com/news-and-insights/publication-listing/the-uk-implements-the-eu-antitrust-damages-directive>.

Office in February 2016, but the last two years have seen a greater focus on proceeding with existing cases and preparing for the UK's withdrawal from the EU rather than opening new cases. Other future developments are likely to involve a greater focus on competition in the digital sector and broader changes to UK competition law enforcement now that the UK has left the EU.

i Competition in the digital sector

Over the last two years the CMA, like many competition authorities around the world, has set out plans to focus its enforcement activities on digital markets.³⁹ Its 2020 Annual Plan states that its priorities for 2020 will include using 'competition law powers to tackle abuses' in digital markets. This focus will not be confined to the CMA. The annual report on concurrency emphasises 'the importance of close collaboration between the CMA and other sector and cross-sector regulators (and international partners) to respond to both the opportunities and challenges that digital markets present'.

In a 2019 letter to the Secretary of State for Business, Energy and Industrial Strategy, Lord Tyrie (the CMA Chair) urged government reform of competition policy, seeing it as an 'opportunity to help shape the response to the challenges that many jurisdictions now face.'⁴⁰ Several of the proposals could impact on dominance investigations. To add bite to CMA information requests, for example, Lord Tyrie suggests implementation of a turnover-based fines regime for non-compliance with enforcement investigations. Where these investigations uncover concerns, more frequent use of interim measures 'will be essential if the CMA is to respond to the challenges thrown up by rapidly changing markets.' Lord Tyrie also proposes that the standard of review by the CAT (which he describes as 'a more protracted and cumbersome appeal process than was originally intended for, and by, the CAT') be lowered from full merits review either to judicial review or to a new standard of review. This proposal has been met with almost universal opposition among legal practitioners and business. The letter also suggests imposing greater restrictions on the admissibility of new evidence and less emphasis on oral testimony in CAT appeals.

The House of Lords Select Committee on Communications also published a report calling for rigorous enforcement in facilitating effective regulation of digital markets. The report describes online platforms as 'gatekeepers' for the internet, and states that 'it is appropriate to put special obligations on these companies to ensure they act fairly.'⁴¹ There is no discussion of the specific substance of these obligations, however, only that they should be created in accordance with a number of principles and enforced by a regulator. Significantly, the report recommends the establishment of a new Digital Authority that would report directly to the Cabinet Office. This new entity would co-ordinate regulators in the digital world through a number of functions, including assessing existing regulation, recommending additional enforcement powers where necessary and assisting in the effective implementation of regulation.

39 Consumer Green Paper: Modernising Consumer Markets, 11 April 2018.

40 Letter from Andrew Tyrie of February 21, 2019, page 3, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf

41 'Regulating in a Digital World', 9 March 2019, p. 45, paragraphs 171-172. available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf>

Several of these suggestions were echoed in the report of the Digital Competition Expert Panel chaired by Professor Jason Furman. This report frames reform of competition policy as an opportunity for the UK to set an example and ‘to lead international action.’⁴² With respect to antitrust enforcement, two principal changes are proposed, both consistent with Lord Tyrie’s proposals: greater use of interim measures and adjustment of appeal standards. The ‘goal of the policy changes is not more or less enforcement but better enforcement.’ The report notes the lengthy duration of abuse of dominance cases and the corresponding risk that companies operating in fast-moving digital markets may go out of business before cases are concluded. Recognising that ‘the powers are already sufficient in themselves,’ the report first recommends greater use of interim measures. To facilitate this, the report proposes streamlining the CMA’s processes such that access to file in interim measures cases would be limited to documents that are ‘clearly relevant’ to the interim measure. The other recommendation is to change the standard of appeal to the CAT from full merits review to more a limited judicial review. When discussing this recommendation, the report also states that ‘significant changes to the appeal standard for antitrust cases would merit a change to the current CMA decision making process to guarantee sufficient independence.’

In addition to reform of the current *ex post* framework, the Furman Report advocates greater emphasis on *ex ante* regulation. It recommends the creation of a Digital Markets Unit to, among other functions, create a code of conduct applicable to companies that are deemed to hold ‘strategic market status.’ The code would set out ‘acceptable norms of competitive conduct on how firms with strategic market status should act with regard to smaller firms and consumers.’ The proposal to introduce more *ex ante* rules is broadly consistent with Lord Tyrie’s letter and the House of Lords Select Committee report, and could have a significant impact on the nature of UK competition enforcement in future, particularly in the digital sector.

In July 2019, the CMA launched its Digital Markets Strategy. This was a response to what the CMA sees as ‘profound changes being brought about by the digital economy,’ requiring competition authorities to ‘develop a path that protects consumers while ensuring robust competitive and innovative digital markets.’ The CMA sought to tackle questions around companies’ use of data, whether certain platforms have market power or ‘gatekeeper’ status, the use of increasingly sophisticated technology to target advertising, and the risk of ‘killer acquisitions’. The CMA set out several priority areas, including: (1) a market study on online platforms and digital advertising (also launched in July 2019, with its interim report published in December 2019 and the final Report due by 2 July 2020); (2) a review of the CMA’s approach to reviewing digital mergers; (3) policy work to consider a possible ‘digital markets unit’, (4) proposals to reform interim measures and other enforcement tools to enable swifter action, and (5) cooperation with international agencies.

In March 2020, the government announced that it had accepted the strategic recommendations included in the Furman Report and commissioned the CMA to lead a cross-regulator Digital Markets Taskforce to advise on the potential design and implementation of pro-competitive measures for digital platform markets. The Taskforce will be housed in the CMA and draw on the expertise of Ofcom and the Information Commissioner’s Office. The Taskforce is focusing on the design and scope of the Code of Conduct, and plans to report

42 Report of the Digital Competition Expert Panel, *Unlocking digital competition*, March 13, 2019, p. 16, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

back to the government in September 2020. This follows the CMA's Interim Report into digital advertising, which also endorsed the idea of an enforceable *ex ante* code for platforms with 'Strategic Market Status'.

ii Implications of Brexit

On 31 January 2020, the United Kingdom ceased to be an EU Member State and withdrew from the EEA. European competition law, including the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU), will continue to apply in the UK only until the end of an implementation period, which is currently expected to be on 31 December 2020.

Once the implementation period ends, EU competition law will no longer apply in the UK, although conduct that took place before that date may still be investigated and subject to private claims under EU law.⁴³ Most pre-existing EU competition law will nevertheless continue to have binding effect under UK domestic law as 'retained EU law' and will do so unless and until specific provisions are overturned by the Supreme Court or repealed by other legislation.⁴⁴

In January 2020, the CMA issued guidance on the application of the Withdrawal Agreement to competition law.⁴⁵ Under Regulation 1/2003, the competition authorities of EU Member States cannot investigate agreements or conduct already being investigated by the European Commission. This will continue to be the case during the transition period. The Commission will also retain exclusive jurisdiction over UK aspects of antitrust investigations that are ongoing at the end of the transition period, provided it has already opened formal proceedings before that date – however long those proceedings take to complete. The Commission will also retain the power to enforce remedies in these cases, unless it explicitly agrees to transfer responsibility to the CMA or a concurrent UK competition authority. The UK authorities will have the power to investigate the UK aspects of abuse of dominance cases begun after this date, even if the same conduct is being investigated at EU level, and so will likely carry out abuse of dominance (and other) investigations in parallel with the European Commission.

Cooperation between the CMA (or concurrent regulators) and the competition authorities of EU Member States will largely continue as before during the transition period, although participation and attendance of the CMA or UK concurrent regulators in European Competition Network meetings, oral hearings and Advisory Committee meetings during the transition period will be by invitation only.

43 On 23 January 2020, the UK Parliament ratified the European Union (Withdrawal Agreement) Act 2020 which sets out the terms of the UK's departure from the EU. The Withdrawal Agreement preserves the status quo regarding the application of Article 102 in the UK until at least 31 December 2020. See Section VIII for further details on the possible implications of the UK's withdrawal from the EU.

44 European Union (Withdrawal) Act 2018, Section 2. Retained EU law may be modified by secondary legislation to the extent necessary to take into account its new domestic context (Section 8).

45 CMA113, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf.

The CMA leadership has spent much of 2019 and 2020 preparing for Brexit and positioning the UK's withdrawal from the EU as an opportunity to step out of the Commission's shadow and establish the CMA as a leading global agency.⁴⁶ The CMA's resources have also expanded to meet the demands of its expected post-Brexit responsibilities.

The CMA has, however, acknowledged in its 2020 Annual Plan that the UK's withdrawal from the EU is likely to result in a significant increase in its workload, including an increase of around 50 per cent in the number of merger cases, and that it 'may therefore have limited opportunities to launch many major new discretionary projects [i.e., including Chapter 2 investigations] over the coming year'. It nevertheless asserts its confidence that it will be able to 'launch some selected new 'domestic' work'.

⁴⁶ See, for example, 'UK Competition Law enforcement: the post-Brexit future', 11 June 2019 where Dr Michael Grenfell states 'The CMA was prepared and ready to take on its new expanded post-Brexit functions . . . To get to this position, the CMA has spent the period since the referendum in planning for its expanded role, recruiting additional staff, setting up systems, drafting guidance and assisting the Government in the development of policy and legislation.'

UNITED STATES

Kenneth S Reinker, Daniel Culley and Benjamin Reese¹

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 monopoly power and anticompetitive conduct that helps to obtain or maintain that power;⁴
- b* attempted monopolisation, which requires a dangerous probability of achieving monopoly power, anticompetitive conduct that threatens to help achieve that power and a specific intent to monopolise;⁵ and
- c* conspiracy to monopolise, which requires a conspiracy, a specific intent to monopolise and 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

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2 See *Verizon Communications Inc. v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 407 (2004).

3 *Id.*

4 *Id.*

5 See *Spectrum Sports Inc v. McQuillan*, 506 US 447, 456, 459 (1993).

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.

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

In the past year, the Supreme Court issued a decision concerning 'direct purchasers' that may expose operators of two-sided platforms to antitrust claims from both consumers and merchants using the platform. Qualcomm appealed a monopolisation judgment against it for abuse of standard-essential patents, prompting a rare public split between the FTC and DOJ. The FTC challenged a healthcare technology company's exclusivity rebates. And the FTC settled with a pharmaceutical company based on a 'product hopping' theory.

i Supreme Court holds that App Store customers can pursue antitrust claims against Apple

In May 2019, the Supreme Court held that App Store customers were direct purchasers and so could proceed on their claims that Apple's policy of charging app developers 30 per cent of their sales through the App Store violated Section 2 of the Sherman Act.¹⁰ (Indirect purchasers do not have standing to pursue federal antitrust claims for damages in the United States.) Apple argued that individuals who purchase apps through the App Store could not be considered direct purchasers under the Supreme Court's earlier decision in *Illinois Brick*, because the app developers and not Apple set the price the consumer paid for the app.¹¹ Apple also argued that classifying both app developers and App Store customers as direct purchasers would open Apple up to duplicative liability, a significant motivation for the Supreme Court's *Illinois Brick* decision.

The Supreme Court construed the concept of 'direct purchaser' more simply—a customer that has a direct contractual relationship with the defendant. It, therefore, found plaintiffs to be direct purchasers because they purchased the apps directly from Apple. The Court concluded that this rule better comported with the text of the Sherman Act, that upstream pricing arrangements between a manufacturer and retailer were irrelevant to the *Illinois Brick* analysis, and that a contrary ruling would allow retailers to immunise themselves from antitrust liability by artfully drafting their contracts with manufacturers. The Court acknowledged that its holding means that both app manufacturers and app purchasers might have antitrust claims against Apple.

8 See *FTC v. Cement Inst*, 333 US 683, 691–94 (1948).

9 15 USC Sections 45, 53(b).

10 *Apple Inc. v. Robert Pepper et al.*, 139 S. Ct. 1514 (2019).

11 *Illinois Brick. Co. v. Illinois*, 431 U.S. 720 (1977).

ii Qualcomm pursues appeal in standard-essential patent case, prompting public split between FTC and DOJ

In May 2019, the District Court for the Northern District of California entered a judgment for the FTC in its suit against Qualcomm.¹² The Court found that Qualcomm conditioned the supply of its modem chips on mobile phone manufacturers agreeing to a Qualcomm patent licence for competitors' modem chips. The Court held that this 'no licence, no chips' policy imposed an anticompetitive 'tax' on competing chips. The Court also held that Qualcomm's refusal to license its standard-essential patents to its competitors was an illegal refusal to deal. The Court further found that Qualcomm had entered *de facto* exclusive dealing arrangements with many original equipment manufacturers (OEMs) based on the conditioning of market development funds and technical support on their purchases of Qualcomm chips, and that Qualcomm had entered an express exclusive agreement with Apple. The Court entered an order mandating that, among other things, Qualcomm offer licences to its competitors and that it renegotiate its licences with OEMs without the threat of withholding its modem chips.

Qualcomm appealed the decision to the Ninth Circuit. On the 'no license no chips' and exclusive dealing holdings, Qualcomm argued that its royalty requirements are not anticompetitive because they are neither paid by nor harm competitors.¹³ On the refusal to license holdings, Qualcomm argued that it has no duty to offer exhaustive licences to its standard essential patents to its competitors under the Supreme Court's *Aspen Skiing* and *Trinko* holdings because Qualcomm has no history of profitably and voluntarily doing so and did not change its practices to sacrifice short-term profits.¹⁴ The FTC argued that what it called the 'heightened standard' for refusals to deal under *Aspen Skiing* and *Trinko* did not apply in this case because Qualcomm had already made voluntary commitments to standard setting organizations to license its patents under fair, reasonable and non-discriminatory terms. The FTC argued that the Ninth Circuit should follow the Third Circuit's *Broadcom v. Qualcomm* decision in finding that breaching commitments made to a standard setting organisation could state a monopolisation claim.¹⁵ The FTC defended the District Court's other holdings based on arguments that largely followed the district court's analysis.¹⁶

In a surprising move, the DOJ filed an amicus curiae brief and appeared at oral argument in support of Qualcomm's position, signalling a rare public break between the agencies on the issue of standard-essential patents and Qualcomm's 'no license, no chips' policy.¹⁷ The DOJ's brief echoed Qualcomm's arguments, emphasising that royalties were charged to customers,

12 Findings of Fact and Conclusions of Law, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (ND Cal, 21 May 2019).

13 Opening Brief for Appellant Qualcomm Incorporated, *FTC v. Qualcomm Incorporated*, No. 19-16122 (9th Cir., 23 August 2019), available at <http://cdn.ca9.uscourts.gov/datastore/general/2019/11/20/19-16122%20-%20Opening%20brief.pdf>.

14 Id.

15 Brief of the Federal Trade Commission, *FTC v. Qualcomm Incorporated*, No. 19-16122 (9th Cir., 22 November 2019), available at <http://cdn.ca9.uscourts.gov/datastore/general/2020/02/27/19-16122-Answering%20brief.pdf>. Compare with *Broadcom v. Qualcomm*, 501 F.3d 297 (3d Cir. 2007) (holding that a monopolist's failure to comply with a FRAND promise for its standard-essential patents violated Section 2 of the Sherman Act).

16 Id. (citing *United States v. Microsoft*, 56 F.3d 1448, 1452, 1462 (D.C. Cir. 1995)).

17 Brief for the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *FTC v. Qualcomm Incorporated*, No. 19-16122 (9th Cir., 30 August 2019), available at <http://cdn.ca9.uscourts.gov/datastore/general/2019/11/20/19-16122%20-%20United%20States%20amicus%20brief.pdf>.

not competitors, and that the district court had failed to properly apply the Supreme Court's heightened duty-to-deal framework.¹⁸ The DOJ also argued that the district court failed to consider whether its global injunction was in the public interest, which the DOJ noted was a serious question given that it had the potential to stifle innovation and endanger national security by unduly impairing Qualcomm's ability to invest in R&D, participate in setting standards and supply the government.¹⁹

iii FTC pursues Section 2 claims against electronic prescription service provider based on exclusivity rebates

In April 2019, the FTC filed suit against Surescripts, LLC, alleging that it violated Section 2 of the Sherman Act by maintaining a monopoly in prescription routing and eligibility.²⁰ Routing involves the transmission of prescription-related data from a prescriber to a pharmacy; eligibility refers to the transmission of formulary and benefit information from a payer (such as an insurance company) to a prescriber's electronic health record system. The FTC alleged that, beginning in 2009, Surescripts began conditioning its customer pricing on whether the customer routed 100 per cent of its transactions through Surescripts's routing and eligibility systems. The FTC argued that this had the effect of foreclosing at least 70 per cent of each of the routing market and eligibility market to Surescripts's competitors. The agency further alleged that Surescripts engaged in other anticompetitive behaviour, including the use of threats as well as a non-compete agreement with a competitor, to maintain its monopoly.

Surescripts moved to dismiss the FTC's complaints arguing that it failed to state a claim under the Sherman Act because the FTC had not alleged that Surescripts's prices were 'predatory' and that the FTC had failed to allege that its loyalty programmes created any anticompetitive effects. Surescripts also argued that since it operates in two-sided markets (that is, for referral, between doctors and pharmacies; and for eligibility, between doctors and insurance companies), the FTC must demonstrate foreclosure on both sides of each market. In January 2020, the district court rejected these arguments, concluding that pricing schemes that sufficiently differentiate between customers that exclusively purchase from the supplier and those that do not can be considered *de facto* exclusive dealing arrangements and are unlawful under Section 2 if the plaintiff can show these arrangements foreclosed competition to a substantial degree and had a significant effect in preserving the defendant's monopoly.²¹ The district court also held that the FTC had adequately alleged harm to both sides of the markets where Surescripts is active.²²

iv FTC obtains settlement in a product hopping case

In July 2019, Reckitt Benckiser Group PLC (Reckitt), the maker of an opioid replacement therapy called Suboxone, agreed to pay US\$50 million to settle allegations that it violated Section 5 of the FTC Act. The FTC alleged that Reckitt had engaged in 'product hopping' – developing a new formulation of a drug and discontinuing or de-emphasising the old

18 Id.

19 Id.

20 Complaint for Injunctive and Other Equitable Relief, *FTC v. Surescripts, LLC*, No. 1:19-cv-01080-JDB (D.D.C., 17 April 2019).

21 Memorandum Opinion, *FTC v. Surescripts, LLC*, No. 1:19-cv-01080-JDB (D.D.C., 17 January 2020).

22 Id.

formulation to avoid generic substitution.²³ The FTC explained that this practice allows a monopolist to avoid the additional competition from generic drugs enabled by state laws allowing pharmacists to substitute equivalent generic drugs to fill a prescription.²⁴ Because the new formulation and old formulation are not considered ‘equivalent’ under these state laws, and because the new formulation has patent protection, a prescription for the new formulation cannot be substituted to a generic drug.²⁵

For Suboxone in particular, it had traditionally been sold as tablets; Reckitt later developed a film version of the drug. The FTC alleged that, after multiple generic drug manufacturers had filed applications with the US Food and Drug Administration, Reckitt not only introduced a new formulation, but it also ‘fabricated a safety story’ about paediatric exposure, filed a false citizen petition with the FDA against the tablet formulation based on that story, increased tablet prices and announced that it was discontinuing the tablet formulation to further encourage physicians to prescribe the film formulation.²⁶ Reckitt by contrast continues to argue in associated private litigation that its switch to film was part of an effort to produce and market a superior product.²⁷

The FTC and Reckitt settled the claims without an admission of misconduct, agreeing to pay US\$50 million to the FTC; disclose the scientific basis of any future citizens’ petitions filed with the FDA; notify the FTC of any applications for approval of a follow-on drug by the FDA; and refrain from pulling the original drug product from the market or taking certain other actions as a result of the follow-on drug application unless the FDA has determined there are legitimate safety concerns.²⁸ The US District Court for the Eastern District of Pennsylvania recently certified classes in a parallel private litigation.²⁹

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.³⁰ 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

23 FTC, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone*, 11 July 2019, available at <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc>

24 Complaint for Injunctive and Other Equitable Relief, *FTC v. Reckitt Benckiser Group PLC*, No. 1:19-CV-00028 (W.D. Va. 2018), available at https://www.ftc.gov/system/files/documents/cases/reckitt_complaint_7-11-19.pdf.

25 id.

26 id.

27 Memorandum Opinion and Order, In re: Suboxone (Buprenorphine Hydrochloride and Nalaxone) Antitrust Litigation, MDL No. 2445, 13-md-2445 (E.D. Pa. 2019).

28 Joint Motion for Entry of Stipulated Order for Permanent Injunction and Equitable Monetary Relief, *FTC v. Reckitt Benckiser Group PLC*, No. 1:19-CV-00028 (W.D. Va. 2018), available at https://www.ftc.gov/system/files/documents/cases/reckitt_joint_motion_for_stipulated_order_7-11-19.pdf.

29 Memorandum Opinion and Order, In re: Suboxone (Buprenorphine Hydrochloride and Nalaxone) Antitrust Litigation, MDL No. 2445, 13-md-2445 (E.D. Pa. 2019).

30 See, for example, *United States v. EI DuPont de Nemours & Co*, 351 US 377, 391–92 (1956).

market shares are more likely to support the inference of monopoly power, and typically shares below 50 per cent cannot support that inference.³¹ But even a very high share does not automatically establish monopoly power.³²

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.³³ Geographic markets are defined by looking at what other geographies sellers operate in and buyers can turn to.³⁴ 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.³⁵

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.³⁶

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 2009.³⁷ The Supreme Court has, however, clarified that where two-sided platforms (such as credit cards) are concerned, courts evaluating antitrust claims must consider the impact of the defendant's conduct on both sides of the market and indicated that pro-competitive effects on one side of the market might be able to justify some anticompetitive impacts on the other.³⁸

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.

31 See, for example, *Domed Stadium Hotel Inc. v. Holiday Inns Inc.*, 732 F 2d 480, 489 (Fifth Circuit 1984) ('Supreme Court cases, as well as cases from this court, suggest that absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.').

32 US law does not recognise 'relative dominance' or 'collective dominance'.

33 See, for example, *Brown Shoe Co v. United States*, 370 US 294, 325 (1962); *DuPont*, 351 US at 395.

34 See, for example, *Tampa Elec Co v. Nashville Coal Co*, 365 US 320, 327–28 (1961).

35 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).

36 See, for example, *United States v. Grinnell Corp*, 384 US 563, 570–71 (1966).

37 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.

38 *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

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 that the defendant's prices are below cost, and there is a 'dangerous probability' that – by raising its prices above competitive levels after driving competitors from the market – the defendant will recoup the losses it incurs by charging below-cost prices.³⁹ 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.⁴⁰

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.⁴¹ 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.⁴² Courts have also suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.⁴³

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 in volatile industries, or lead to efficient contracting such as by encouraging promotional or marketing efforts. However, like exclusive dealing, they can also foreclose rivals and impair their competitiveness. US law on loyalty discounts is unsettled. Some courts have applied a

39 See *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.

40 See *Pacific Bell Telephone Co v. linkLine Communications Inc.*, 555 US 438 (2009).

41 *Tampa Electric Co v. Nashville Coal Co.*, 365 US 320, 327 (1961).

42 Compare *Twin City Sportservice Inc v. Charles O Finley & Co Inc.*, 676 F 2d 1291, 1298, 1304 (Ninth Circuit 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 (First Circuit 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).

43 See *Microsoft*, 253 F 3d at 70.

predatory pricing analysis, finding loyalty conditions to be potentially anticompetitive only when the resulting price is below cost.⁴⁴ Other courts have applied an exclusivity analysis, finding loyalty conditions to be potentially anticompetitive whenever they foreclose a substantial share of the market.⁴⁵ 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.⁴⁶

Most-favoured nation (MFN) clauses provide that a customer will receive pricing or other terms as good as those that the seller offers other customers.⁴⁷ MFNs can pro-competitively help buyers obtain low prices and can help prevent opportunism when one party makes relationship-specific investments. However, 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.⁴⁸

Tying and bundling

Tying is when a supplier conditions its sale of one product (the tying product) on the customer purchasing another product (the tied product).⁴⁹ 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.⁵⁰ Additionally, tying requires that the defendant have market power in the tying product.⁵¹ More recent cases have recognised the potential pro-competitive benefits of tying, although some older precedents could be read to suggest that pro-competitive justifications are inadmissible in a tying case.⁵² 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,

44 See, for example, *Concord Boat Corp v. Brunswick Corp*, 207 F 3d 1039, 1060–62 (Eighth Circuit 2000).

45 See, for example, *LePage's Inc. v. 3M*, 324 F 3d 141, 157–59 (Third Circuit 2003) (en banc).

46 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).

47 For discussions of MFNs, see, for example, Baker, 'Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses', 64 *Antitrust LJ* 517 (1996); Salop & Scott Morton, 'Developing an Administrable MFN Enforcement Policy', 27(2) *Antitrust Magazine* 15 (2013).

48 See, for example, Complaint, *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155-DPH-MKM (ED Mich 18 October 2010).

49 See *Jefferson Parish Hospital v. Hyde*, 466 US 2, 21 (1984).

50 See *Eastman Kodak Co v. Image Technical Services Inc.*, 504 US 451, 462 (1992).

51 See *Jefferson Parish*, 466 US at 13–14.

52 See *Ill Tool Works Inc. v. Independent Ink Inc.*, 547 US 28, 35 (2006).

but 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.⁵³ 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.⁵⁴ Other courts have instead found that bundling can be potentially anticompetitive whenever it forecloses a substantial share of the market.⁵⁵

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,⁵⁶ antitrust laws encourage innovation, and US courts are generally reluctant to second-guess product design decisions.⁵⁷ 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).⁵⁸ Even when other US regulations mandate dealing between competitors, US courts generally will not find an antitrust duty to deal.

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.⁵⁹ 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

53 See, for example, *Cascade Health Solutions v. PeaceHealth*, 515 F3d 883, 903 (Ninth Circuit 2008).

54 See *id.*, at 906–08.

55 See, for example, *LePage's Inc. v. 3M*, 324 F 3d 141, 154–57 (Third Circuit 2003) (en banc).

56 See, for example, *United States v. Microsoft Corp*, 253 F 3d 34, 65 (DC Cir 2001) (en banc); *CR Bard Inc. v. M3 Systems Inc.*, 157 F 3d 1340, 1382 (Fed Cir 1998).

57 See, for example, *Berkey Photo Inc. v. Eastman Kodak Co*, 603 F 2d 263, 286–87 (Second Circuit 1979).

58 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).

59 15 USC Section 13.

effect from the fact of differential pricing.⁶⁰ 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.⁶¹ 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. However, 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).⁶²

Monopolisation claims have 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 claims to go forward, while others have suggested they do not constitute monopolisation.⁶³ The FTC has also used Section 5 of the FTC Act to pursue enforcement actions against alleged abuses of the standard-setting process.⁶⁴

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.⁶⁵ Similarly, enforcing intellectual property rights obtained through fraud can be monopolisation.⁶⁶ Other abuses of governmental processes are also possible.⁶⁷

60 See *FTC v. Morton Salt Co*, 334 US 37, 47 (1948).

61 15 USC Section 13(a), (b).

62 See *Trinko*, 540 US at 415 n. 4.

63 Compare *Broadcom Corp v. Qualcomm Inc.*, 501 F 3d 297 (Third Circuit 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).

64 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.

65 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).

66 See, for example, *Walker Process Equip v. Food Mach & Chem Corp*, 382 US 172 (1965).

67 Findings of Fact and Conclusions of Law, *FTC v. AbbVie Inc.*, No. 2:14-cv-05151-HB (ED Pa 2018), available at https://www.ftc.gov/system/files/documents/cases/abbvie_findings_and_order_6-29-18.pdf.

‘Reverse payment’ settlements – that is, payments made by a branded drug manufacturer to a generic competitor as part of a patent settlement that can delay generic entry – can also be challenged as monopolisation in some situations.⁶⁸ The FTC has pursued several enforcement actions against these types of settlements and there has also been private litigation.

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.⁶⁹

Mergers that help obtain or maintain a monopoly can constitute monopolisation, although mergers are typically 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.⁷⁰ 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.⁷¹ 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 supra-competitive profits related to the antitrust violation) or restitution (an order requiring that the defendant compensate victims for their losses). However, a plaintiff must show that the defendant is violating or is about to violate the law in order to obtain injunctive relief; simply showing past conduct and a likelihood of recurrence are insufficient.⁷²

Private plaintiffs can seek monetary damages equal to three times their actual injury, plus litigation costs and reasonable attorneys’ fees, as detailed below.⁷³ 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).⁷⁴ In addition, a US state can bring a *parens patriae* action seeking treble damages on behalf of its residents.⁷⁵

68 See *FTC v. Actavis*, 133 S Ct 2223, 2227 (2013) (holding that reverse payment settlements ‘can sometimes violate the antitrust laws’).

69 See *Conwood Co v. United States Tobacco Co*, 290 F 3d 768, 783–84 (Sixth Circuit 2002).

70 As noted, criminal sanctions are theoretically available but not pursued in practice.

71 See, for example, *United States v. United Shoe Mach Corp*, 391 US 244, 250 (1968).

72 *FTC v. Shire ViroPharma Inc*, 917 F.3d 147 (3rd Cir. 2019), available at <https://www2.ca3.uscourts.gov/opinarch/181807p.pdf>.

73 15 USC Section 15.

74 15 USC Section 15(b); 15a.

75 15 USC Section 15c.

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., Congress). The DOJ and the FTC can work voluntarily with the target of the investigation and third parties, or can use compulsory process, including subpoenas and 'civil investigative demands', to obtain documents, written responses to questions and witness testimony.⁷⁶ Entities subjected to a compulsory process often seek to negotiate the scope of the discovery and sometimes seek to quash it,⁷⁷ 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. The FTC can also bring lawsuits in federal court seeking equitable relief but, as noted above, one recent case held that the FTC did not have authority to pursue equitable relief in federal court for conduct that was solely in the past.

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.⁷⁸ 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 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

76 See 15 USC Sections 46, 49, 57b-1; 15 USC Sections 1311–1314.

77 See 15 USC Section 1314(b); 16 CFR 2.7(d).

78 See *General Investment Co v. Lake Shore & Mich S Ry Co*, 260 US 261, 286–88 (1922).

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 the FTC's present enforcement intentions as to certain conduct.⁷⁹ Businesses must submit a written request to the DOJ or the FTC describing the conduct and provide documents and other information. The DOJ or the 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 the FTC responds, the response and request are made available publicly. The guidance is not legally binding, but in practice the DOJ and the 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). The guidance also does not preclude private plaintiffs from challenging the proposed conduct.

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.⁸⁰ 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.⁸¹

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.

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.

79 See 16 CFR Sections 1.1–1.4; 28 CFR Section 50.6.

80 See Fed R Civ P 23.

81 See *Illinois Brick Co v. Illinois*, 431 US 720 (1977); *California v. ARC America Corp*, 490 US 93 (1989).

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.⁸² 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

In February 2019, the FTC created a Technology Enforcement Division to monitor competition and investigate potential anticompetitive conduct in markets in which digital technology is an important dimension of competition. In explaining the decision, the then Director of the Bureau of Competition noted that '[t]echnology markets, which are rapidly evolving and touch so many other sectors of the economy, raise distinct challenges for antitrust enforcement', and explained that '[b]y centralizing our expertise and attention, the new task force will be able to focus on these markets exclusively – ensuring they are operating pursuant to the antitrust laws, and taking action where they are not'.⁸³ In a similar vein, the Antitrust Division of the DOJ announced in July 2019 that it 'is reviewing whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers'.⁸⁴

These announcements were followed by announcements of investigations into Amazon, including interviews with small businesses that sell products on Amazon.com, and Google as well as requests to major technology companies to provide details on their recent acquisitions. These moves signal heavier scrutiny by both US antitrust enforcement agencies of technology companies and particularly larger online platforms like Google, Amazon, and Facebook.

It is unclear whether the outbreak of the covid-19 virus and its impact on the global economy will have any impact on these enforcement priorities.

82 See 15 USC Section 16(a).

83 FTC, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets*, 26 February 2019, available at <https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology>.

84 DOJ, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (23 July 2019), available at: <https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms>.

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He has also successfully represented corporate clients in various administrative proceedings, inspections and dawn raids by the antitrust authorities, and has worked on projects related to antitrust compliance.

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A pioneer member of the Competition Commission of Singapore, now known as the Competition and Consumer Commission of Singapore (CCCS), Elsa has assisted on close to 90 per cent of complex CCCS merger reviews requiring commitments, including the first foreign-to-foreign merger with commitments (*Thomson/Reuters*) and the first CCCS conditional merger clearance requiring local commitments (*SEEK/JobStreet*).

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He has also assisted on multiple leniency filings made to the Competition and Consumer Commission of Singapore (CCCS), and assisted clients during dawn raids by the CCCS.

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Daniel Culley splits his time between Cleary Gottlieb Steen & Hamilton LLP's Washington, DC and Brussels offices, and practises in a broad range of antitrust matters, including litigation, mergers, cartels and counselling across a wide number of industries.

Mr Culley received his JD, *magna cum laude*, Order of the Coif, from Georgetown University Law Center in 2008, and received his BS, *magna cum laude*, in international economics, from Georgetown University School of Foreign Service in 2005. He has written a number of articles on antitrust and competition law, with a particular focus on the application of antitrust and competition law to intellectual property and high-technology industries.

MARCEL DIETRICH

Homburger AG

Marcel Dietrich is the head of Homburger's competition and regulatory team. His practice focuses on Swiss and European competition and antitrust law as well as on commercial public and administrative law and regulated markets. He has extensive and long-standing experience in all areas of competition law ranging from merger control to administrative and civil antitrust litigation.

He also advises on compliance matters and internal investigations. With regard to regulated markets, he specialises in energy, healthcare and pharma, media and telecommunication, infrastructure and transport as well as in public procurement.

He is a member of various national and international competition law associations. He is the chair of the Zurich Bar Association's committee on competition law. He regularly publishes and lectures on various subjects of competition law, commercial public and administrative law.

MAURITS DOLMANS

Cleary Gottlieb Steen & Hamilton LLP

Maurits JFM Dolmans is a partner based in the London office of Cleary Gottlieb Steen & Hamilton LLP.

Mr Dolmans' practice focuses on EU, UK and international competition law, as well as EU regulatory and EU intellectual property law. Mr Dolmans has extensive experience in the information technology, telecoms, media and entertainment sectors, as well as in the energy, medical devices, chemicals and manufacturing industries. He has appeared in proceedings before the EU Commission and the EU courts, national courts and national competition authorities of several Member States, and ICC and NAI arbitrations. Many of his competition cases involve abuse of dominance, licensing or refusals to license, European standardisation, access to networks, mergers, joint ventures and other transactions in the IT, telecoms and other areas, intellectual property arbitration and litigation, abuses of dominance and cartels. He has published widely in these areas.

Mr Dolmans' public cases include the EU's clearance of Google's acquisition of Motorola, the UK OFT's clearance of Google's acquisition of Beatthatquote and Waze, the successful closure of a range of complaints against IBM for alleged abuse of dominance, representation of Google in a wide range of matters involving alleged abuse of dominance relating to patents, search services and advertising, and various antitrust cases against Microsoft.

Mr Dolmans is distinguished by Chambers' guides on 'the world's leading lawyers' and by other publications as a leading lawyer in the areas of competition, antitrust and communications.

BERNT ELSNER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Bernt Elsner is a partner at CMS Reich-Rohrwig Hainz and leads the Austrian team for EU competition law, public procurement law and public law. He is head of the global CMS public procurement group and a member of the managing team of the global CMS competition and EU practice groups. Bernt studied law at the University of Vienna and

business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 23 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience on cross-border merger control matters, anticompetitive behaviour in tender procedures, antitrust damage, antitrust compliance and state aid.

MARIA ERMOLAEVA

CMS

Maria Ermolaeva is an associate in the competition team of CMS Russia. Her practice focuses on competition law and IP issues.

Maria advises clients on a broad range of antimonopoly matters, such as anticompetitive agreements, concerted actions and distribution structuring, as well as obtaining merger clearances. Her experience also includes advising on general competition compliance and industry-specific antimonopoly issues.

GIANLUCA FAELLA

Cleary Gottlieb Steen & Hamilton LLP

Gianluca Faella is a counsel at Cleary Gottlieb Steen & Hamilton LLP. His practice focuses on competition law, state aid and economic regulation (including electronic communications and media regulation). He advises leading companies in proceedings before competition and regulatory authorities and EU, administrative and civil courts concerning abuses of dominance, restrictive agreements, mergers, state aid and regulatory issues.

In 2019, Mr Faella was named the 'Best Italian EU Litigation Lawyer of the Year' by Italian legal magazine *TopLegal*.

He is associate professor of economy law at the Link Campus University of Rome, where he teaches competition and intellectual property law and comparative law, and adjunct professor at the LUISS University of Rome, where he teaches law and economics. He was also an adjunct professor at the University of Siena, the University of Bologna and the University of Naples Federico II.

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 the LUISS University in 2005.

Mr Faella is the author of a book on discount policies of dominant firms, as well as several articles and essays on competition law, unfair competition, intellectual property and civil law, and regularly delivers speeches at conferences and seminars in Italy and abroad.

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 the Sydney office.

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 and a practising Irish solicitor.

MARCUS GLADER

Vinge

Marcus Glader specialises in competition law and is a partner in Vinge's EU, competition and regulatory practice group. Marcus works with all types of EU and competition law matters, and focuses in particular on transactions, abuse of dominance issues and competition law litigation. Marcus has a wealth of international experience after several years in Brussels, including at the European Commission and a leading international firm, before managing Vinge's Brussels office. He is ranked among the top five competition law specialists in Sweden. Marcus holds a doctor of laws from Lund University, and is a guest lecturer at Lund University and Stockholm University.

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 (Spain), as well as LL.M. degrees from the Free University of Brussels (Belgium) and Harvard University (United States), and an economics and mathematics degree from the Open University (UK).

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, he clerked at the European Court in Luxembourg. From 1990 to 1996, he 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 the 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 Gürkaynak Attorneys-at-Law

Mr Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 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 and Brussels, as well as in England and Wales, where he is currently a non-practising solicitor. Before founding ELIG Gürkaynak 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 Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues, with more than 20 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 35 written and oral defences in investigations of the Turkish Competition Authority, approximately 15 antitrust appeal cases in the high administrative court and over 85 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.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish through various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

FRANZ HOFFET

Homburger AG

Franz Hoffet is a partner in Homburger's competition and regulatory team. He has extensive experience in all areas of Swiss and European competition law, including domestic and

multinational merger control, administrative and civil antitrust litigation. He has represented a wide range of companies and trade associations in proceedings before the Swiss competition authorities, the European Commission and in civil courts and arbitration proceedings.

He also advises clients on compliance matters of Swiss and European competition law. Other areas of practice include regulated markets (in particular, healthcare and pharma, telecommunications and media, energy, infrastructure and transport), international trade and public procurement.

He is the chair of the Swiss Bar Association's committee on competition law and a member of a number of international and national competition law associations. He has published numerous articles on antitrust matters and is the co-editor and co-author of one of the leading treatises on Swiss Competition Law.

BEN HOLLES DE PEYER

General Court of the European Union

Ben Holles de Peyer is a *référéndaire* at the General Court of the European Union.

Prior to joining the Court in 2019, Mr Holles de Peyer was an associate based in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Holles de Peyer's practice focused on EU and Spanish competition law. Mr Holles de Peyer also practiced in the firm's Washington, DC office.

Mr Holles de Peyer has a law degree and a political science degree from the Autonomous University of Madrid (Spain), as well as LLM degrees from the College of Europe (Belgium) and Harvard University (United States). He also participated in an international exchange programme at Sciences Po, Paris.

Mr Holles de Peyer is a member of the Bar in Madrid. His native languages are English, Spanish and Catalan, and he is fluent in French.

VANESSA HORACECK

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz in Vienna. She specialises in European and Austrian competition law, with a focus on merger control.

VANGELIS KALOGIANNIS

Bernitsas Law

Vangelis is a junior associate with the firm which he joined as a trainee in 2017.

Vangelis advises on EU and competition law matters, including cartels, merger control and damages actions. He also acts in data protection projects, such as reviewing and drafting data processing agreements. Vangelis advises on the regulatory requirements under EU and Greek telecommunications rules and liaises with the National Regulatory Authority (EETT).

SHANTHI KANDIAH

SK Chambers

Shanthi Kandiah is the head of SK Chambers' legal and regulatory advisers, specialising in competition law, telecommunications regulation, data protection and cybersecurity. Her competition law practice covers antitrust litigation, cartels and sectoral competition regimes,

including merger control. She regularly advises many corporations in sectors such as media and telecommunications, aviation, fast-moving consumer goods, construction, pharmaceuticals and other service industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Recently, she acted as coordinating counsel in the largest enforcement action to date by the Malaysia Competition Commission involving fines exceeding 200 million ringgit. On mergers, her recent assignments include serving as local counsel on a multi-jurisdiction merger transaction led by a magic circle firm. She has also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector. Shanthi has a master's degree in law and a postgraduate diploma in competition economics, both from King's College London.

KITI KARVINEN

Castrén & Snellman Attorneys Ltd

Kiti Karvinen is a counsel in Castrén & Snellman's competition and procurement practice. Ms Karvinen joined the practice at the beginning of 2015 after working for 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. She specialises in antitrust and competition law, as well as merger and acquisition transactions. She advises clients in EU and Finnish competition law across a variety of business sectors, and her specialities are competition issues related to joint ventures between competitors, dominant companies and mergers and acquisitions. In addition to her LLM degree from the University of Helsinki, she has completed a postgraduate diploma in EU competition law at King's College London and worked on secondment in a large Finnish company that is part of an international group.

YUSUKE KASHIWAGI

Koike & Kashiwagi Law Office

From 2004 to 2008, Mr Kashiwagi was chief investigator at the Investigation Bureau of the Japan Fair Trade Commission (JFTC), during which time he led the JFTC to victory in its fight against several companies in cases such as *NIPRO* (private monopolisation) and *Microsoft* (unfair business practices, non-assertion provisions). He has also reviewed other cases, such as the *Marine Hose* cartel case and the *Qualcomm* case. From 2007, he also served in the JFTC's Merger and Acquisitions Division, was responsible for legal revisions of the prior notification system, drafted revised clauses for Chapter 4 of the Antimonopoly Act and conducted a review of *BHP Billiton/Rio Tinto*.

Since 2008, he has obtained both maximum immunities and reductions of fines imposed by various countries on auto part cartels, been involved in numerous cases relating to international cartels, such as auto shipping cartels, and has also been involved in some highly complex merger control cases, as well as in numerous cases of private monopolisation and unfair business practices.

In 2018, Kashiwagi founded a new law firm, Koike & Kashiwagi Law Office.

NATALIA LATRONICO

Cleary Gottlieb Steen & Hamilton LLP

Natalia Latronico is an associate at Cleary Gottlieb Steen & Hamilton LLP, based in the Milan office. Her practice focuses on European and Italian competition law. She advises Italian and

foreign companies in relation to proceedings before the Italian Antitrust Authority and the European Commission and on appeal respectively before the Italian administrative courts and the EU courts.

Ms Latronico graduated from the University of Milan in 2012 and obtained an LLM degree from College of Europe, Bruges in 2014, as well as a PhD in EU competition law from the University of Milan in 2019. She was a visiting research fellow at King's College in 2018 and a teaching assistant at the University of Milan (2015–2018). She has been a member of the Milan Bar since 2017.

FRANÇOIS-GUILLAUME DE LICHTERVELDE

Cleary Gottlieb Steen & Hamilton LLP

François-Guillaume de Lichtervelde is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. His practice focuses on EU and Belgian competition law. After completing an LLB and a BSc in business engineering at the Saint-Louis University of Brussels in 2013, Mr de Lichtervelde graduated from the Catholic University of Leuven in 2015 with a master of laws, having spent one semester at the Autonomous University of Madrid. He earned an LLM degree from the London School of Economics and Political Sciences in 2017. Prior to his admission to the Brussels Bar, he trained with the Directorate-General for Competition of the European Commission. His native language is French, and he is fluent in English and Dutch, with a proficient knowledge of Spanish.

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* have 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.

JOHN MESSENT

Cleary Gottlieb Steen & Hamilton LLP

John Messent is an associate based in the London office of Cleary Gottlieb.

Mr Messent's practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation, as well as foreign investment rules. He is a practising barrister and has represented clients before the European Commission and the UK Competition and Markets Authority, as well as in litigation.

Mr Messent joined the firm's Brussels office in 2008, and moved to the London office in 2012. From October 2013, he spent six months on secondment in the policy department of the UK Office of Fair Trading, working on guidance documents to be published by the new Competition and Markets Authority (including guidance on mergers, Competition Act investigations and criminal cartel offence prosecutions).

HENRY MOSTYN

Cleary Gottlieb Steen & Hamilton LLP

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. He has represented clients before the European Commission and the UK Competition and Markets Authority, as well as litigated before the European Courts in Luxembourg and the UK High Court. His particular focus is on the application of the abuse of dominance rules to the technology sector. During 2017–2018, Henry worked at the UK Competition and Markets Authority as assistant director in the mergers team.

TEREZA MRÁZKOVÁ

Wolf Theiss

Tereza Mrázková is a member of the Dispute Resolution and Competition teams who regularly advises clients in various sectors on their complex litigation, arbitration and competition matters. Prior to joining Wolf Theiss, Tereza acted for the Appeal Committee of the Czech Ministry of Justice, focusing on drafting appeal decisions and being responsible for the newly established Department of Appeals. She also worked at the Czech Chamber of Deputies where she was responsible for carrying out legal research. Tereza graduated from Charles University, Faculty of Law.

JUSSI NIEMINEN

Castrén & Snellman Attorneys Ltd

Jussi Nieminen is a partner in Castrén & Snellman's competition and procurement practice. Mr Nieminen specialises in competition law, state aid and procurement matters, as well as merger and acquisition transactions. He advises clients in all aspects of Finnish and EU competition and procurement law regimes. Mr Nieminen frequently represents major companies in competition law enforcement proceedings before authorities and courts. He also has extensive expertise in complex merger control filings, substantive analysis and multi-jurisdictional coordination, audits, strategic compliance work and complex commercial arrangements across a number of industries.

Prior to joining Castrén & Snellman in 2009, Mr Nieminen worked in the legal department of a multinational listed construction group. In addition to having completed

his LLM degree at the University of Turku, he also studied at the University of Copenhagen in Denmark and has a postgraduate diploma in competition law economics from King's College London.

MITCHELL J O'CONNELL

Jones Day

Mitchell O'Connell is an associate at Jones Day in the global disputes practice based in Brisbane, who handles litigation, arbitration and other dispute resolution procedures across a range of sectors.

Mitch has acted in large-scale, high-value disputes in the Supreme Court of Queensland; acted for a financial institution in relation to the Royal Commission into banking, superannuation and financial services; and advised on complex contractual disputes.

Mitch holds a bachelor of laws and a bachelor of business (management) from Bond University in Queensland.

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 in the *Lundbeck* case. He has represented several clients in proceedings before the Indian Competition Commission, the Competition Appellate Tribunal, the National Company Law Appellate Tribunal and the Supreme Court of India, including Apple Inc, MCX-SX, Financial Technologies (India) Limited, Sony Pictures, Daiichi Sankyo, Eli Lilly, General Motors, Bull Machines, Ericsson, Amazon, Super Cassettes, members of the Tata Group and DLF Limited.

Mr Pathak has practised law for more than 30 years. Prior to joining P&A Law Offices, he was a lawyer in Brussels, Cleveland, New York and Palo Alto. He is admitted to practise law in India and the US states of Ohio and California. 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 and 2012; and 'India Competition Lawyer of the Year' each year from 2011 to 2018. Earlier this year, he received 'Indian Lawyer of the Decade' Award for the period 2010–2020.

TANIA PATSALIA

Bernitsas Law

Tania is a senior associate at the firm, which she joined in 2010. Her practice is focused on EU, competition and antitrust law, advising on all aspects of antitrust, merger control and state aid rules.

Tania regularly assists clients with antitrust and competition law issues arising from their commercial arrangements and has been involved in high-profile cartel and merger control cases before the Hellenic Competition Commission. She provides clients with on-site assistance in dealing with dawn raids, including running workshops and mock exercises. Tania also advises on the application of EU law in Greece and the regulatory requirements applicable to the telecoms, media and technology sectors, regularly liaising with regulators such as the National Telecommunications and Post Commission, the National Council for Radio and Television and the Hellenic Data Protection Authority. She provides guidance to telecoms operators on licensing requirements, compliance with their annual reporting obligations and telecoms issues relating to the use of new technologies and the launch of new products and services. Tania has broad experience in all aspects of EU and Greek data privacy rules and she routinely advises clients on the proactive identification, assessment and management of risks associated with their privacy practices. Tania assists clients in GDPR compliance steps, and advises extensively on how to identify compliance gaps and draft privacy policies, consent forms and data processing agreements. Prior to joining the firm, Tania worked as a lawyer with Ashurst LLP in Brussels as a member of the EU & competition law team and as a trainee at the European Commission, Directorate-General for Competition, Cartels Unit.

ROBERT PELIKÁN

Wolf Theiss

Robert Pelikán has extensive experience in corporate law, litigation, arbitration and all aspects of national (Czech and Slovak) and EU competition law, including merger control, antitrust, cartel investigations and abuse of dominant positions. In the course of his career, he regularly advised notable and prestigious clients, both from the Czech Republic and abroad, in high-profile complex cases, which has gained him an excellent reputation as one of the major local experts in these practice areas. Robert graduated from the Faculty of Law of Charles University in Prague, has worked at several prestigious law firms and joined Wolf Theiss in 2018, becoming partner in 2019. From 2015 to 2018, he served as the Minister of Justice of the Czech Republic and, since 2017, he has presided over the Legislative Council of the Czech government.

Robert has always been active in academia, and co-authored the Commentary to the Civil Code in 2014 and *Corporate Law* in 2015. He also teaches corporate and competition law at the Faculty of Law of Charles University.

ROMINA POLLEY

Cleary Gottlieb Steen & Hamilton LLP

Romina Polley is a partner based in the Cologne office of Cleary Gottlieb Steen & Hamilton LLP, member of the Cologne bar and seasoned widely published competition lawyer. Her practice focuses on German and European merger control, cartel cases and abuse of

dominance proceedings as well as antitrust litigation. For example, she acted as counsel for the IOC in the FCO's 2019 commitment case on athletes marketing rights, represented Rimowa in the FCJ's 2017 case on relative dominance and acted for Google in the 2015 VG Media commitment case. She was admitted to the German bar in 1995 after studies in Augsburg, Geneva, Berlin and New York and a doctorate degree from the Free University of Berlin and has been a partner at Cleary Gottlieb Steen & Hamilton LLP since 2004.

DOMINIC REBELO

Anjarwalla & Khanna

Dominic Rebelo is a partner at Anjarwalla & Khanna and co-heads the firm's competition practice. He has wide-ranging experience in competition, corporate mergers and acquisitions, private equity, capital markets 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.

BENJAMIN REESE

Cleary Gottlieb Steen & Hamilton LLP

Benjamin Reese is an associate based in Cleary Gottlieb Steen & Hamilton LLP's Washington, DC office, practising in a broad range of antitrust matters, including government investigations, merger review and counselling across a wide range of industries.

Mr Reese received his JD, *summa cum laude*, Order of the Coif, from the University of Michigan Law School in 2016, where he was an articles editor for the *Michigan Law Review*, and received his BA, *summa cum laude*, in economics and political science from Marietta College in 2013. He clerked for the Honorable Ed Carnes of the US Court of Appeals for the Eleventh Circuit and the Honorable James Gwin of the US District Court for the Northern District of Ohio.

KENNETH S REINKER

Cleary Gottlieb Steen & Hamilton LLP

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, government investigations and merger review. His practice spans all industries and includes extensive experience in pharmaceuticals, medical devices and healthcare; high-technology industries; mass media; and financial institutions. He has particular expertise in the application of economics to complex legal matters and in working with economic experts, and, after law school and prior to joining the firm, he worked as an antitrust economist on cutting-edge litigation as executive director of Legal Economics LLC.

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. He clerked for the Honorable Michael Boudin of the US Court of Appeals for the First Circuit, and while in law school, taught antitrust economics at Harvard as a teaching fellow.

BART DE RIJKE

De Brauw Blackstone Westbroek NV

Bart de Rijke divides his time between Amsterdam and Brussels. He specialises in EU and Dutch competition law. Bart has a special interest in technology-driven industries, building on his experience in representing high-tech companies in complex competition matters and his involvement in Europe-wide patent litigation involving substantial competition law issues. He has significant experience in acting as coordinating counsel in multi-jurisdictional merger filings and has established working relations with first-tier competition experts in all major jurisdictions. He has successfully litigated in abuse of dominance cases and regularly advises clients on related topics. His work includes advising and defending clients in cartel investigations by European and national regulators. He also regularly advises multinational clients on aspects of competition law in contractual relations, in particular involving IP rights.

ANNA RYAN

Lane Neave

Anna Ryan is a Partner in Lane Neave's corporate team. Anna leads Lane Neave's national competition practice, and routinely advises on the Commerce Act, the Fair Trading Act and all aspects of competition and consumer law. Anna holds a master's degree from the University of Melbourne in Competition and Consumer Protection Law, and is the current chairperson of the Competition Law and Policy Institute of New Zealand (CLIPNZ).

ELLEN SEWELL

Lane Neave

Ellen Sewell is a senior associate in Lane Neave's corporate team with more than 15 years' commercial and corporate law experience. As part of her practice, she advises clients on competition law matters including the application of the Commerce Act and New Zealand's consumer protection laws. Ellen holds a bachelor of laws (with honours) from the University of Canterbury. She is admitted as a solicitor in both New Zealand and New South Wales, Australia. Prior to joining Lane Neave, Ellen worked for several other national New Zealand law firms and an international law firm based in Sydney where she specialised in communications, media and technology.

DAREN SHIAU

Allen & Gledhill LLP

Daren Shiau, PBM, is a leading regional competition law specialist whose practice covers antitrust litigation, international cartels and merger control. He is co-head of the firm's corporate and commercial department and competition and antitrust practice.

A pioneering competition law specialist in Singapore and ASEAN with unparalleled antitrust experience in South East Asia, Daren has been cited as 'the most highly nominated practitioner', 'Singapore's top competition lawyer', 'a real expert according to rivals' and one of the 'finest lawyers in the region' by *Who's Who Legal*.

He has successfully advised on more than three-quarters of Singapore's merger control cases, acted for the successful amnesty applicant of Singapore's first global cartel decision, the successful leniency applicant to its second one and defended parties in 100 per cent of Singapore's international cartel decisions to date.

Daren has also worked on multiple landmark abuse of dominance cases to date, including the first appeal to the Competition Appeal Board, and a significant majority of the public consumer protection investigations by the Competition and Consumer Commission of Singapore.

A commissioned trainer of the high-level ASEAN Experts Group on Competition, Daren is a principal examiner on competition law for the Singapore Institute of Legal Education's Foreign Practitioners Examinations, and the Singapore Bar Examinations. He is also Singapore's first appointed non-governmental adviser at the International Competition Network.

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, Australian Competition and Consumer Commission immunities, authorisations and notifications of contracts affecting competition.

Prior to joining Jones Day, Prudence held the position of principal lawyer in the Australian Competition and Consumer Commission.

ROBBERT SNELDERS

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Robbert Snelders is a partner in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Snelders focuses his practice on EU competition law. He has extensive experience in EU and worldwide merger control proceedings, EU and international cartel and abuse of dominance investigations and litigation before national courts and the European courts in Luxembourg and arbitration proceedings. He is distinguished by *Chambers Global* as an antitrust practitioner in Belgium and by *Chambers Europe* as a European antitrust lawyer. A graduate from Leiden University (1990, highest honours), the College of Europe (1991, DAELS degree) and Harvard Law School (1992), Mr Snelders is a member of the Brussels Bar and the New York Bar. His native language is Dutch, and he is fluent in English and in French.

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Song Ying is a partner at AnJie Law Firm. She graduated from the University of Bonn in Germany with a master's degree in competition law. Ms Song has extensive experience in representing multinational and domestic clients in antitrust investigations, and has advised clients across a broad range of sectors, such as the internet, aviation, automobile, pharmaceuticals, electronics, telecommunications, chemicals, energy, household electrical appliance, infant formula, food and semiconductor sectors. She has represented clients in

several high-profile antitrust litigation cases in China, such as the *Panasonic* case, and filed many concentration antitrust notifications with SAMR and MOFCOM of China, such as the *ChemChina/Syngenta* deal. With an in-depth experience of Chinese antitrust enforcement, Ms Song has also assisted companies in antitrust compliance.

She has also been involved in the drafting, advising, discussion and formulation of the supporting regulations of the Chinese Anti-Monopoly Law. Ms Song has been named as a recommended antitrust lawyer of the PRC by *Chambers and Partners* and *The Legal 500* from 2017 to 2020.

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Spasov & Bratanov Lawyers' Partnership

Georgi Spasov is the managing partner for Spasov & Bratanov and has been a member of the Bar since 1993. His areas of specialist knowledge acquired during his overseas research studies include: banking and finance law (London), securities exchange and regulation (Japan), European banking law (London) and EU law (The Hague). He has participated in most of the partnership's sizeable projects in the areas of mergers and acquisitions, banking and securities markets, energy and infrastructure, competition law, litigation and arbitration. He taught commercial law at Sofia University 'St Kliment Ohridski', and is repeatedly mentioned, as well as personally recommended, as an eminent practitioner by the leading professional directories. He has performed various professional assignments in more than 20 jurisdictions and, in 2016, was appointed to both panels of the International Centre for Settlement of Investment Disputes by the Bulgarian government. Georgi leads the competition practice of the firm.

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Kristina Sutherland is an associate in Lane Neave's corporate team. She advises clients on a broad range of contentious and non-contentious competition law matters including the application of the Commerce Act and New Zealand's consumer protection laws. Prior to joining Lane Neave, Kristina worked for an international accountancy firm in London specialising in indirect tax litigation and dispute resolution. Kristina holds a bachelor of law degree and a bachelor of commerce degree (economics) from the University of Canterbury.

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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 as a summer associate in 2011 and as an associate in 2013, and is now based in the firm's London office with the EU competition and trade practice group.

ANTOINE WINCKLER

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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 Ecole Normale Supérieure in 1976 and the French Ecole Nationale d'Administration in 1983.

Mr Winckler is a member of the Bars of Paris and Brussels, and he 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.

KREMENA YANEVA-IVANOVA

Spasov & Bratanov Lawyers' Partnership

Kremena Yaneva-Ivanova has been a member of the Bar since 2010, and has extensive professional experience in counselling large and medium-sized corporates on all aspects of antitrust and competition law, including dawn raids and investigation defence, as well as in related litigation. Kremena has particular expertise in antitrust and merger control in the energy, utilities and media sectors. In 2017, Kremena was awarded a Master of Arts degree in EU competition law by King's College London, for her dissertation titled 'What Article 102 can do about tacit collusion', which deals with one of the most complex and

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DIETER ZANDLER

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Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts, and the European Commission and EU courts. He has over 10 years of experience as a lawyer and holds a doctorate from the University of Salzburg, as well as a master's of law from Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian cartel court and was an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU law office in Brussels.

ZHAN HAO

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Zhan Hao is the managing partner of AnJie Law Firm. He has obtained a PhD in law and conducted postdoctoral research on microeconomics. He is an arbitrator for the China International Economic and Trade Arbitration Commission and the vice president of the Competition Commission of the ICC China .

Dr Zhan has successfully defended clients in antitrust litigations before Chinese courts, and also has an abundance of experience in representing clients in antitrust investigations. For instance, he represented respondents in China's first antitrust investigation into price cartels, obtaining suspension of the investigation. Dr Zhan has assisted many multinational and SOEs in concentration antitrust filings in China, such as the ChemChina/Syngenta deal, and to date he has secured approvals for all the transactions he has represented. He has served in multiple fields, including pharmaceuticals, automobile, energy, finance, machinery, electronics, textiles, aviation, high-tech and consumer goods.

He has been extensively involved in the drafting, advising, discussion and formulation of the Chinese Anti-Monopoly Law and its supporting regulations.

Dr Zhan has been named as a Band 1 antitrust lawyer of the PRC by *Chambers and Partners*, and recommended by *Who's Who Legal*, GCR and ALB as leading PRC antitrust lawyers for many years.

Appendix 2

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