ANTITRUST
Year In Review

2020

AMERICAN BAR ASSOCIATION
International Law Section
International Antitrust Committee

Letter from the Editors

Welcome to the 2020 Antitrust Year in Review, a compilation of the latest antitrust/competition law developments in 17 jurisdictions worldwide. Each contribution – from leading antitrust/competition practitioners – offers commentary on significant legislative developments, as well as developments across mergers, cartels, anticompetitive practices and abuse of dominance, and judicial decisions.

We are pleased to be reviving the SIL Antitrust Year in Review to recap antitrust developments in an exceedingly eventful year. Unsurprisingly, much of this year's commentary focuses on the impact of the COVID-19 pandemic on all aspects of antitrust law, as well as global legislative and enforcement responses to protect competition in the face of global disruption. Some other highlights that you'll see in this year's edition are the latest worldwide responses to issues concerning 'big tech'; proposed legislative amendments considering the role of antitrust in a changing worldwide economy; and analysis of mergers involving everything from airlines to eyewear to railways to healthcare.

The 2020 year in review is the culmination of a great deal of work on the part of our authors and our editorial team. We thank all of our contributors for their excellent and timely analysis.

We hope you enjoy reading our summary of key antitrust developments, and that this publication becomes a valuable tool for understanding the increasingly important role of antitrust across the world.

Sincerely,

Melissa Ginsberg
Editor
Patterson Belknap

Kate McNeece
Editor
mccarthy tetrault

Message from the Committee Chairs

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

One of our Committee's principal functions is to keep our Committee and Section members informed about significant international competition law developments. We do this through regular reports on our Committee listserv, brown bags and teleconferences, and panels at the Section's meetings.

Another major component of our outreach effort is our annual analysis and summary of key antitrust developments in jurisdictions around the world. We do this through two vehicles: the International Section's comprehensive printed "Year in Review" publication, which came out over the summer, and through our committee's own Year in Review, the 2020 edition of which you are now reading.

The "Year in Review" requires substantial time and effort on the part of the contributors and editors. We are indebted to Kate McNeece and Melissa Ginsberg, and to all of the authors for their excellent contributions to this project.

Sincerely,

Molly Askin

Federal Trade Commission

Miguel del Pino

MARVAL O'FARRELL MAIRAL

Nikiforos Iatrou

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I. AUSTRALIA*

A. LEGISLATIVE DEVELOPMENTS

There were no relevant amendments to the *Competition and Consumer Act 2010* (Cth) in 2020. However, the Chairman of the Australian Competition and Consumer Commission ("**ACCC**"), Rod Sims, continued to maintain the need for amendments to Australia's merger regime, citing the ACCC's track record of losing merger cases in court as evidence that change is needed. However, given urgent pandemic-related priority work, Mr. Sims indicated that vigorous public advocacy and detailed proposals was deferred until 2021. In Australia, the ACCC does not have the power to block mergers itself. If the ACCC decides that it opposes a transaction on the basis that it would substantially lessen competition, it must obtain a court order to prevent it from completing. The ACCC has not won a contested merger case outright since 1992.[1]

Details of any proposed changes are yet to be released, but based on Mr. Sims' public statements to date, the ACCC's proposals will likely seek to address perceived issues with the counterfactual analysis courts undertake and the evidentiary requirements for the ACCC to prove its case. Other possible changes include a separate regime for technology companies, an industry in which the removal of nascent competition by serial acquirers is a concern for the ACCC.

B. MERGERS

The COVID-19 pandemic did not significantly impact the merger control regime in Australia. The ACCC continued to review mergers under its informal merger review process, and there was no relaxation of the ACCC's standards in order to facilitate mergers in industries affected by the pandemic. Mr. Sims stated publicly that the ACCC would consider any 'failing firm' arguments very carefully,[2] but would not be likely to approve a transaction that involved the merger of a failing firm with its largest competitor in a concentrated market. However, the ACCC does not appear to have received a significant number of merger review applications that made failing firm arguments in 2020.[3] The pandemic also did not have a significant impact on the time taken to conduct informal merger reviews.

The ACCC completed 30 informal merger reviews in 2020. 17 were not opposed and 3 were not opposed subject to divestiture undertakings. A further 8 were withdrawn – of these 8, 4 were withdrawn after the ACCC published a 'Statement of Issues' outlining competition concerns

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* Elizabeth Avery and Rebecca Mahony, Gilbert + Tobin.

1 Rod Sims, *Tackling market power in the COVID-19 era* (National Press Club, 21 October 2020) https://www.accc.gov.au/speech/tackling-market-power-in-the-covid-19-era.

2 See, e.g., Gilbert + Tobin, *In conversation with Rod Sims: COVID-19 and the fitness and flexibility of Australia's merger law* (1 December 2020) https://www.gtlaw.com.au/insights/conversation-rod-sims-covid-19-fitness-flexibility-australias-merger-law.

3 The ACCC does not publish merger reviews that it assesses via confidential 'pre-assessment'. Of the mergers it publicly reviewed, one (BGC (Australia) Pty Ltd / Midland Brick) involved an argument that the target would exit the relevant market in the absence of the proposed transaction, but this does not appear to have been caused by the COVID-19 pandemic. The ACCC announced that it did not oppose the transaction on 6 October 2020.

or potential concerns about the proposed transaction. In two additional mergers, the ACCC recorded 'no decision' – in one case because the merger was discontinued, and in another because the ACCC finished its investigation into a completed acquisition. Notably, the ACCC no longer publishes information about its investigations of completed mergers on its public register, considering that completed acquisitions are not subject to the ACCC's informal merger review processes or timelines, but are rather enforcement investigations that may lead to litigation.

Several key mergers were finalised in 2020. In January 2020, the ACCC authorised Gumtree AU Pty Ltd's (owned by eBay Inc) proposed acquisition of Cox Australia Media Solutions Pty Ltd. This was only the second formal merger authorisation application the ACCC has received since the merger authorisation process was reformed in 2017. The ACCC can authorise a merger either on the basis that it would not cause a substantial lessening of competition, or because it would provide a net public benefit. This authorisation was decided under the first limb of the test; the ACCC is yet to authorise a merger on the basis of a net public benefit.

Two high-profile contested merger cases were decided by Australian courts. In *ACCC v Pacific National Pty Limited*,[4] the Federal Court of Australia dismissed an appeal by the ACCC against a lower court decision, which held that the sale of the Acacia Ridge Intermodal Terminal in Queensland to Pacific National would have contravened the prohibition on anti-competitive mergers (on the basis that it would deter new entry in relevant rail linehaul markets), if not for an undertaking Pacific National offered the Court during the trial intended to prevent Pacific National from discriminating against new entrants. On appeal, the Court not only dismissed the ACCC's appeal but went further than the trial Court, finding that even in the absence of the undertaking, the transaction would not have substantially lessened competition. The Court found that the prospect of new entry in the relevant timeframe was speculative. The High Court dismissed the ACCC's application for leave to appeal in December 2020.

Unusually, *Vodafone Hutchison Australia Pty Limited v ACCC*[5] was instigated by Vodafone seeking a declaration from the Federal Court that its proposed acquisition of TPG Telecom was not likely to substantially lessen competition, following the ACCC's announcement that it opposed the merger on the basis that Australia's mobile services market was concentrated, and TPG had a commercial imperative to roll out Australia's fourth mobile network.[6] However, TPG had abandoned those plans after the Australian Government banned Huawei's participation in 5G networks. The Court made the declaration in Vodafone's favour, finding that '[i]t is extremely unlikely and there is no real chance that TPG will roll-out a retail mobile network or become an effective competitive fourth mobile network operator ('MNO') in Australia in the relevant future'.

Throughout 2020, the ACCC also reviewed Google's acquisition of Fitbit under its informal process. However, after a year under review, the parties completed the transaction in January 2021 without the ACCC completing its review. In December 2020 the ACCC had announced that it did not accept a proposed undertaking that would have required Google not to

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4 [2020] FCAFC 77.

5 [2020] FCA 117.

6 ACCC, *ACCC opposes TPG-Vodafone merger* (8 May 2019) https://www.accc.gov.au/media-release/accc-opposes-tpg-vodafone-merger.

use health data for advertising, maintain certain third party access to certain Fitbit and Google data collected through wrist-worn wearables, and maintain interoperability between Android mobile devices and third party wearables, for 10 years.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

The ACCC commenced Court proceedings in respect of two cartel cases in 2020, one criminal and one civil. The criminal case is against Alkaloids of Australia and a former export manager in connection with the supply of scopolamine N-butylbromide, the active pharmaceutical ingredient in antispasmodic bowel medications.[7] The civil case is against NQCranes Pty Ltd, alleging market sharing conduct in the overhead crane industry.[8]

Two cartel matters were also finalised. In June 2020 the Norwegian shipping company Wallenius Wilhelmsen Ocean AS (WWO) pleaded guilty to criminal cartel conduct regarding the transportation of vehicles to Australia in June 2011 – July 2012. Two other shipping companies (Nippon Yusen Kabushiki Kaisha and Kawasaki Kisen Kaisha Ltd) had already pleaded guilty in relation to the cartel.[9] Later, in February 2021, the Federal Court ordered WWO to pay a $24 million fine, bringing the total fines in connection with the cartel to $83.5 million.[10]

In September 2020, in the first instance of a prosecution of obstruction of an ACCC investigation, a former general manager of sales and marketing at BlueScope Steel pleaded guilty. The former employee was sentenced to 8 months in prison and ordered to pay a $10,000 fine but was released without entering custody on a 2-year good behaviour condition.[11]

Throughout the year but particularly in March-May 2020, the ACCC received a large number of applications for authorisation of conduct that would otherwise breach competition laws, in order to facilitate industry responses to the COVID-19 pandemic. These applications involved industries including banking, supermarkets, airlines, medical technology, pharmaceuticals and private hospitals. The ACCC refocused its priorities and its workforce during this period, and responded to applications for interim authorisation extremely quickly. In just three weeks in

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7 ACCC, *Criminal cartel charges laid against pharmaceutical ingredient company and its former export manager* (1 December 2020) https://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-pharmaceutical-ingredient-company-and-its-former-export-manager

8 ACCC, *Action over alleged market sharing cartel in the overhead crane industry* (19 October 2020) https://www.accc.gov.au/media-release/action-over-alleged-market-sharing-cartel-in-the-overhead-crane-industry

9 ACCC, *Wallenius Wilhelmsen pleads guilty to criminal cartel conduct* (18 June 2020) https://www.accc.gov.au/media-release/wallenius-wilhelmsen-pleads-guilty-to-criminal-cartel-conduct.

10 ACCC, *Shipping cartel fines now total $83.5 million after WWO conviction* (5 February 2021) https://www.accc.gov.au/media-release/shipping-cartel-fines-now-total-835-million-after-wwo-conviction.

11 ACCC, Ex BlueScope GM Jason Ellis convicted and sentenced for obstructing ACCC cartel investigation (16 December 2020) https://www.accc.gov.au/media-release/ex-bluescope-gm-jason-ellis-convicted-and-sentenced-for-obstructing-accc-cartel-investigation.

March – April, the ACCC assessed 14 separate interim authorisations,[12] half the number of applications it received in 2019. Some of these applications were assessed in a matter of days.

D. DOMINANCE

In November 2020 Epic Games, Inc. brought a private action against Apple in the Federal Court, alleging that Apple has misused its power in iOS app distribution and in-app payment processing markets by, among other things, restraining developers from using any in-app payment processing system other than Apple's system, and charging a 30% commission for in-app content.[13] Epic brought a similar case against Google in March 2021.

In April 2021 the proceedings against Apple were stayed on the basis that, under the licence agreement governing the relationship between Epic and Apple, the claims should be heard in Northern California.[14] This decision is under appeal, and the ACCC has been granted leave intervene to be heard on the basis of the significant public policy questions raised in relation to the appropriate forum for enforcement of Australia's competition law.[15]

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[12] Rod Sims, *Managing the impacts of COVID-19 disruption on consumers and business* (Gartner CEO Forum, 8 April 2020) https://www.accc.gov.au/speech/managing-the-impacts-of-covid-19-disruption-on-consumers-and-business.

[13] Epic Games, *Epic Games files legal proceedings against Google in Australia* (11 March 2021) https://www.epicgames.com/site/en-US/news/epic-games-files-legal-proceedings-against-google-in-australia.

[14] *Epic Games, Inc. v Apple Inc (Stay Application)* [2021] FCA 338.

[15] Epic Games, Inc & Anor v Apple Inc & Anor NSD325/2021 https://www.comcourts.gov.au/file/Federal/P/NSD325/2021/actions.

II. BRAZIL*

A. LEGISLATIVE DEVELOPMENTS

In reaction to the COVID-19 pandemic, CADE took a series of internal regulatory initiatives, aiming to keep its operations stable and offer a minimum of certainty during such atypical and uncertain times. Most of such regulatory initiatives amounted to amendments to CADE's internal regulations, for the purpose of allowing its staff of public servants to work remotely and for commissioners to cast their votes in online trial sessions.

A more substantive legislative initiative was taken by the Brazilian Congress on June 10th, with the enactment of Law No. 14.010[1], which, among other things, provided for a temporary suspension of certain provisions of the Antitrust law (Law No. 12.529) that required the review of associative agreements (commercial agreements among competitors)that aimed to address the Sars-Cov-2 pandemic consequences. CADE remained entitled to request the ulterior submission of such associative contracts. The temporary suspension is valid until the state of calamity lasts, which has been extended until December 31, 2020.

B. MERGERS

Despite the severe impacts of Sars-Cov-2 pandemic in the Brazilian economy, CADE's merger review regime continued at the same levels as in previous years. Until December 31 2020, CADE appraised 454 merger cases, outperforming 2019, when 433 cases had been assessed by the authority in the same period.[2]

The average time for the General Superintendence (GS) to appraise non-fast track merger cases however increased to 104 days in 2020, compared to 89 days in 2019. The increase has been attributed to the pandemic by the General Superintendent[3].

At the Tribunal level, Commissioners have begun to pull cleared merger cases for reassessment more frequently. Although the Tribunal members always had the right to do so, the reassessment request was until 2020 very uncommon; however, in 2020 five merger cases[4] have been pulled by Tribunal members for reassessment - four within a period of three months.

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* Bruno Drago, Milena Mundim, Daniel Oliveira Andreoli, Paola Pugliese, Demarest Advogados.

1 See http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L14010.htm

2 Source: http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true

3 Source: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1240868&siteid=203

4 See Merger Cases: FI M Profit 1552 | Kepler Weber (nº 08700.000180/2020-04); Seara | Bunge (nº 08700.001134/2020-14); Bunge | Imcopa (nº 08700.002605/2020-10); Delta | LATAM Airlines (nº 08700.003258/2020-34) ; Fiat | Peugeot (nº 08700.002193/2020-18).

The most relevant merger cases in 2020 included Fiat/PSA[5] and Delta/LATAM (JV)[6], both unconditionally cleared by the GS and pulled by the Tribunal for reassessment (clearance decision upheld by the Tribunal in both cases); Nike/SBF Group[7] and Boehringer/Hypera[8], both conditionally cleared by CADE; and Bombardier/Alstom[9], Boeing/Embraer[10] and GrandVision/EssilorLuxottica[11], all four unconditionally cleared by CADE.

CADE did not block any merger case in 2020 and assessed only 2 gun jumping infractions[12], less than the 5 cases ruled in 2019.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Brazilian antitrust was severely affected by the Sars-Cov-2 pandemic, with the largest decrease in enforcement falling in CADE's leniency program, the authority's main source for new investigations. Leniency agreements "*significantly dropped in 2020 due to Covid*"[13], with only 2 agreements signed in the year, as opposed to 11 in 2019. However, the effects of Covid are not likely continue after the pandemic, as CADE's budget for 2021 will be maintained[14], regardless of the reduction in enforcement activity.

Despite all this, a focus on digital and innovation-driven markets has gained significant traction in 2020, especially with CADE's inquiry on big tech's potential acquisitions of nascent competitors in the last 10 years[15]. Some of the most relevant ongoing probes include wellness platform Gympass' exclusivity agreements with accredited gyms[16], Android's mobile operating system dominance[17] and Google's allegedly exploitative practices in the news segment[18]. In addition, one of Brazil's largest banks, Bradesco, settled on a proceeding regarding data portability and access by third parties[19].

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5 See Merger Case nº 08700.002193/2020-18

6 See Merger Case nº 08700.003258/2020-34

7 See Merger Case nº 08700.000627/2020-37

8 See Merger Case nº 08700.001226/2020-02

9 See Merger Case nº 08700.002824/2020-91

10 See Merger Case nº 08700.003896/2019-11

11 See Merger Case nº 08700.005884/2019-21

12 Cases Tintas Hidracor | Arco Íris (nº 08700.000422/2020-51) and Light Energia | CGI (nº 08700.005455/2019-54)

13 Source: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1240861&siteid=203

14 Source: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1240869&siteid=203

15 Source: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1202799&siteid=203&rdir=1

16 Proceeding No. 08700.004136/2020-65.

17 Proceeding No. 08700.002940/2019-76.

18 Proceeding No. 08700.003498/2019-03.

19 Proceeding No. 08700.003425/2020-47.

In a broader picture, the most relevant proceedings ruled on by CADE in 2020, measured by the imposed fine amounts, were (i) 27,5 mm BRL for single-firm conduct by associations, clinics and hospitals in the northeast state of Ceará[20]; (ii) 20,9 mm BRL for an international cartel in the subterranean and subsea power cables[21]; and (iii) 19,2 mm BRL for a cartel in PVC products[22]. In total, CADE ruled on 14 anticompetitive conduct proceedings in 2020, amounting to approx. BRL 138 million (approx.. USD 25.6 million[23]) in fines[24], in a reduction of over 80% when compared to 2019 numbers.

D. COURT DECISIONS

Federal Supreme Court

A recent decision issued by Brazil's constitutional court, the Federal Supreme Court (STF)[25] is causing a heated debate among scholars in the antitrust community. The decision ʳefers to a certain "duty of deference" by the Courts towards CADE's technical expertise and institutional capacity on the merits of its decisions. The controversy arises from the fact that, under the Brazilian Constitution, decisions rendered by an administrative body like CADE are fully subject to court review, including on the merits. Supreme Court Justice Luiz Fux, the current President of the Supreme Court, ruled however that courts should rely on the merits of CADE's decision on economic matters. If his interpretation prevails, the Courts would only be permitted to review CADE's decisions on procedural grounds (particularly due process of law), but not on their merits.

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20 Proceeding No. 08012.007011/2006-97.

21 Proceeding No. 08012.003970/2010-10.

22 Proceeding No. 08700.001422/2017-73.

23 Exchange rate of 1 USD = 5,38 BRL.

24 Source: CADE's enforcement activity database, "CADE em números. Accessed on November 21, 2020 via http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true

25 RE 1083955. Disponível em http://portal.stf.jus.br/processos/detalhe.asp?incidente=5287514

Examples of Judicial Review of the Competition Authority

In September 2020, the Brazilian Superior Court of Justice resumed a trial that should decide whether the CADE has jurisdiction to assess and sanction foreign-to-foreign transactions[26].

An appeal filed by CADE against a decision by the Federal Regional Court (TRF) of the 1st Region, in favor of the company White Martins, brought the case to the review of the Superior Court of Justice. White Martins, who had been sanctioned by CADE for not reporting a transaction that took place in the US, claimed that CADE lacked jurisdiction over transactions that take place in a foreign jurisdiction. The reporting judge, Justice Napoleão Nunes Maia Filho, had already voted in favor or White Martins (REsp 1353267 and REsp 1353274). The trial was resumed in September 2020 with the decision of Justice Regina Helena Costa in CADE's favor. The case now awaits the decisions of Justices Sérgio Kukina, Gurgel de Faria and Benedito Gonçalves, who stayed the trial in order to review the case files.

CADE's jurisdiction on regulated sectors

Throughout the year, the debate regarding the collection of terminal handling charges gained prominence in CADE and in the Judiciary. Recent judicial decisions recognized the legitimacy of the fees charged by port operators against bonded warehouses, contrary to CADE's understanding[27].

In June of 2020, STJ Justice Sérgio Kukina dismissed the appeal AREsp nº 1,537,395 / DF, filed by CADE. Thus, it upheld the judgment of the Federal Appellate Court of the 1st Region that had annulled the conviction of the competition authority based on the absence of a competitive infraction due to the simple collection of such charge[28].

The STJ is expected to render another decision regarding this topic in a different case (REsp No. 1,774,301). In this opportunity, the Court will decide whether CADE has jurisdiction to review regulatory and decision-making acts of regulatory agencies.

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[26] https://valor.globo.com/legislacao/noticia/2020/09/22/stj-julga-competencia-do-cade-para-analisar-negocios-fechados-no-exterior.ghtml

[27] (i) https://www.mlex.com/GlobalAntitrust/DetailView.html?cid=1200322;

(ii) https://www.mlex.com/GlobalAntitrust/DetailView.html?cid=1199701;

(iii) https://www.mlex.com/GlobalAntitrust/DetailView.html?cid=1178650

[28] https://www.portosenavios.com.br/artigos/artigos-de-opiniao/judiciario-legitima-o-sse-thc2-em-momento-decisivo-no-cade

III. CANADA*

A. LEGISLATIVE DEVELOPMENTS

On May 21, 2020, the Competition Bureau ("Bureau") released a model timing agreement aimed at providing the Bureau with additional time and information in merger reviews involving claims by merging parties related to the "efficiencies defence" in Canada's Competition Act ("Act"). This defence, a longstanding feature of Canada's competition law framework, permits a merger that results in a substantial lessening or prevention of competition to be cleared on the basis of offsetting efficiencies. In releasing the model agreement, the Bureau noted the complexity posed by the need to test parties' efficiencies claims, including the need for significant document/data review and engagement with the parties, counsel, businesspeople and experts.[1]

On July 29, the Bureau invited comments on its draft revisions to the Competitor Collaboration Guidelines ("Guidelines"). The Guidelines had not been revised since their initial publication in 2009.[2] The draft revised Guidelines contained several noteworthy changes, including:, a discussion suggesting that the Bureau might consider buy-side agreements (including "no-poach" agreements) under the criminal provisions of the Act; a broadening of the "competitors" the Bureau previously viewed as subject to the civil provisions,[3] including for the purposes of R&D agreements; a description of the Bureau's use of multiple investigations before determining under which provision(s) of the Act to proceed; comments regarding the civil review of consortium bids; and the addition of qualifying language across the document, among numerous other changes.[4] Stakeholders had significant concerns with many of the proposed revisions.[5] With respect to buy-side agreements and in response to feedback received, the Bureau subsequently clarified its position in a stand-alone statement dated November 27 that enforcement against any

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* Adam S. Goodman and Simon Kupi Dentons Canada LLP

1 "Competition Bureau releases model timing agreement for mergers involving claimed efficiencies", **Competition Bureau** (May 21, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-releases-model-timing-agreement-for-mergers-involving-claimed-efficiencies.html.

2 "Competition Bureau invites feedback on updated Competitor Collaboration Guidelines", **Competition Bureau** (Jul. 29, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/07/competition-bureau-invites-feedback-on-updated-competitor-collaboration-guidelines.html.

3 Specifically, the Bureau indicated that parties that do not compete with respect to the product(s) to which an agreement being reviewed under the civil provisions apply can nevertheless be "competitors" for the purposes of those provisions if they compete with respect to a product outside of the agreement's scope.

4 "Competition Bureau statement on the application of the *Competition Act* to no-poaching, wage-fixing and other buy-side agreements", **Competition Bureau** (Nov. 27, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html.

5 Canadian Bar Association, Competition Law Section, Submission, "Competitor Collaboration Guidelines" (October 2020), online: https://www.cba.org/CMSPages/GetFile.aspx?guid=002e3c59-ce2b-4ff8-8ca1-478cd0dec408.

buy-side agreements would proceed under the civil rather than criminal provisions of the Act to the extent these agreements relate to the purchase of goods and services.[6] The Bureau released its revised Guidelines in May 2021.[7]

B. MERGERS

On February 24, the Bureau completed its review of the non-notifiable acquisition of Total Metal Recovery Inc. ("TMR") by American Iron & Metal Company Inc. ("AIM"). Pre-closing, TMR and AIM were Quebec's two largest scrap metal processors. In clearing the transaction without remedies, the Bureau accepted that TMR was a failing firm whose assets were likely to have exited the market absent the merger. It also accepted that TMR had conducted a thorough search for potential alternative purchasers, with none being competitively preferable to AIM.[8]

On March 30, the Bureau cleared the merger between United Technologies Corp. and Raytheon Company without any Canadian remedies, relying instead on remedies imposed by the U.S. Department of Justice and the European Commission to address its competition concerns relating to the parties' overlapping military airborne radio and military GPS businesses.[9]

On April 22, several months after it had previously cleared the transaction, the Bureau provided details concerning its review of a transportation merger between two providers of refrigerated intermodal services, Canadian National Railway (CN) and H&R Transport Limited (H&R). This review was the first conducted under a draft form of the Bureau's above-noted model timing agreement. It saw the Bureau clear the transaction on the basis of efficiencies that the Bureau concluded would offset the transaction's likely anti-competitive effects relating to eight markets for refrigerated intermodal services.[10]

In August 6, the Bureau registered a consent agreement with the Competition Tribunal to address its concerns relating to the acquisition by WESCO International Inc. (WESCO) of Anixter International Inc. (Anixter), both diversified industrial distributors and providers of supply chain and logistics services. Together, WESCO and Anixter were the two largest distributors of pole line hardware and data communication products in Canada. The transaction was cleared after

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6 *Ibid*.

7 See **Competition Bureau**, *Competitor Collaboration Guidelines* (May 6, 2021), online: https://www.ic.gc.ca/eic/site/cb-bc.nsf/eng/04582.html.

8 *See* "Competition Bureau statement regarding the acquisition of Total Metal Recovery (TMR) Inc. by American Iron & Metal Company Inc.", **Competition Bureau** (Apr. 29, 2020), online: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04528.html.

9 "Competition Bureau will not oppose merger between United Technologies and Raytheon", **Competition Bureau** (Mar. 30, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/03/competition-bureau-will-not-oppose-merger-between-united-technologies-and-raytheon.html.

10 "Competition Bureau outlines its assessment of CN's acquisition of H&R", **Competition Bureau** (Apr. 22, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-outlines-its-assessment-of-cns-acquisition-of-hr.html.

WESCO agreed to divest its utility and data communications divisions to a Bureau-approved purchaser.[11]

C. ABUSE OF DOMINANCE

In February 2020, the Bureau obtained court orders requiring several seed and pesticide manufacturers and wholesalers to produce documents and information relating to an to advance its investigation into those manufacturers and wholesalers' alleged refusal to supply a single retailer, the Farmers Business Network Canada. This retailer was a new entrant in Canada with an online platform offering farmers agronomic advice and price comparisons.[12]

On April 2, 2020, the Bureau closed its inquiry into the refusal by a branded pharmaceutical company, Otsuka Canada Pharmaceutical Inc. ("Otsuka"), to grant another manufacturer access to drug samples needed for testing and regulatory approval of a generic version of Otsuka's drug.[13] While Otsuka ultimately granted access, the Bureau used its press release to warn that it might seek financial penalties should it observe further such conduct in the industry. The Otsuka investigation represented the second public investigation into branded drug companies delaying or refusing to grant access to generic drug companies – the first being its investigation into Celgene initiated in 2016.

D. CARTELS

On April 8, the Bureau announced its enforcement approach to competitor collaborations responding to the COVID-19 pandemic.[14] This guidance provided that the Bureau would generally refrain from scrutinizing "good faith" collaborations to address the pandemic that go no further than needed in the circumstances. The Bureau also established a procedure allowing firms to disclose the details of their proposed COVID-19-related collaborations and seek guidance from the Bureau.

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11 "Competition Bureau safeguards competition in markets essential to the delivery of electricity and internet to Canadians", **Competition Bureau** (Aug. 6, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/08/competition-bureau-safeguards-competition-in-markets-essential-to-the-delivery-of-electricity-and-internet-to-canadians.html.

12 "Competition Bureau obtains court orders to advance agricultural investigation", **Competition Bureau** (Feb. 12, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/02/competition-bureau-obtains-court-orders-to-advance-agricultural-investigation.html.

13 "Competition Bureau warns pharmaceutical industry that any further obstruction to the manufacture of generic alternatives will not be tolerated", **Competition Bureau** (Apr. 2, 2020), online: 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.

14 "Competition Bureau statement on competitor collaborations during the COVID-19 pandemic", **Competition Bureau** (Apr. 8, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-statement-on-competitor-collaborations-during-the-covid-19-pandemic.html.

In June, two engineering firms, SNC-Lavalin and Génius Conseil Inc., agreed to a total of C$2.2 million in payments to settle criminal cases relating to the Bureau's investigation into municipal infrastructure bid-rigging in Quebec.[15] In December, a third, CIMA+, agreed to pay $3.2 million to settle its case.[16] Penalties of over $12 million have been ordered in relation to the relevant bid-rigging allegations, which cover conduct alleged to have occurred from 2003 to 2011.[17]

E. COURT CASES

On April 14, a C$1 billion class action alleging a price-fixing conspiracy by eighteen groups of bank financial institutions in the foreign exchange market was certified by an Ontario court, although the class ultimately certified excluded, amongst others, foreign exchange purchases from non-defendants.[18] This action follows in the wake of certain defendant banks settling proceedings with U.S. and Canadian authorities over their traders' foreign exchange activities.[19]

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15 "SNC-Lavalin to pay $1.9 million in fourth Québec bid-rigging settlement", **Competition Bureau** (Jun. 19, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/06/snc-lavalin-to-pay-19-million-in-fourth-quebec-bid-rigging-settlement.html; " Génius Conseil Inc. to pay $300,000 in fifth Québec bid-rigging settlement", **Competition Bureau** (Jun. 19, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/06/genius-conseil-inc-to-pay-300000-in-fifth-quebec-bid-rigging-settlement.html.

16 "CIMA+ to pay $3.2 million in latest Québec bid-rigging settlement", **Competition Bureau** (Dec. 8, 2020), online: https://www.canada.ca/en/competition-bureau/news/2020/12/cima-to-pay-32-million-in-latest-quebec-bid-rigging-settlement.html.

17 *Ibid*.

18 See *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646.

19 *Ibid* at paras 80–89.

IV. CHINA*

A. LEGISLATIVE DEVELOPMENTS

In 2020, the State Administration for Market Regulation of China ("SAMR") released five sets of anti-monopoly guidelines, including *Guidelines on Application of Leniency Program in Horizontal Monopoly Agreement Cases*[1], *Guidelines on Undertakings' Commitments in Anti-Monopoly Cases*[2], *Anti-Monopoly Guidelines on Intellectual Property Rights* [3], *Anti-Monopoly Guidelines on the Automobile Sector*[4] and *Guidelines on Antitrust Compliance* [5]. In addition, SAMR promulgated the *Interim Regulations on the Review of Concentration of Undertakings*[6], consolidating multiple existing regulations and rules relating to merger review.

In February 2021, SAMR released the *Antitrust Guidelines on Platform Economy Sector* ("Platform Guidelines")[7]. The Platform Guidelines provide a case by case approach for market definition in platform economy and an analysis framework to determine the illegality of algorithm collusion, most-favorable-nation clauses ("MFN clause"), hub-and-spoke agreements, exclusive dealing, and other discriminatory practices. The Platform Guidelines also include a controversial essential facility doctrine whereby a platform may be found to constitute an essential facility based on an array of factors such as the data possessed by the platform, the availability of an alternative platform, and the feasibility of developing a competing platform. Finally, the Platform Guidelines clarify the merger filing obligations for transactions involving variable-interest-entity ("VIE") structure, which was previously a grey area of China filings.[8]

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1 See SAMR, the Guidelines on Application of Leniency Program in Horizontal Monopoly Agreement Cases (in Chinese): http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321856.html.

2 See SAMR, the Guidelines on Undertakings' Commitments in Anti-Monopoly Cases (in Chinese): http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321855.html.

3 See SAMR, the Anti-Monopoly Guidelines on Intellectual Property Rights (in Chinese): http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321857.html.

4 See SAMR, the Anti-Monopoly Guidelines on the Automobile Sector (in Chinese): http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321860.html.

5 See SAMR, the Guidelines on Antitrust Compliance (in Chinese): http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321796.html.

6 See SAMR, Interim Regulations on the Review of Concentration of Undertakings (in Chinese): http://gkml.samr.gov.cn/nsjg/fgs/202010/t20201027_322664.html.

7 See SAMR, the Anti-Monopoly Guidelines on Platform Economy (draft for consultation) (in Chinese): http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html. On February 7th, 2021, SAMR released the Anti-Monopoly Guidelines on Platform Economy, which were slightly different from the prior draft for consultation. *See* SAMR, the Anti-Monopoly Guidelines on Platform Economy (in Chinese): http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html.

8 *Id.*, Section 2 of Article 18.

In addition, SAMR promulgated the *Interim Regulations on the Review of Concentration of Undertakings* ("Interim Regulations")[9], consolidating multiple existing regulations and rules relating to merger review in China with new clarifications.

B. MERGERS

As of December 31, 2020, SAMR approved four mergers with restrictive conditions and 469 cases without conditions in 2020.[10] In addition, SAMR published 16 penalty decisions,[11] including several enforcement cases against Chinese internet giants for nonfiling.

In Danaher / GE Healthcare, SAMR required Danaher and the combined entity to divest several businesses related to micro carriers, particle verification standards ("PVS"), chromatographic media, chromatographic equipment, and its molecular identification, to address horizontal overlaps.[12]

In Infineon / Cypress, Infineon, Cypress, and the combined entity were found to have several horizontal overlaps as well as other adjacent market relationships, and would have "strong market power" in two markets, automotive-grade IGBTs ("IGBTs") and automotive-grade NOR flash memory ("NOR") post-transaction. SAMR thus required the parties (1) not to tie the sale of automotive-grade MCUs ("MCUs") to the sale of either IGBTs or NOR in the Chinese market; (2) to continue to make stand-alone IGBT, NOR and MCU products separately available to Chinese customers; (3) to ensure compatibility between their NOR and standards-compliant third-party MCUs; and (4) to continue to supply Chinese customers with NOR, IGBTs and MCUs on fair, reasonable and non-discriminatory ("FRAND") terms.[13]

In NVIDIA / Mellanox, SAMR found that, although the parties had no horizontal overlaps and only one minor vertical relationship, the combined company would possess "strong market power" in markets for GPU accelerators ("GPUs"), dedicated network interconnect devices, and high-speed Ethernet adapters (together, "high-speed interconnect devices"), noting that the Transaction "will enable the post-merger entity to provide both products at the same time, further enhancing its control over the relevant markets." As a result, SAMR required the combined entity (1) not to tie the sales of NVIDIA's GPU and Mellanox's high-speed interconnect devices; (2) to continue to supply NVIDIA's GPU and Mellanox's high-speed interconnect devices to the Chinese market on FRAND terms; (3) to continue to ensure interoperability between NVIDIA's GPUs and

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9 See SAMR, Interim Regulations on the Review of Concentration of Undertakings (in Chinese): http://gkml.samr.gov.cn/nsjg/fgs/202010/t20201027_322664.html.

10 See SAMR Cases Approved with Conditions or Prohibited (in Chinese): http://www.samr.gov.cn/fldj/tzgg/ftjpz/ and SAME Cases Approved without Conditions (in Chinese): http://www.samr.gov.cn/fldj/ajgs/wtjjzajgs/.

11 See SAMR Administrative Penalty Cases (in Chinese): http://www.samr.gov.cn/fldj/tzgg/xzcf/index.html.

12 See SAMR, Notice of Conditional Approval of Danaher's Acquisition of GE Healthcare Biopharma Unit (February 28, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/ftjpz/202002/t20200228_312297.html.

13 See SAMR, Notice of Conditional Approval of Infineon's Acquisition of Cypress (April 8, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/ftjpz/202004/t20200408_313950.html.

third-party network interconnects, and between Mellanox's high-speed interconnects and third-party accelerators.[14]

In *ZF Friedrichshafen / WABCO*, SAMR determined that the merging parties had multiple horizontal and vertical relationships, including a dominant market position (from WABCO) in the upstream automated mechanical transmission ("AMT") controller market that would provide the ability and incentive "to block raw material supply." SAMR's decision required both parties and the combined entity to (1) continue to supply existing customers with AMT controllers or related components on terms no less favorable than those under existing contracts; and (2) continue to supply AMT controllers to Chinese customers, as well as provide Chinese customers with opportunities to develop AMT controllers for future supply, on FRAND terms.[15]

C. ADMINISTRATIVE ENFORCEMENT

In 2020, SAMR concluded nine horizontal agreement cases and eight abuse of dominance cases.[16] Among the nine horizontal agreement cases, six relate to the automotive industry (including driving schools, automobile testing companies, and second-hand automobile dealers), two involve the cement and concrete industry, and one relates to bottled natural gas. The eight abuse of dominance cases involve several sectors, including natural gas supply in certain cities (4 cases), active pharmaceutical ingredients ("API") (2 cases), water supply (1 case), and a funeral parlor (1 case).

In the *calcium gluconate* active pharmaceutical ingredient ("API") case, SAMR imposed a total of RMB 325.5 million in fines against three API companies for abuse of collective dominance, based on a combination of factors such as overlap of key staff, profit-sharing and other close contractual ties.[17]

SAMR also imposed fines on several companies and individuals for obstructing its investigation into the API case[18] and another natural gas supply case.[19]

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[14] See SAMR, Notice of Conditional Approval of NVIDIA's Acquisition of Mellanox (April 16, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/ftjpz/202004/t20200416_314327.html.

[15] See SAMR, Notice of Conditional Approval of ZF Friedrichshafen's Acquisition of Wabco (May 15, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/ftjpz/202005/t20200515_315255.html.

[16] See, Note 12.

[17] *See* SAMR Administrative Penalty Decision for Calcium Gluconate API Case (April 14, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414_314227.html.

[18] *See* SAMR Administrative Penalty Decision for Refusing and Confronting Investigations in Calcium Gluconate API Case (April 14, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/xzcf/202004/t20200414_314229.html.

[19] *See* SAMR Administrative Penalty Decision for the Abuse of Dominance by Qianghai Minhe Chuanzhong Petro Natural Gas Co. (May 19, 2020) (in Chinese): http://www.samr.gov.cn/fldj/tzgg/xzcf/202005/t20200519_315357.html.

D. JUDICIAL JUDGMENTS

In 2020, China's courts, including the Supreme People's Court ("SPC"), adjudicated several important antitrust cases involving the refusal to purchase bio-diesels, the jurisdiction of disputes concerning standard-essential patents ("SEPs"), and the exclusive supply of APIs.

Yunnan Yingding Bio-Energy Co. v. Sinopec[20]

In *Yunnan Yingding Bio-Energy Co*., the plaintiff sued Sinopec for refusing to distribute its bio-diesels in accordance with China's Renewable Energy Law ("REL"). In November 2019, the SPC dismissed the request for retrial and confirmed the judgments of the lower courts rejecting the plaintiff's claims.

The SPC ruled that, among other things, the plaintiff had alternative refined oil distribution companies to distribute its bio-diesels and that Sinopec's refusal to deal had sound justifications because the bio-diesels produced by the plaintiff did not satisfy national standards.

ZTE v. Conversant Wireless Licensing S.a.r.l.[21]

ZTE, a Chinese telecommunication company, filed a lawsuit in Shenzhen Intermediate People's Court against Conversant Wireless Licensing S.a.r.l. ("Conversant"), to determine FRAND royalty rates covering certain alleged SEPs owned by Conversant. Conversant contested the court's jurisdiction because Conversant had no business entity in China. The SPC found jurisdiction and held that Chinese courts have jurisdiction if any of the following places are within China: the place where the SEP is granted, where the SEP is practiced/used, and where the licensing contract is executed or performed.

Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute Co. Ltd.[22]

Yangtz River Pharmaceutical Group and its subsidiary filed an antitrust lawsuit against Hefei Industrial Pharmaceutical Institute Co., Ltd. and its subsidiaries, claiming that the defendant abused its dominance in the desloratadine citrate disodium ("DCD") API market, including exclusive dealing, charging unfairly high prices, tying and imposing unreasonable transaction terms.

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20 *See,* China Supreme People's Court Civil Retrial Ruling in Yunnan Yingding Bio-Energy Co. Ltd. v. Sinopec (November 11, 2019) (in Chinese): https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=9dd4224a7d254fc88d68ab8e01158160.

21 See China Supreme People's Court Civil Ruling in ZTE v. Conversant Wireless Licensing S.a.r.l. (August 21, 2020) (in Chinese): http://www.ipeconomy.cn/index.php/index/news/magazine_details/id/1394.html.

22 See Nanjing Intermediate People's Court Civil Judgment in Yangtze River Pharmaceutical Group v. Hefei Industrial Pharmaceutical Institute Co. Ltd. (March 18, 2020) (in Chinese): http://www.zggpjz.com/a/dianxinganli/20200410/5585.html.

The court found that, among other things, (1) the defendant had 100% market share in China's DCD API market, as it was the only company approved by the China Food and Drug Administration ("CFDA") to manufacture DCD API; (2) the defendant increased its DCD API price by approximately 2.5 times without reasonable justification; and (3) while knowing the plaintiff's subsidiary was expected to receive approval from the CFDA to manufacture a generic version of DCD API, the defendant locked the plaintiff in a long-term (5 year) exclusive supply contract imposing penalties on the plaintiff for purchasing from other suppliers. The court invalidated exclusivity clauses in the long-term supply contract, ruled against the defendant for charging unfairly high prices and imposing unreasonable transaction terms, and ordered the defendant to pay compensation of over RMB 68 million for damages.

V. EUROPEAN UNION*

A. LEGISLATIVE DEVELOPMENTS

The challenges triggered by the Covid-19 pandemic led the European Commission ("EC") to provide companies with guidance on collaborating to supply necessary goods.[1] Under the steer of Competition Commissioner Margrethe Vestager, the EC continued to consider the implications of big data and big tech, and proposed flagship legislation to regulate "gatekeeper" platforms and provide new tools to take enforcement actions more swiftly,[2] whilst initiating a sector-wide inquiry into the Internet of Things ("IoT").[3] In parallel, the EC progressed its reviews of the antitrust rules covering the distribution of goods,[4] and R&D and production agreements,[5] while renewing the antitrust exemption for liner shipping consortia[6] and supporting efforts of EU national agencies to promote compliant cooperation on sustainability.[7] On the hot topic of foreign investment, in May 2021 the EC proposed legislation to counter perceived distortive effects of foreign subsidies.[8]

B. MERGERS

While fewer transactions were notified to the EC than in the previous years, 2020 was marked by important deal activity.[9] The EC cleared Google's proposed acquisition of Fitbit, subject to commitments to ensure that Fitbit user data will remain separate from any other user

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1 See European Commission Communication, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0408(04)&from=en

2 See Digital Services Act package, at https://ec.europa.eu/digital-single-market/en/digital-services-act-package and Digital Markets Act, at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool

3 See European Commission, Antitrust: Commission launches sector inquiry into the consumer Internet of Things (IoT) (July 16, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1326

4 See European Commission Review of the Vertical Block Exemption Regulation at https://ec.europa.eu/competition/consultations/2018_vber/index_en.html

5 See Public Consultation - Review of the two horizontal block exemption regulations at https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html

6 See European Commission Regulation (EU) 2020/436 of 24 March 2020, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.090.01.0001.01.ENG&toc=OJ:L:2020:090:TOC

7 See European Commission Regulation, Statement on ACM public consultation on sustainability guidelines, at https://ec.europa.eu/competition/antitrust/news.html

8 See European Commission, Addressing distortions caused by foreign subsidies, at https://ec.europa.eu/competition/international/overview/foreign_subsidies.html; Proposal for a Regulation on foreign subsidies distorting the internal market, at https://ec.europa.eu/competition/international/overview/proposal_for_regulation.pdf.

9 See EC merger webpage at https://ec.europa.eu/competition/mergers/news.html.

data that Google uses for advertising and that Google ensure interoperability between competing wearables and Android.[10] The EC also conducted an in-depth review of Essilor-Luxottica's plans to acquire optical retail chain GrandVision, amidst litigation between the two companies to access information about GrandVision's handling of Covid-19. The EC ultimately cleared the deal in early 2021, subject to divestment of certain stores in Italy, Belgium and the Netherlands.[11] The EC also cleared Alstom's proposed acquisition of rival Bombardier subject to certain divestments.[12]

C. ANTI-COMPETITIVE PRACTICES

The EC continued to vigorously prosecute cartels, and imposed fines totaling about €278 million (approximately $330 million) on companies found involved in cartels relating to car closure systems[13] and ethylene procurement, [14] a stark decline compared to the total fines imposed in the preceding years.[15] That said, the EC also started or continued investigations of suspected cartel activities, including in canned vegetables, a retailer purchasing alliance, and car clean emissions technology.[16]

The EC fined NBCUniversal €14.3 million (approximately $17 million) for restricting its licensees from selling Jurassic World, Minions and other licensed merchandise beyond their allocated territories or customers.[17]

Additionally, the EC fined Teva and Cephalon €60.5 million (approximately $72 million) for entering into a reverse-payment patent settlement to allegedly delay the market entry of a

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[10] See European Commission Press Release, Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions (December 17, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2484

[11] See European Commission Press Release, Mergers: Commission clears acquisition of GrandVision by EssilorLuxottica, subject to conditions (March 23, 2021), at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1348

[12] See European Commission Press Release, Mergers: Commission clears Alstom's acquisition of Bombardier, subject to conditions (July 31, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1437

[13] See European Commission Press Release, Antitrust: Commission fines car parts suppliers of € 18 million in cartel settlement (September 29, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1774

[14] See European Commission Press Release, Antitrust: Commission fines ethylene purchasers € 260 million in cartel settlement (July 14, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1348

[15] See https://ec.europa.eu/competition-policy/cartels/statistics_en

[16] See EC cartels webpage at http://ec.europa.eu/competition/cartels/cases/cases.html.

[17] See European Commission Press Release, Antitrust: Commission fines NBCUniversal €14.3 million for restricting sales of film merchandise products (January 30, 2020), at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_157.

generic version of Cephalon's modafinil drug.[18] This is the fourth case that the EC brought against this type of settlement agreement on the back of its pharmaceutical sector inquiry in 2009.

D. ABUSE OF A DOMINANT POSITION

Alongside its policy efforts in the digital space, the EC opened investigations into Apple's App Store Rules[19] and Apple Pay,[20] Amazon's practices concerning its Buy Box and Prime label, as well as adopted formal charges against the latter over its use of data collected from independent sellers.[21] The EC also accepted commitments from Broadcom to resolve its preliminary concerns regarding certain exclusivities and incentives in contracts for the supply of TV set-top box and modem chipsets.[22]

E. COURT DECISIONS

In its first ruling on the hotly debated issue of reverse payment patent settlements, the EU Court of Justice clarified that such settlements may be deemed restrictive of competition by object if no pro-competitive effects can be shown and the parties' incentives are clear.[23]

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[18] See European Commission Press Release, Antitrust: Commission fines Teva and Cephalon €60.5 million for delaying entry of cheaper generic medicine (November 26, 2020), at https://ec.europa.eu/commission/presscorner/detail/env/ip_20_2220

[19] See European Commission Press Release, Antitrust: Commission opens investigations into Apple's App Store rules (June 16, 2020) at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073

[20] See European Commission Press Release, Antitrust: Commission opens investigation into Apple practices regarding Apple Pay (June 16, 2020) at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075

[21] See European Commission Press Release, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices (November 10, 2020) at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077

[22] See European Commission Press Release, Antitrust: Commission accepts commitments by Broadcom to ensure competition in chipset markets for modems and set-top boxes (October 7, 2020) at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1852

[23] See Case C-307/18 (January 30, 2020) at https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200008en.pdf

VI. GERMANY*

A. LEGISLATIVE DEVELOPMENTS

In 2020, major amendments to the German Act Against Restraints of Competition ("**ARC**") were discussed. Such amendments were implemented in early 2021 with effect as of January 19, 2021.

The amendments concern, in particular, changes aiming to protect competition in the digital economy. To that end, a newly introduced provision, Section 19 ARC, has been adopted. Such rule is viewed by the German Federal Cartel Office ("**FCO**"), as a "most important change" as it will enable the authority "to intervene at an early stage" in cases where competition is threatened by certain legal digital companies.[1] Such new rule provides for a new type of intervention tool, which targets certain types of conduct of large platforms and similar companies whose "paramount cross-market significance for competition" has been established by the FCO for a period of five years by way of an administrative order. In order to accelerate the implementation of the new tool, an FCO decision under this provision can only be appealed directly to the German Federal Supreme Court (rather than going first to the Düsseldorf Higher Regional Court, as would normally be the case with FCO decisions).

The new intervention tool is targeted at companies that operate to a significant extent on multi-sided markets and networks. The FCO determines "paramount cross-market significance for competition" by taking into account a range of factors. The revised law lists, for example, a dominant position, access to resources and data, and vertical integration, as relevant factors. The required assessment is a cross-market analysis, which takes account of the fact that digital platforms and networks can be of central importance for a multitude of markets due to conglomerate structures and the key positions they hold, without necessarily being dominant on each of these markets.

Even if there is no abuse of a dominant position, the FCO can prohibit such a company from engaging in certain types of conduct, unless the company can prove that the conduct is objectively justified. Such conduct encompasses restrictive practices that have been identified as relevant on digital markets and includes self-preferencing, as well as the safeguarding of the unassailability of digital ecosystems through restrictive measures.

In the future, companies with paramount cross-market significance for competition will, therefore, be subject to stricter rules than companies that hold a "classic" dominant or strong position on the market. The legislature expects that there will be up to three proceedings to determine paramount cross-market significance for competition within the first five years following enactment of the revised law.

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1 "Amendment of the German Act against Restraints of Competition," (Jan. 19, 2021) available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html?nn=3591568

Other important changes concern merger control. Until recently, Germany was known for its rather low merger control thresholds. These thresholds have now been substantially increased. Mergers are now subject to German merger control if, in the last completed year prior to the transaction, one of the companies achieved sales in Germany of at least EUR 50m (previously 25m) whilst another company participating in the transaction, generated sales in Germany of at least EUR 17.5m (previously EUR 5m). The FCO reportedly expects that the number of mergers reported to the authority each year may drop by approximately 40% because of those changes. Moreover, the rules on investigation periods have been changed. More specifically, the FCO needs to complete second phase proceedings within 5 months after notification (previously 4 months). As before, however, the investigation period can be extended by mutual agreement between the FCO and the notifying party or parties.

If an undertaking concerned generated domestic turnover of more than EUR 50 million (rather than the previous EUR 25 million) in the last full financial year, but neither the company to be acquired, nor another undertaking concerned generated domestic turnover of more than EUR 17.5 EUR (rather than the previous EUR 5 million), the transaction is still subject to merger control if the transaction value threshold of EUR 400 million is exceeded. The threshold for the combined aggregate worldwide turnover generated by all of the undertakings concerned remains unchanged, i.e. more than EUR 500 million in the last full financial year. Furthermore, the company to be acquired must (as before) be active to a significant extent in Germany.

The deadline for the FCO to assess mergers in Phase II proceedings has been increased from four months from the date of submission of the notification to five months.

Moreover, the amendment of the ACR also implemented the so-called European Competition Network Plus ("ECN+") directive on the EU level. In such context, the previous notices on the determination of fines as well as leniency have now been implemented into the law.

B. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

In 2020, FCO closed a number of cartel investigations by imposing fines of approximately EUR 35 m in total. Such fines were imposed on 19 companies and 24 individuals and related to crop protection products, vehicle registration plates, as well as aluminium forging. According to Andreas Mundt, the FCO's president, the number of leniency applications filed with the FCO has decreased due to a rise in private damage proceedings. As a consequence, the FCO aims at exploring innovative investigation methods such as market screening as well as to expand the range of possibility offered by its digital anonymous whistle-blowing system.[2]

C. MERGER CONTROL

In 2002, the FCO reviewed approximately 1,200 notified transactions. Of those, seven were reviewed in second phase proceedings. Whilst three of those seven were cleared without conditions, two matters were only cleared subject to conditions whereas the two remaining cases

[2] "Bundeskartellamt – Review of 2020," (Dec. 29, 2020), available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/29_12_2020_Jahresr%C3%BCckblick.html

were still subject to review in early 2021. The seven cases concerned industries such as furniture retail, food retail, insurance, hospitals, automotive components, as well as locomotives.[3]

In view of the Covid-19 pandemic, the review periods for mergers were briefly extended in mid-2020. Overall, the pandemic had no substantial effect on review by the FCO.

D. DOMINANCE

As in the previous year, the FCO's enforcement activities as regards the abuse of dominant positions focussed on companies active in the digital space. In particular, the FCO continues to investigate business practices of *Facebook* as it opened a new investigation against *Facebook*. The new investigations focus on the question whether Facebook is abusing a dominant position by limiting the use of visual reality product Oculus to its social network. That case is also the first case in which the new provisions of Section 19 ARC are being used.[4]

E. COURT DECISIONS

One of the major court decisions in 2020 also related to the ongoing *Facebook* proceedings. In particular, on June 23, 2020 the Federal Supreme Court (*Bundesgerichtshof*, "**BGH**") squashed the Duesseldorf Court of Appeals interim relief decision and referred the matter back to the Court of Appeals. The BGH found that *Facebook* had a dominant position on the market for social networks in Germany. The court further held that *Facebook* abused such position its user conditions as it did not offer users a choice of terms on which to access the platform.[5]

Moreover, on July 13, 2020 the BGH squashed a decision of the Duesseldorf Court of Appeals in the *beer cartel* matter. The court held, in particular, that the Court of Appeals was wrong when it held that a meeting in 2007 had no relevance for a price increase in 2008 as there is, according to the BGH, a factual presumption that participants in a meeting take information gathered in the meeting into account in subsequent decisions on prices.[6]

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[3] *Id.*

[4] "First proceeding based on new rules for digital companies – Bundeskartellamt also assesses new Section 19a GWB in its Facebook/Oculus case," (Jan. 28, 2021) available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/28_01_2021_Facebook_Oculus.html

[5] See July 13, 2020 decision, available at https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b0af33d3974af592c604ffa417f52311&nr=109044&pos=19&anz=43 (in German).

[6] See July 13, 2020 decision, available at https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=110717&pos=4&anz=595 (in German).

VII. INDIA*

A. LEGISLATIVE AND INSTITUTIONAL DEVELOPMENTS

In order to tackle the challenges posed by the COVID-19 pandemic, the Competition Commission of India ("CCI") has embraced technology and introduced e-filings[1] and allowed virtual meetings as well as hearings, depositions and cross-examinations.[2] CCI has also issued guidance to businesses to address the need for competitor collaboration during COVID-19.[3]

CCI published a long awaited market study report on 'e-commerce' focusing on consumer goods, accommodation services, and food services. The report identifies pitfalls, advises self-correction practices and sets out CCI's enforcement and advocacy priorities.[4] Additional market study reports are underway in the telecoms, pharma[5] and private equity sectors.[6]

Draft legislation with significant amendments to the existing framework has been published for public comments following the recommendations made by the Competition Law Review Committee in 2019.[7] Comments have also been invited to proposed amendments to regulations governing combinations, including: (i) doing away with prescribed standards for

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* Naval Satarawala Chopra, Partner and Aman Singh Sethi, Principal Associate at Shardul Amarchand Mangaldas & Co. ("SAMCo.")

1 See CCI, Measures in view of threat of CORONAVIRUS / COVID-19 pandemic (Apr. 20, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Notice20042020.pdf.

2 See CCI, Standard Operating Procedure for Virtual Hearings (Oct. 6, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/SOP.pdf. Over time, the National Company Law Appellate Tribunal ("NCLAT") which hears appeals of competition law cases as well as the Courts in general have also begun hearing cases by virtual means and with an increased reliance on electronic filings.

3 See CCI, Advisory to business in times of COVID-19 (Apr. 19, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf.

4 See CCI, Market Study on E- Commerce in India: Key Findings & Observations (Jan. 8, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf.

5 See Business Standard, "After e-commerce, CCI looks at pharma sector to unlock competition" (Dec. 3, 2020), https://www.business-standard.com/article/economy-policy/after-e-commerce-cci-looks-at-pharma-sector-to-unlock-competition-120120300026_1.html. The study is expected to examine discounts and margin policies, the role of trade associations, the impact of e-commerce on price and competition, as well as the extent of proliferation of branded generic drugs to assess bottlenecks in the entry of bio-equivalent/ bio-similar drugs.

6 See Keynote address by Chairperson CCI to CII Annual Conference on Competition Law, (Dec. 4, 2020), https://www.cci.gov.in/sites/default/files/speeches/ChairpersonAddress_0.pdf? download=1.

7 See Competition Law (Amendment) Bill, 2020 (Feb. 12, 2020), https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf..

assessing non-compete restrictions by freeing parties to consider them holistically,[8] and (ii) easing the acquisition of shares pursuant to public bid/purchase on a stock exchange.[9] A bill to amend the Competition Act, 2002 ("Competition Act") is expected to be introduced and passed in Parliament in early 2021.

CCI has also revised its guidance notes concerning short form notifications, including by expanding on the need to provide information on complementary activities.[10]

B. CARTELS AND OTHER ANTI- COMPETITIVE AGREEMENTS

In a first, CCI refrained from imposing monetary penalties in a case of proved cartelization in light of the prevailing economic situation due to COVID-19.[11]

In May 2020, the CCI held that mere commonality of directors or ownership in participating firms would not amount to collusion in the bidding process.[12] In a subsequent case, it also held that having a common address, common shareholders, financial transactions between bidders and acting in a collective way towards a common purchaser was insufficient to establish even a *prima facie* case of contravention, in the absence of evidence of collusion.[13]

In February 2020, the NCLAT dismissed an appeal against CCI's first leniency decision reaffirming that the parties indulged in cartelization.[14] NCLAT also refused to interfere with CCI's dismissal of a complaint against taxi aggregators Ola and Uber for alleged hub and spoke cartelization and resale price maintenance.[15] In December 2020, the Supreme Court dismissed an appeal against this finding, affirming findings by the CCI and the NCLAT that Ola and Uber did

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8 See CCI, Inviting public comments regarding examination of non- compete restriction under regulation of combinations (May, 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/PublicComments-Non-Compete.pdf.

9 See CCI, Inviting public comments on the amendment to the combination regulations relating to acquisition of shares pursuant to a public bid or on a stock exchange (Nov., 2020), https://www.cci.gov.in/sites/default/files/whats_newdocument/Combination-Regulation-Market-Purchases-For-Public-Comments.pdf.

10 See CCI, Press Release - Notes to Form I, (updated Mar. 27, 2020), https://www.cci.gov.in/sites/default/files/press_release/PR492019-20.pdf. Revised Notes to Form I, https://www.cci.gov.in/sites/default/files/page_document/Form1.pdf.

11 See CCI, Chief Material Manager, South Eastern Railway v. Hindustan Composites, Reference Case No. 03 of 2016 (Jul. 10, 2020). *See*, *also* CCI, Industrial and Automotive Bearings, Suo Moto Case No. 05 of 2017 (Jun 5, 2020) where despite finding a horizontal agreement, no penalty was levied.

12 See CCI, Ved Prakash Tripathi v. Director General Armed Forces Medical Services, Case No. 44 of 2019 (May 14, 2020).

13 See CCI, XYZ v. Lakeforest Wines, Case No. 36 of 2020 (Nov., 17 2020). See, also CCI, Arrdy Engineering Innovations v. Heraeus Technologies, Case No. 47 of 2020 (Dec. 11 2020).

14 See NCLAT, Western Electric and Trading Company v. CCI, Competition Appeal No. 37 of 2017, (Feb. 17, 2020).

15 See NCLAT, Samir Agarwal v. CCI, Appeal No. 1 of 2019 (May 29, 2020).

not facilitate cartelization or anticompetitive practices between drivers, who were independent individuals acting independently of each other.[16]

CCI ordered an investigation against e-retailers Amazon and Flipkart for alleged vertical restraints,[17] which is presently stayed.[18]

C. ABUSE OF DOMINANCE

CCI dismissed, at the threshold, allegations that WhatsApp abused its dominant position in "internet-based messaging applications" to manipulate a digital payments space where it had launched a payments offering.[19] It has separately ordered an investigation against Google for indulging in unfair business practices with respect to payments app Google Pay.[20]

CCI dismissed allegations that app-based food ordering and delivery platform, Swiggy, abused its dominant position by charging higher prices than listed restaurants charged in their own outlets. The CCI noted that Swiggy, an intermediary, was not liable for pricing decisions made by the third party restaurants in which it had no say, but also suggested that Swiggy could proactively say so, to allay any such concerns.[21]

CCI dismissed allegations by fashion companies that Amazon abused its dominance in the market for "online fashion retail in India" by selling counterfeit, unlicensed and unauthorized products at unfair and discriminatory prices. The CCI noted that there were many players providing online platforms for selling fashion merchandise and held that Amazon was not dominant. Further, it held that defining markets and making competition assessments depended on market realities at the time of assessment rather than a static approach.[22]

NCLAT upheld the CCI's abuse of dominance findings against Adani Gas, but reduced the penalty from 4% to 1% of relevant turnover.[23]

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16 See Supreme Court, Samir Agarwal v. CCI, Civil Appeal No. 3100 of 2019 (Dec. 15, 2020).

17 See CCI, Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and Amazon Seller Services Private Limited, Case No. 40 of 2019, (Jan. 13, 2020). The CCI rejected the allegation that Amazon and Flipkart were both dominant and proceeded to examine the allegations under the lens of potential anticompetitive vertical arrangement between Amazon/ Flipkart and sellers on their platforms.

18 See Karnataka HC, Amazon Seller Services Private Limited v. CCI, Writ Petition No. 3363 of 2020, (Feb. 14, 2020) and Flipkart Internet Private Limited v. CCI, Writ Petition No. 4334 of 2020, (Feb. 27, 2020).

19 See CCI, Harshita Chawla v. WhatsApp Inc. & Facebook Inc., Case No. 15 of 2020, (Aug. 18, 2020).

20 See CCI, In Re: XYZ v. Alphabet Inc., Case No. 07 of 2020, (Nov. 11, 2020).

21 See CCI, Prachi Agarwal v. Swiggy, Case No. 39 of 2019 (Jun. 19, 2020).

22 See CCI, Lifestyle Equities v. Amazon, Case No. 9 of 2020 (Sep. 11 2020).

23 See NCLAT, Adani Gas Limited v. CCI and Faridabad Industries Association, TA (AT) (Competition) No. 33 of 2017, (Mar. 5, 2020).

D. MERGER CONTROL

CCI continues to seek behavioral and structural remedies and has even required the transfer of technology rights as a condition for granting merger approval.[24] For the first time, in *ZF/WABCO*, CCI required structural remedies but did not appoint a monitoring trustee leaving it to the parties (and counsel) to self-monitor.[25]

CCI approved the acquisition of 9.99% shareholding in India's leading telecom player while characterizing the transaction as an active investment and strategic tie-up.[26] In *Suzuki/Toyota*,[27] it held that cross-shareholdings amongst competitors with a view to pursue permissible competitor collaboration does not give rise to competition concerns.

CCI continues to take stern action against gun-jumping where parties fail to notify interconnected transactions, viewing this as a breach of a requirement to notify as well as the positive obligation on parties to make full disclosures in their notification form.[28]

NCLAT in *Eli Lilly*[29] reversed CCI's earlier decision on the implementation of the *de minimus* target based exemption and held that only the assets/ turnover of the transferred business needs to be considered.

E. NOTABLE COURT DECISIONS

The Gujarat High Court has reiterated that, while directing an investigation in a case, CCI is required to provide reasons for finding a *prima facie* contravention of the Competition Act.[30] The Delhi High Court also held that actions against enterprises may proceed only where a *prima facie* case is made out, setting aside the CCI's proceedings where CCI issued notice to an enterprise against whom no finding of contravention was made either by the CCI during the investigation.[31]

NCLAT held that follow-on actions for damages can be sought pursuant to the Supreme Court's final disposal of a case, and need not be sought at the initial appellate stage for the fear of being barred by limitation. NCLAT considered a period of 3 years from final disposal of a case as a "reasonable" time to initiate such proceedings.[32]

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[24] See CCI, Outotec OYJ and Metso OYJ, Combination No. C-2020/03/735, (Jun. 18, 2020).

[25] See CCI, ZF Freidrichshafen AG, Combination No. C-2019/11/703, (Feb. 14, 2020).

[26] See CCI, Jaadhu Holdings LLC, Combination No. C-2020/06/747, (Jun. 24, 2020).

[27] See CCI, Suzuki Motor Corporation and Toyota Motor Corporation, Combination No. C-2019/10/692 (Nov. 26, 2019).

[28] See CCI, Proceedings against Canada Pension Plan Investment Board and ReNew Power Limited, (Nov. 21, 2019).

[29] See NCLAT, Eli Lilly & Company v. CCI, TA(AT) (Competition) No. 3 of 2017, (Mar. 22, 2020).

[30] See Gujarat HC, Vardayani Offset v. CCI, Special CA No. 8101 of 2020, (Aug. 18 2020).

[31] See Delhi HC, National Engineering Industries v. CCI, W.P. (C) 1714 of 2020 (Feb. 25 2020).

[32] See NCLAT, Food Corporation of India v. Excel Corp Care, Compensation Application (AT) No. 1 of 2019, (Jun. 3, 2020).

VIII. JAPAN*

A. OVERVIEW

During the fiscal year ended on March 31, 2020, the total amount of administrative surcharges under the Antimonopoly Act (AMA)[1] was particularly high. The Japan Fair Trade Commission (JFTC) imposed charges against 37 companies, totalling JPY 69.28 billion (approximately US $634.68 million), a sum far exceeding the JPY 261.1 million (approximately US $2 million) of the previous year.[2] The number of companies subject to, and the total amount of, surcharges reached a five-year record and was the second highest since the system was introduced back in 1977. These figures relate to a period that did not experience the impact of the COVID-19 pandemic. During the subsequent fiscal year (ending March 2021), due to a decrease in the number of on-site inspections, the amount of surcharges is also likely to decrease.

During the fiscal year ending March 2020, the number of merger filings reported to the JFTC slightly decreased from 321 to 310. Only one case relating to merger control progressed to a ruling pursuant to a Phase II review by the JFTC.[3] Four cases were cleared based on merger remedies proposed by the parties.[4]

B. LEGISLATIVE DEVELOPMENTS

Under the former Antimonopoly Act, the surcharge system was based on a non-discretionary, uniformly calculated and imposed methodology. That is to say, any reduction as a result of participation in the leniency program was determined only by the order of the application. The Antimonopoly Act's new leniency program was designed to avoid unreasonable constraints, such as cartels and bid riggings, and promote consumer interest and Japanese economic growth. In addition to the order of the application, it also takes into consideration and adjusts the level of surcharges imposed based on the degree to which companies cooperate with the JFTC's investigation.[5] The current limit on the number of leniency applicants was also eliminated.

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* Shigeyoshi Ezaki, Vassili Moussis, Kiyoko Yagami and Naoki Uemura of Anderson Mori & Tomotsune.

1 Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, available at: https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index_files/The_Antimonopoly_Act_2.pdf

2 The JFTC Annual Reports submitted to the OECD (April 2019 – March 2020), available at: https://www.jftc.go.jp/en/about_jftc/annual_reports/oecd_files//japan2019.pdf

3 The JFTC Reviewed the Proposed Acquisition of Shares of Daewoo Shipbuilding & Marine Engineering Co., Ltd. by Korea Shipbuilding& Offshore Engineering Co., Ltd. and Seeks Comments from Third Parties (March 19, 2020), available at https://www.jftc.go.jp/en/pressreleases/yearly-2020/March/200319.html

4 The status of notifications regarding business combinations and the results of review major business combinations in fiscal year 2019 (press release), available at https://www.jftc.go.jp/en/pressreleases/yearly-2020/July/200722.html

5 See Press Release, Enactment of the Act to Amend the Antimonopoly Act, June 19, 2019 at https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/19061907.html

Furthermore, the amendment revised surcharge calculation methods by expanding the scope thereof. The calculation period of such charges "being traceable back to 10 years from the date on which the JFTC started to investigate" and the statute of limitation having been extended to 7 years (previously 3 and 5 years, respectively).[6]

In order to facilitate the implementation of the new leniency program, the JFTC published a series of operational rules and guidelines on handling such applications.[7] In addition, while attorney-client privilege is not recognized in Japan, the amendment to the Antimonopoly Act introduced new rules prohibiting the JFTC from using in its investigation confidential communications between a company and its external legal counsel in connection with matters related to the leniency program.[8] This amendment and the new rules/guidelines associated therewith became effective as of December 25, 2020.

C. MERGERS AND ACQUISITIONS

During the fiscal year ended March 31, 2020, 300 out of the 310 cases reported were cleared by the JFTC following a Phase I review,[9] including four contingent upon the implementation of certain remedies. Six of those cases, including the acquisition of Nihon Ulmarc by M3 described below,[10] were voluntarily reported to or investigated by the JFTC even though there was no mandatory filing requirement.

M3 is one of the major operators of online platforms providing doctors with free information and advertising relating to prescription drugs. Ultmarc is the operator of medical information databases on medical institutions and doctors ("MDB"). Among other concerns, the JFTC was worried that post-merger, M3 would have the ability and incentive to eliminate its competitors by refusing to offer the MDB, or by tying or bundling strategies. In October 2019, after taking into consideration the various behavioral remedies proposed by the parties, the JFTC concluded that the transaction would not substantially restrain competition.

In July 2020, the JFTC was notified about the integration of Z Holdings Corporation (which owns Yahoo Japan) and LINE Corporation.[11] Among the three areas where the two companies

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6 See Press Release, Cabinet Decision on the Antimonopoly Act Amendment Bill, March 12, 2019 at https://www.jftc.go.jp/en/pressreleases/yearly-2019/March/190312.html

7 See Press Release, Amendments of the Rules/Guidelines with the Amendment of the Antimonopoly Act (Determination Procedure etc.), June 25, 2020 at https://www.jftc.go.jp/en/pressreleases/yearly-2020/June/200625.html

8 See Guidelines on treatment of objects recording confidential communications between an enterprise and an attorney at https://www.jftc.go.jp/en/pressreleases/yearly-2020/June/20062602

9 See Major Business Combination Cases in Fiscal Year 2019 at https://www.jftc.go.jp/en/pressreleases/yearly-2020/July/2007221.pdf

10 See Press Release, the JFTC Reviewed the Proposed Acquisition by M3 of Ultmark, October 24, 2019 at www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html

11 See Press Release, The JFTC reviewed the proposed managerial integration of Z Holdings Corporation and LINE Corporation, August 4, 2020 at https://www.jftc.go.jp/en/pressreleases/yearly-2020/August/200804.html

overlap -- free-news services, digital advertising and smartphone code settlements -- the JFTC was particularly concerned about the possibility of smartphone code settlements being affected by the proposed integration. In August 2020, the JFTC accepted the parties' undertaking to (i) eliminate and prohibit exclusive conditions, and (ii) file periodic reports with the JFTC for a period of 3 years and cleared the transaction.

D. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The total amount of administrative surcharges imposed by the JFTC during the fiscal year ending on March 2020 was particularly high. In July 2019, the JFTC resolved a monumental price cartel case in the asphalt mixture industry by issuing cease-and-desist orders to seven manufacturers and surcharge payment orders to eight manufacturers – imposing the highest amount of surcharge for a single case – in a total amount of approximately JPY 39.9 billion (approximately $US365.5 million).[12]

In February 2020, the JFTC filed a petition with the Tokyo District Court for an emergency interim order against Rakuten, Inc., the largest e-commerce operator in Japan. The motion claimed that Rakuten's mandatory shipping plan, called "Shipping Inclusive Program Measures" and designed to be employed by all of its marketplace vendors, prevented such vendors from charging purchasers for delivery fees. The JFTC determined that Rakuten's acts constituted an abuse of a superior bargaining position[13] and should, therefore, be suspended. Rakuten eventually made the shipping plan optional and on March 10, 2020, the JFTC withdrew its petition.

It is noteworthy that in 2020, in accordance with the commitment procedures newly introduced the prior year, the JFTC approved five commitment plans, including one submitted by Amazon Japan. The commitment procedures allow the JFTC and any company undergoing investigation to resolve an alleged violation of the AMA by mutual consent. The cases handled pursuant to such procedures may include certain types of violation, such as suspected abuse of superior bargaining position, private monopolization, interference with a competitor's transactions and restrictive trading, but hard-core cartels or bid-rigging cases are not eligible for such treatment. Under the commitment procedures, the company would have to implement remedies for alleged violations set forth in a commitment plan voluntarily submitted by it and approved by the JFTC. The declaration in the public announcement of the approval of the plan would, nevertheless, state that "this Approval of the Commitment Plan does not represent a determination that the activities of the company constituted a violation of the Antimonopoly Act."

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[12] The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders to the Manufacturers of Asphalt Mixture (July 30, 2019), available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/July/190730.html

[13] See Press Release, The JFTC has Filed a petition for an Urgent Injunction against Rakuten, Inc., February 28, 2020 at https://www.jftc.go.jp/en/pressreleases/yearly-2020/February/200228.html

IX. KOREA*

A. LEGISLATIVE DEVELOPMENTS

On December 9, 2020, the National Assembly passed a bill to comprehensively amend the Monopoly Regulation and Fair Trade Law ("FTL").[1] The amendment, which remains largely the same as the draft bill proposed by the Korea Fair Trade Commission ("KFTC") in 2018, aims to strengthen the KFTC's enforcement powers, bolster due process rights for respondents and clarify and/or simplify the legal requirements under the FTL. In particular, the amendments include: (1) adding information exchange as a type of prohibited collusive conduct;[2] (2) introducing a new size-of-transaction test to the merger filing requirements; (3) doubling the maximum revenue percentages which serve as a basis of administrative fines; and (4) introducing a legal basis for private parties to seek injunctions for violations of the FTL.[3] Most of the amended FTL will take effect from December 30, 2021.[4] While the amended FTL did not include a suggested proposal to abolish the KFTC's exclusive referral authority for criminal prosecution of violations of the FTL, significant changes to the future process for investigating cartel cases are expected as the Prosecutor's Office also recently passed its own leniency guidelines,[5] which grant considerable benefits to individuals with respect to the investigations by the Prosecutor's Office as well as court proceedings. This will have important ramifications on parties seeking to apply for leniency given the KFTC's separate leniency process.

On September 28, 2020, the KFTC announced the draft Fair Online Platform Intermediary Transaction Act ("Platform Act").[6] The Platform Act is a new sector-specific legislation that would require online platform operators that act as intermediaries and meet certain requirements, including minimum sales revenues with Korean vendors and Korean consumers[7] to: (i) prepare and provide written contracts to vendors specifying key terms and conditions, including the criteria used for search results, responsibilities in the event of damages and issues related to data

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* Youngjin Jung, Maria Hajiyerou and Eun Hee Kim, Kim & Chang.

1 KFTC Press Release: "Publication of Draft Bill for Overhaul of the Monopoly Regulation and Fair Trade Law", June 10, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8582)

2 Currently, information exchanges are treated as evidence to support the existence of a collusive agreement, and is not prohibited *per se*.

3 If passed, the parties to a merger that fail to meet the existing worldwide assets/sales revenues and Korean sales revenues thresholds may need to file under this new threshold. The specific threshold amount is yet to be determined.

4 The amendment to limit voting rights of conglomerate-affiliated public interest corporations will require another year before coming into effect.

5 Effective as of December 10, 2020

6 KFTC Press Release: "Publication of Draft Bill for Fair Online Platform Intermediary Transaction Act", September 28, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8746)

7 Of up to KRW 10 billion or intermediates transactions worth up to KRW 100 billion (as of the most recent fiscal year).

monopoly; and (ii) notify sellers in advance of any contract term or restriction, suspension or termination of any of their services.

B. MERGERS

On April 4, 2020, the KFTC unconditionally approved Jeju Air's proposed acquisition of Eastar Air.[8] Notably, the KFTC indicated that the decision applied the failing firm defense in recognition of the impact of COVID-19 on the passenger airline industry.

On May 20, 2020, the KFTC conditionally cleared Borealis AG's acquisition of DYM Solutions. As the number 1 and number 2 suppliers of high-voltage and extra-high-voltage ("EHV") semi-conductive compounds, the KFTC imposed behavioral remedies to alleviate the competitive concerns raised by the acquisition,[9] including: (i) requiring that semi-conductive compounds be offered on FRAND terms for 5 years; and (ii) mandating that a third company co-developer of DYM Solution's EHV semi-conductive compounds be provided all relevant manufacturing technology.

On February 4, 2020, the KFTC conditionally approved Danaher's acquisition of GE's biopharma business that is engaged in the production of bioprocessing equipment, instruments and consumables, and other life science products. In cooperation with the European Commission, the KFTC's remedies included divestment by either party of its assets related to eight bioprocessing products.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

On September 22, 2020, the Fair Trade Investigation Division of the Seoul Central Prosecutor's Office indicted 7 large-scale pharmaceutical companies and 10 individual executives/employees for their alleged involvement in a bid-rigging cartel for vaccine procurement under the National Immunization Program.[10] The Prosecutor's Office had been investigating the alleged bid rigging scheme for over a year, and also included, for the first time ever in a criminal antitrust case, allegations of fraud under the Act on Aggravated Punishment of Specific Economic Crimes. The case remains pending at the Seoul High Court.

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8 KFTC Press Release: "Merger Review of Jeju Air's acquisition of Eastar Air", April 23, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8536)

9 KFTC Press Release: "Merger Review of Transaction between Borealis and DYM Solutions", May 20, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8561)

10 Chosun Daily, "Bid-rigging Cartel Regarding Government's Vaccine Procurement", September 22, 2020 (https://www.chosun.com/national/court_law/2020/09/22/XV2JVEHLZ5G3VD7AQ46XZPPREE/)

The KFTC also continued to actively investigate local bid rigging cartels, including cases involving ready-mix concrete companies,[11] CT scanners supplied to a hospital,[12] and software used in schools.[13]

D. DOMINANCE

In May, in its first case addressing unfair self-preferencing, the KFTC fined Naver, a popular domestic online platform, for abusing its market dominant position and engaging in unfair trade practices in its real estate-related services[14] and separately for its shopping and video search services.[15] The KFTC alleged that Naver engaged in unfair self-preferencing by (i) altering its search algorithm for its shopping to feature its preferred products and services first at the top of the search results page, (ii) altering search results so that its own videos were given additional points as well as failing to inform competitors of changes to the search algorithm; and (iii) preventing partnering real estate information content providers from entering into agreements with Naver's competitors. By unfairly altering and adjusting search algorithms, the KFTC found that Naver had deceived users, who believed that the search results were objective, and distorted open market and video platform markets.

On February 9, 2020, the Seoul High Court overturned the KFTC's findings that Siemens Healthineers ("Siemens") abused its dominant position against independent service organizations in the CT/MRI equipment maintenance & service markets.[16] In its reversal, the Seoul High Court found that: (i) the provision of free access to maintenance and service software ("SSW") was not customary industry practice and (ii) it was reasonable, and not discriminatory, for Siemens to apply different access conditions on SSW depending on specific intended use.

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[11] KFTC Press Release: "Sanction on Remicon Bid-rigging", May 15, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8558)

[12] KFTC Press Release: "Sanction on CT Bid-rigging", March 13, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8500)

[13] KFTC Press Release: "Sanction on Software Bid-rigging", July 8, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8616)

[14] KFTC Press Release: "Sanction on Naver Real Estate's Elimination of Competitors", September 4, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8759)

[15] KFTC Press Release: "Sanction on Naver (Shopping and Video)'s Abuse of Market Dominant Position and Unfair Trade Practice", October 6, 2020 (http://www.ftc.go.kr/www/selectReportUserView.do?key=10&rpttype=1&report_data_no=8713)

[16] Yonhap News, "The Court Finds 'Siemens Did Not Engage in Unfair Trade Practice', Revokes Correction Order and Administrative Fine", February 9, 2020 (https://www.yna.co.kr/view/AKR20200206176100004)

X. RUSSIA*

A. LEGISLATIVE DEVELOPMENTS

Antimonopoly Compliance Law

On March 1, 2020, the Federal Law No. 33-FZ "On Amendments to the Federal Law on Protection of Competition" (the "**Antimonopoly Compliance Law**") was adopted to help companies prevent antimonopoly violations. This initiative was an important part of the policy of the Federal Antimonopoly Service ("**FAS Russia**") on enhancement of the role of preventive measures in the Russian antitrust enforcement.

The Antimonopoly Compliance Law introduced the concept of an "internal antimonopoly compliance system" and listed recommendations on its possible structure and contents. Enactment of an antimonopoly compliance system is not mandatory for market players. However, companies are entitled to submit the draft of their antimonopoly compliance policy to FAS Russia to check whether it meets the requirements of the Russian antimonopoly legislation.

It is expected that the Antimonopoly Compliance Law should promote the development of antimonopoly compliance in companies doing business in Russia.

Antimonopoly Resolution of the Supreme Court

On March 4, 2021, the Supreme Court of the Russian Federation (the "**Supreme Court**") adopted Resolution No. 2, "On certain issues arising in connection with the application of antimonopoly law by courts" (the "**Resolution**.") This document provides guidance for courts on various complex issues arising from application of the Federal Law No. 135–FZ dated July 26, 2006 "On Protection of Competition" (the "**Competition Law**") and other related acts.

One of the main ideas of the Resolution is that the actual economic situation should be analyzed instead of using a purely formal approach when resolving antitrust disputes. For example, the Resolution allows a company to prove that factors relating to the group as a whole should not apply to an entity/person *formally* belonging to one group, but *in fact* acting independently (autonomously) on the market. The Resolution also prescribes that to establish a cartel agreement, the antimonopoly authority has to *prove* that the agreement is actually *aimed at* and/or *may result in* the listed anti-competitive consequences. Furthermore, the Resolution explains which instruments and arguments may be used within the market analysis to establish (or refute) the fact of a dominant position, certain types of abuse of dominance, or other circumstances having legal importance for resolving antitrust disputes.

B. MERGERS

Despite the legislative regulation, the merger control regime has not been significantly changed in 2020. FAS Russia continued applying and further developing its new practical approaches. Namely, it continued the trend for actively looking at not only "classic" competition issues, but also at general industrial matters and digital-related concerns within the merger control. Moreover, it continued to pay special attention to analysis of applicability of the strategic and

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foreign investments regime to the merger control transactions. On a separate note, FAS Russia has prepared the draft "Merger Control Guidelines" last year to clarify practical issues and to unify the approaches for the merger review, which is expected to be adopted in 2021.

Digitalization – new approaches to the merger review

Some of the first cases when FAS Russia faced the need to take into account new factors for the market power in digital markets included the Bayer / Monsanto deal[1] and the Yandex / Uber deal[2]. FAS Russia applied new approaches to the analyses of these high-profile complex transactions (assessment of the impact of big data, digital platforms, and network effects on market power, as well as using the concept of "technology transfer") and, therefore, formed the basis of the draft amendments to the current antimonopoly legislation prepared by FAS Russia (the "Fifth Antimonopoly Package"), which is currently under development.

Broad interpretation of the Strategic Investments Law

The Nabors/Tesco case is a recent example that illustrates FAS Russia's analysis and interpretation of an entity's "strategic" activities.[3] In this case, FAS Russia broadly interpreted the list of strategic activities in the Federal Law "On the Procedure for Foreign Investments in Companies Having Strategic Importance for the National Security and Defense" No. 57-FZ dated April 29, 2008 (the "**Strategic Investments Law**.") In particular, FAS Russia declared that services ancillary to drilling (which were not expressly included in the list of "strategic activities") were related to the "strategic" ones as an integral part of the same technological process, and, therefore, the Russian target company was strategic and the transaction required clearance under the Strategic Investments Law. The Russian Constitutional Court supported the position of FAS Russia.[4] This precedent laid the legal basis for the broader interpretation of the Strategic Investments Law for future transactions (at least in oil & gas sector), which should be taken into account by the parties when assessing the need for the strategic investments filing in Russia.

Moreover, the Russian Prime Minister may order any transaction of a foreign investor in respect of a Russian company to be brought to the Government Commission for clearance, even if this Russian company is not engaged in performing any of the closed list of "strategic activities."

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1 The Decision of FAS Russia on the case No. IA / 28180/18 as of April 20, 2018; https://br.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/ia-28180-18/ (in Russian).

2 The Decision of FAS Russia on the case No. AG / 82029/17 as of November 24, 2017; https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82029-17/ (in Russian).

3 The Resolution of the Arbitration Court of the Moscow District as of August 12, 2019 No. F05-14552 / 2018 in the case No. A40-72889 / 2018; https://kad.arbitr.ru/Card/2d1f2008-1b92-42b4-b101-f26751391563 (in Russian).

4 The Resolution of the Constitutional Court of the Russian Federation as of June 18, 2020 No. 1106-O "On refusal to accept for consideration the complaint of the foreign company Canrig Drilling Technology Canada Ltd. on violation of constitutional rights and freedoms by the provisions of Article 6 of the Strategic Investments Law"; http://doc.ksrf.ru/decision/KSRFDecision476854.pdf (in Russian).

Enhancing role of the disclosure of ultimate beneficial owners

FAS Russia has started to request information on beneficiaries and controlling persons from foreign investors under the relevant Rules[5] (the "**UBO Disclosure Rules**") not only during the strategic and foreign investment review, but also within the merger control procedure. The authority proceeds with this approach to ensure that acquirer is not a "public" foreign investor (directly or indirectly controlled by foreign states and (or) international organizations) within the meaning of the Strategic Investments Law, since the transactions made by them are subject to stricter regulation and lower thresholds under the Russian foreign investments regime. Formally, entities refusing to disclose such information upon FAS Russia's request may be penalized by administrative fine and possible rejection to approve the merger control application.

Recent cases

On December 21, 2020, FAS Russia cleared a joint venture between the four leading Russian telecommunication operators to create 5G network in Russia. The authority has approved a transaction with a prescription to maintain non-discriminatory access to radio frequencies for all representatives of the mobile radiotelephone market.[6] Thus, the operators shall develop and agree the relevant terms of usage and sharing the infrastructure and radio frequencies with FAS Russia.

In June 2020, FAS Russia refused to approve the acquisition by Yandex.Taxi (a leading taxi aggregator) of Vezet group (another popular taxi aggregator) as potentially leading to anticompetitive effects in the market of taxi aggregators. According to FAS Russia, if the transaction closed, the joint market share of the parties would exceed 80% in certain market segments. In February 2021, Yandex.Taxi announced closing of the acquisition of call centers and freight order business of Vezet group as an asset deal not falling within the merger control rules. FAS Russia will analyze the completed transaction for compliance with antimonopoly legislation.[7]

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

Criminal liability for cartels

In 2020, FAS Russia tightened its policy regarding cartels by developing a practice of bringing individuals to criminal liability. In July 2020, the courts handed down the fifth conviction in a case concerning criminal cartels (against CEOs of companies.)[8] On March 17, 2021, during the meeting with the Prosecutor's General Office of the Russian Federation, Mr. Vladimir Putin,

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5 The Decree of the Government of the Russian Federation No. 1456 dated December 1, 2018; http://static.government.ru/media/files/jfdNDbx2BFFldr1WtpY2c0OBl66BG3av.pdf (in Russian).

6 FAS Russia official website: FAS Russia agreed the application of communication operators to create a joint venture on 5G (December 24, 2020); http://fas.gov.ru/news/31037 (in Russian).

7 FAS Russia official website: FAS Russia will check Yandex.Taxi transaction on the purchase of part of the assets of Vezet group (February 4, 2021); https://fas.gov.ru/publications/22600/ (in Russian).

8 FAS Russia official website: The court has issued a sentence on the case on cartel in the Meshalkin hospital (July 8, 2020); https://fas.gov.ru/news/30075 (in Russian).

the President of Russia, emphasized once again the importance of combating cartels (especially, on healthcare markets.)[9]

Using "auction robots" for conclusion of cartels

FAS Russia continued its practice of investigating violations in digital markets. One notable investigation in 2020 was FAS Russia's analysis of "auction robots" (programs allowing competitors to implement automatically the pre-agreed strategy on electronic bidding).[10] Companies were held liable for concluding a cartel aimed at price maintenance on state bids via "auction robots". Previously, FAS Russia had developed and introduced an electronic program called the "Big Digital Cat" to detect signs of antitrust violations automatically by analyzing data from various online sources and databases.

D. DOMINANCE

New approach to market analysis

FAS Russia continued applying new approaches to market analysis when establishing dominant position, estimating not only companies' market shares, but also network effects, "big data", digital platforms, and other IP held by market players (e.g. in cases against Apple[11], Booking.com.[12]) The Russian regulator also followed the global trend for antitrust enforcement against global IT corporations, investigating their potential abuse of dominant position in the markets for operating systems, marketplaces for applications, and search engines.

Mandatory pre-installation of applications of Russian developers

On December 2, 2019, the Federal Law No. 425-FZ dated December 2, 2019 "On Amendments to Article 4 of the Law of the Russian Federation "On the Protection of Rights of Consumers" (the "**Pre-installation Law**") was passed to protect the interests of Russian local developers and to limit the market power of the global IT corporations. In 2020, the Pre-installation Law was developed by a number of additional regulations on its implementation.[13]

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9 The President of Russia official website: Meeting of the Board of the Prosecutor General's Office (March 17, 2021); http://www.kremlin.ru/events/president/news/65165 (in Russian).

10 The Decision of FAS Russia on the case No. 1-11-166 / 00-22-17 as of April 27, 2018; https://fas.gov.ru/documents/628624 (in Russian).

11 The Decision of FAS Russia on the case No. 11/01 / 10-24 / 2019 as of August 10, 2020; https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/b70e9d96-8d39-46f5-9d7d-342da95b354b/?query=11/01/10-24/2019 (in Russian).

12 The Decision of FAS Russia on the case No. 11/01/10-41/2019 as of December 21, 2020; https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/cdf15018-ef29-40e8-acbd-d39edc8aee39/ (in Russian).

13 The Decree of the Russian Government No. 1867 dated November 18, 2020; https://rg.ru/2020/11/26/predustanovka-po-dok.html (in Russian). The Regulation of the Russian Government No. 3704-p dated December 31, 2020; http://publication.pravo.gov.ru/Document/View/0001202101060012 (in Russian).

According to the new regulation, all companies producing and selling to Russia devices of a certain type (smartphones, tablets, stationary and laptop computers and Smart TV) are obliged to pre-install pre-defined applications of developers from Russia or other member states of the Eurasian Economic Union (Armenia, Belarus, Kazakhstan and Kyrgyzstan) starting from April 1, 2021.

This initiative is unique for the Russian market, but its impact on the competition development is subject to further assessment.

XI. SINGAPORE*

A. LEGISLATIVE DEVELOPMENTS

The Competition & Consumer Commission of Singapore ("**CCCS**") did not review its legislation in 2020, but conducted a public consultation of proposed amendments to certain of its guidelines[1]. These proposals include:

- introduction of a formal process for offering commitments;
- clarifying its approach on the assessment of multi-sided markets; and
- expansion of the scope of its intellectual property rights ("**IPR**") guidelines.

Singapore's Competition Act[2] allows parties to propose commitments to the CCCS to address competition concerns that have arisen in the course of an investigation or review of a merger notification. The proposed amendments to the CCCS' Guidelines on Enforcement (to be renamed the Guidelines on Remedies, Directions & Penalties) [3] now clarify the process and procedures which the CCCS will adopt in accepting and considering commitments. The key proposals are set out below.

- The inclusion of a formal commitments process in which CCCS will stipulate a deadline by which parties may submit commitments for its consideration. Should the CCCS find the commitments acceptable, it will then proceed with market testing, and following this, will decide whether to accept the commitments. If it does, it will issue a favourable decision subject to these commitments. If commitments are not proposed or not acceptable to or accepted by the CCCS before the stipulated deadline, CCCS will terminate its assessment and proceed to its second, more detailed phase of review.
- The same process is repeated in the second phase review. If no commitments are proposed by the deadline or if proposed commitments are not acceptable to the CCCS (whether before or after the market testing process), the CCCS will issue a provisional unfavourable decision. In this case, the parties have one last

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1 CCCS, 'Consultation Paper: Proposed Amendments to the CCCS Guidelines' (2020) <https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/2020-public-consultation-on-guidelines-amendments/cccs-guidelines-amendments-2020--public-consultation-paper-10-sept-2020.pdf?la=en&hash=3DA3C9F20344242C8618D1F3A65EFC161F3421F2>.

2 The Competition Act (Chapter 50B).

3 CCCS, 'Annex F – CCCS Guidelines on Remedies, Directions and Penalties' (2020) < https://www.cccs.gov.sg/-/media/custom/ccs/files/public-register-and-consultation/public-consultation-items/2020-public-consultation-on-guidelines-amendments/annex-f---cccs-guidelines-on-remedies-directions-and-penalties.pdf?la=en&hash=B50BEBCC54E758CDFC39F30DB8C61FC70DF8D95A>.

chance to propose commitments to the CCCS as part of their representations in respect of the provisional unfavourable decision.

The amended guidance makes clear that the CCCS is unlikely to entertain repeated revisions of a commitments proposal, and will only extend the stipulated deadlines for proposing commitments in very limited circumstances. Further, where a resubmitted proposal is substantially amended and requires further market testing, the CCCS may reject it if there is insufficient time to adequately assess the proposal.

On the other hand, where a party is being investigated by the CCCS for a potential infringement of the Competition Act, the acceptance of commitments is entirely at the CCCS's discretion. The CCCS has indicated that it would generally not accept commitments in cases involving restrictions of competition by object, e.g. price fixing, bid rigging where there is no accompanying net benefit. Should a party being investigated indicate to the CCCS that it wishes to offer commitments, the CCCS will stipulate a deadline for submission of such proposals, and proceed to issue the proposed infringement decision if no acceptable proposal is offered by that deadline.

CCCS has also proposed changes on the factors to be considered in assessing if multi-sided platforms are dominant. These proposals follow from the findings from its market study on e-commerce platforms which recommended such changes, as set out below.

- Multi-sided platforms which exhibit strong network effects, i.e. where the increase in usage on one side of the platform greatly increases its value to users on the other side, may be considered dominant unless there are other mitigating factors, such as the prevalence of multi-homing (where users typically utilise more than one competing platform) and low costs involved in switching platforms.

- Market share is an important (though not definitive) factor considered by the CCCS when assessing dominance – CCCS considers a market share of more than 60% as likely to indicate dominance. While market shares are typically computed based on value and volume of sales, the proposed amended guidance lists various alternative measures that may be more appropriate in assessing multi-sided platforms, such as monthly active users (on both sides), transaction volumes and gross merchandise values.

- The proposed amendments further highlight that economies of scope, i.e. savings which are achieved by costs / know-how shared over the provision of a range of products / services, may be a barrier to entry as new entrants which only provide one or a narrow range of offerings may not be able to compete against an incumbent. Similarly, where buyers find it more efficient to purchase multiple distinct products / services from the same platform, such consumption synergies may also present a barrier to entry to incumbents which do not offer such a wide range of offerings initially.

In addition**,** the CCCS proposes to update its Guidelines on the Treatment of Intellectual Property Rights ("**IPR Guidelines**")[4] to address how CCCS may view certain arrangements relating to IPR agreements and/or conduct involving IPRs. In particular, the proposed amendments to the IPR Guidelines signal how the CCCS may treat certain IPR licensing related practices as giving rise to competition concerns under Section 34 of the Competition Act:

- non-challenge clauses in agreements where there is a direct or indirect obligation not to challenge the validity of the licensors' IPR;
- agreements which prevent the lawful parallel importation of a product; and
- agreements which restrict a licensee's ability to exploit its technology rights such as:
    - IPR "pay-for-delay" type settlement agreements which are based on a value transfer from one undertaking in return for a limitation on the entry and/or expansion into the market of another undertaking;
    - IPR settlement agreements involving cross-licensing between the parties which imposes a restriction of the use of their IPRs to inter alia share markets or fix reciprocal running royalties that have a significant impact on market prices; and/or
    - IPR settlement agreements where parties are entitled under the terms of the agreement to use each other's technology and future developments.

As at 19 March 2021, the CCCS has not indicated if these amendments will come into force or be amended following the public consultation period.

B. MERGER CONTROL

The CCCS issued 5 merger control decisions in 2020, which is fairly typical for the regulator, given the size of its jurisdiction and the voluntary nature of the merger control regime.

In *Korea Shipbuilding & Offshore Engineering's acquisition of a majority interest in Daewoo Shipbuilding & Marine Engineering*[5], the CCCS unconditionally cleared the merger of two Korean shipbuilders after a prolonged review period. The matter was first notified in September 2019, and cleared in August 2020, after a Phase 2 review.

In its decision, while noting high barriers to entry and expansion, and the lack of buyer power, CCCS found there were viable alternative suppliers to the merging parties, which had excess capacity. While market concentrations in the relevant markets would be high post-merger,

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[4] CCCS, 'Annex A – CCCS Guidelines on the Treatment of Intellectual Property Rights' (2020) <https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-treatment-of-intellectual-property-rights-in-competition-cases.pdf?la=en&hash=E0488711C6A714D7C2EE4A969725BA5892CBB7F4>.

[5] Application for Decision Relating to the Merger between Korea Shipbuilding & Offshore Engineering Co., Ltd. and Daewoo Shipbuilding & Marine Engineering Co., Ltd. (CCCS 400/140/2019/002).

CCCS found that the evidence did not indicate that the transaction would result in coordination or collusion on prices, as shipbuilders tend to have private negotiations with customers, which limit price transparency. CCCS also noted that shipbuilders may also find it difficult to coordinate on prices, as customers perceive differences in quality and experience of shipbuilders.

CCCS also issued merger clearances in waste management services[6], the supply of warehouse space and supply of fund management services for industrial real estate assets[7], and the provision of haemodialysis services and products[8].

Perhaps the most significant decision issued on mergers was one by the Competition Appeal Board, in Uber's appeal against the infringement decision issued by the CCCS with respect to Grab Inc.'s acquisition of Uber's Southeast Asian ride hailing business, which was issued at the end of December 2020. In its appeal[9] Uber had noted that CCCS had, amongst other things, ceased negotiations over commitments without notice although parties' commitments offer was close to that issued by the CCCS in its final directions. In its decision, the Competition Appeal Board noted, *inter alia*, that:

- CCCS is not obliged to accept voluntary commitments offered by the parties *even if these commitments are sufficient to address all potential competition concerns*, in particular if there are other considerations that would suggest that an infringement decision (and/or a penalty) would be more appropriate.

- The current regime allows CCCS to proceed with an infringement decision while negotiations over commitments are pending. While the parties should have an opportunity to be heard (including to offer voluntary commitments) and to understand CCCS' competition concerns, CCCS is not required to engage parties specifically on the adequacy of the commitments that were offered and has no obligation to inform the parties on the specific form of commitments that would satisfy their requirements.

The concerns over the abrupt termination of negotiations that Uber raised in its appeal will be partially addressed by the proposed amendments to the CCCS Guidelines on Merger Procedure described above, in particular the proposed amendments to include a formal commitments procedure, if these come into force.

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6 Proposed Acquisition by Sembwaste Pte. Ltd. Of Veolia ES Singapore Pte. Ltd. (CCCS 400/140/2020/002).

7 Proposed Acquisition by ARA Logistics Ventures I Limited of LOGOS China Investments Limited (CCCS400/140/2020/001). Please refer to CCCS's media release dated 26 February 2020 which can be found here:

8 Proposed Acquisition by Fresenius Medical Care Singapore Pte. Ltd. of RenalTeam Pte. Ltd. (CCCS 400/140/2020/003).

9 *Uber Singapore Technology Pte Ltd & Ors vs CCCS* [2020] SGCAB 2

C. ANTI-COMPETITIVE AGREEMENTS

In a year defined by the pandemic, the CCCS issued a guidance note[10] clarifying that it would assume that competing businesses collaborating on essential goods and services such as hospital and primary care facilities, waste management and critical infrastructure amongst others would generate net economic benefits, and would therefore not infringe the Section 34 prohibition on anti-competitive agreements. CCCS has indicated it will not investigate such collaborations. The guidance note applies to collaborations put in place from 1 February 2020, and will expire by 31 July 2021.

CCCS issued 2 decisions on bid-rigging in 2020, one in relation to pool maintenance services[11] and the second in relation to tenders for building and maintenance services called by the Wildlife Reserves[12]. In the pool maintenance case, two of the parties signed a Fast Track Agreement with CCCS, acknowledging their liability for infringing the Act and agreed to cooperate throughout CCCS' investigation and confirmed that they would not make extensive written representations or requests to inspect the documents and evidence in the CCCS' file. The use of the Fast Track procedure made them eligible for a fixed 10% reduction in the amount of financial penalty they were directed to pay. This was the first time since CCCS introduced the Fast Track procedure in December 2016 that it has been used.

D. ABUSE OF DOMINANCE

The CCCS did not take any enforcement action in respect of the Abuse of Dominance provision in 2020.

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[10] CCCS, 'CCCS Guidance Note on Collaborations between Competitors in Response to the Covid-19 Pandemic' (2020) <https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/ccs-guidelines/covid19-business-collab-guidance-note-20-jul-20/cccs-guidance-note-on-the-collaborations-in-response-to-the-covid-20-july-2020.pdf?la=en&hash=95EB090C890AB8604F651B3A65918BF157C15887>.

[11] Infringement of the Section 34 Prohibition in relation to the Provision of Maintenance Services for Swimming Pools, Spas, Fountains and Other Water Features (CCCS 500/7003/17).

[12] Infringement of the Section 34 Prohibition in relation to Bid- Rigging of Building, Construction and Maintenance Tenders (CCCS 500/7003/16).

XII. SOUTH AFRICA*

Legislative Developments

The new buyer power provisions of the recently amended Competition Act[1] ("**Act**") came into force in February 2020. The Regulations required in terms of those sections were published on 13 February 2020,[2] and the Competition Commission ("**Commission**") followed up with Guidelines for the enforcement of the Buyer Power provision and regulation. Both the new buyer power provision and the amendments to the price discrimination provision are designed to enhance fairness for small and medium businesses and firms owned by historically disadvantages persons and to facilitate growth and entry by such entities.

In response to the Covid-19 pandemic, the Minister of the Department of Trade, Industry and Competition ("**the DTIC**"), Mr Ebrahim Patel ("**the Minister**") issued block exemptions in the healthcare, retail property, banking and hotel sectors. The purpose of these temporary exemptions was to strengthen the government's programmes designed to fight Covid-19 by exempting categories of agreements or practices from the application of sections 4 and 5 (the prohibition of restrictive horizontal and vertical practices respectively) of the Act.[3]

The Minister also issued Consumer Protection Regulations[4] providing that, during any period of "national disaster", a material price increase which does not correspond to cost increases, or increases of the net margin or mark-up above the average margins or mark-ups seen prior to the Covid pandemic, are indicators of excessive pricing in terms of the Competition Act. The Regulations also provide that such price, margin or mark-up increases are indicators of unconscionable, unfair, unreasonable and unjust conduct in terms of the Consumer Protection Act. Regulations on Competition Tribunal Rules for Covid -19 Excessive Pricing Complaint Referrals were then issued to provide for complaints in terms of the Consumer Protection Regulations to be dealt with by the Tribunal on an urgent basis.

2020 also saw a major change in leadership at the Competition Appeal Court ("**CAC**") when Dennis Davis retired after 21 years as Judge President.

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* Lara Granville, Cliffe Dekker Hofmeyr Inc. The author would like to thank Lauren Loxton and Jonathan Sive for their assistance in drafting this chapter.

1 Competition Act 89 of 1998 (S. Afr.).

2 GN 168 of 13 February 2020: Buyer Power Regulations, (Government Gazette No. 43018).

3 The exemptions remain in operation for as long as the declaration of Covid-19 as national disaster under the Disaster Management Act 57 of 2002 subsists, or until withdrawn by the Minister.

4 GNR.350 of 19 March 2020: Consumer and Customer Protection and National Disaster Management Regulations and Directions (Government Gazette No. 43116)

A. MERGERS

In addition to the now-familiar imposition of public interest conditions related to the preservation of employment,[5] the scope of public interest conditions expanded in 2020 to include requiring the location of the merged entity's head office and tax residency to remain in South Africa,[6] requirements to increase the merged entity's workforce post-merger,[7] requirements to continue procuring from local suppliers,[8] and investments in Broad-Based Black Economic Empowerment ("**B-BBEE**"), including by promoting a greater spread of ownership and participation by workers.[9]

The Commission prohibited two mergers, the first of which was overturned by the Tribunal, [10] and the second of which was upheld at the Tribunal. [11] Reasons have not been issued for either of these decisions (although the orders to approve conditionally and to prohibit were issued six and twelve months ago respectively), potentially indicating concerning resource constraints at the Tribunal.

The CAC overturned the Tribunal's and Commission's 2019 prohibition of a merger between the large Mediclinic hospital group and the a local hospital (Matlosana Medical Health Services).[12] The matter is now on appeal at the Constitutional Court,[13] where the Commission has argued that the prohibition should stand because it believes there will be changes in tariffs at the target hospital which will impact the competitive behaviour of the acquiring firm, thereby lessening competition as well as limiting uninsured patients' access to private health in the effected regions.

B. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

The Tribunal dismissed a number of the Commission's cartel referrals, suggesting that the Commission had referred the complaints on inferential bases rather than on the basis of substantial

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5 *Id. See also* K2020704995 (South Africa) (Pty) Ltd / Comair Ltd (In Business Rescue), LM137Oct20 and the Commission's conditional approval in Upjohn Inc. / Mylan N.V. where a 3-year moratorium on job losses was imposed.

6 *See* Mapochs Mine (Pty) Ltd / IRL (South Africa) Resources Investments (Pty) Ltd, SM148Jul18; Senwesbel Ltd & Senwes Ltd / Suidwes Holdings (RF) (Pty) Ltd, LM001Apr20; Simba (Pty) Ltd / Pioneer Food Group Ltd, LM108Sep19; https://mailchi.mp/99b7c579d63f/case-alert-pepsico-simba-and-pioneer?e=[UNIQID**].**

7 Chrome Production Holdings (Pty) Ltd / Lanxess Chrome Mining (Pty) Ltd

8 Wipro Unza Holdings Ltd / Canway (Pty) Ltd; Foschini Retail Group (Pty) Ltd and the Assets / Business Conducted by Edcon Ltd as a Going Concern Under the "Jet" Division out of certain of Edcons Physical Retail Stores in South Africa, LM087Aug20.

9. Simba (Pty) Ltd / Pioneer Food Group Ltd, Case No: LM108Sep19.

10 IM141Dec19 (the Tribunal approved the merger conditionally).

11 LM183Sep18.

12 Mediclinic Southern Africa (Pty) Ltd / Competition Commission, 172/CAC/Feb19

13 Constitutional Court Case Number: CCT 31/20.

evidence. [14] The Commission had one successful cartel prosecution in 2020.[15]

In a break with past practice, the Commission accepted a number of settlement agreements with alleged cartelists, which did not include admissions of contraventions of the Act,[16] making it difficult for those pursuing civil damages actions on the basis of the same conduct.

The Commission has been successful in using the outcomes of market inquiries as negotiation tools to secure voluntary commitments from market players to address the identified concerns. These commitments have taken the form of consent orders following the Data Services Market Inquiry[17] and the Grocery Retail Market Inquiry.[18]

C. ABUSES OF DOMINANCE

The Commission confirmed that it received 1,734 Covid-19 related complaints in terms of the Consumer Protection Regulations between March and November 2020,[19] and the Tribunal confirmed 35 settlement agreements in terms of these Regulations, many of which did not involve admissions of guilt.

Of significance were the *Dis-Chem Pharmacies Ltd*[20] and *Babelegi Workwear and*

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[14] Competition Commission / Npc Cimpor (Pty) Ltd; Afrisam (Sa) (Pty) Ltd; Lafarge South Africa (Pty) Ltd; Pretoria Portland Cement Company Ltd, CR206Feb15 confirmed by the CAC in 178/CAC/Dec19; Competition Commission / Irvin and Johnson Ltd; Karan Beef (Pty) Ltd, CR198Oct18; Competition Commission / Catha Silkscreen Printers Cc; Melemo Trading CC; Lounge 848 CC; Nakanyane Business Solutions CC; Litabe And Seema Trading CC, CR086Jun17; Competition Commission / Tourvest Holdings (Pty) Ltd and Trigon Travel (Pty) Ltd, CR209Feb17.

[15] Competition Commission / Afrion Property Services CC; Belfa Fire (Pty) Ltd; Cross Fire Management (Pty) Ltd; Fire Protection Systems (Pty) Ltd; Fireco (Pty) Ltd; Fireco Gauteng (Pty) Ltd; Tshwane Fire Sprinklers.

[16] Competition Commission / Timrite (Pty) Ltd and Tufbag (Pty) Ltd, CO145Jan20; Competition Commission / T.Rad Company Ltd, CO112Sep20; Competition Commission / Panasonic Corporation, CO103Aug20; Competition Commission / Rooibos Ltd, CR075Jun17/SA102Aug20.

[17] *See* Competition Commission / Mobile Telephone Networks (Pty) Ltd ("**MTN**"), CO006Apr20 and Competition Commission / Vodacom (Pty) Ltd, CO166Mar20 where MTN and Vodacom both agreed to reduce prices of mobile data following the findings of the market inquiry.

[18] *See* Competition Commission / Shoprite Checkers (Pty) Ltd, CO026May20 wherein the retailer agrees to immediately stop enforcing exclusivity provisions in its long-term exclusive lease agreements with its landlords against small, medium and micro enterprises (SMMEs) and speciality and limited line stores such as butcheries, bakeries, liquor stores and greengrocers. The Commission has entered into a similar agreement with Pick n Pay Retailers Proprietary Limited, see http://www.compcom.co.za/wp-content/uploads/2020/10/THE-COMPETITION-COMMISSION-REFERS-CONSENT-AGREEMENT-WITH-PICK-N-PAY-TO-THE-COMPETITION-TRIBUNAL-FOR-CONFIRMATION.pdf

[19] Competition Commission presentation to the Parliamentary Portfolio Committee on Trade and Industry: Update on Covid-19 Cases and Investigations (20 October 2020).

[20] Competition Commission / Dis-Chem Pharmacies Ltd, CR008Apr20.

Industrial Supplies CC[21] matters where the respondents were found to be temporarily dominant as they were "lucky monopolists" in the exceptional circumstances created by Covid-19. Both cases found the respondents to have engaged in excessive pricing.

After the Commission's successful prosecution of Computicket (Pty) Ltd ("**Computicket**") for exclusionary conduct arising from long-term exclusivity contracts,[22] the Commission brought a referral against Shoprite Checkers, seeking to hold the holding company of Computicket liable for Computicket's contraventions of the Act.[23] Shoprite ultimately settled with the Commission.[24]

D. COURT DECISIONS

A number of decisions in 2020 developed the law on procedural matters.

The *Vexall (Pty) Ltd / Business Connexion (Pty) Ltd*[25] case involved the Tribunal granting interim relief for the first time. On appeal, the CAC held that the interim order of the Tribunal was not appealable because it was not final.

In *Competition Commission / Beefcor (Pty) Ltd; Cape Fruit Processors (Pty) Ltd*,[26] the Commission sought to reinstate a referral after it had been withdrawn. The CAC dismissed the Commission's appeal on the basis that jeopardy attaches at the time of the delivery of the complaint referral. Withdrawal of these documents must be construed to have the effect that the proceedings are completed reinstatement or referral again to the Tribunal would constitute double jeopardy.[27]

The Constitutional Court's decision in *Competition Commission of South Africa / Pickfords Removals SA (Pty) Limited,*[28] involved a major development of the law on time limitations for prosecution of complaint referrals. The Court held that interpreting section 67(1) of the Competition Act as imposing an absolute time-bar would subvert the right of access to the courts. Rather, it determined that section 67 involved a procedural provision such that the Tribunal has the power to condone non-compliance. This decision will grant the Commission the ability to investigate and prosecute cartel conduct that stopped three years before its investigation started, if the Tribunal condones the delay.

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21 Babelegi Workwear and Industrial Supplies CC / Competition Commission, 186/CAC/JUN20

22 See Uniplate Group (Pty) Ltd / Competition Commission of South Africa, 176/CAC/Jul19 and Computicket (Pty) Ltd / Competition Commission of South Africa, 170/CAC/Feb19

23 Shoprite Checkers (Pty) Ltd / The Competition Commission, CR228Dec18/DSM258Feb19.

24 https://www.comptrib.co.za/case-detail/8689

25 Vexall (Pty) Ltd / Business Connexion (Pty) Ltd / Competition Commission, IR119Oct19

26 177/CAC/Nov19

27 The appeal of the CAC decision was heard by the Constitutional Court of South Africa on 23 February 2021 under case number CCT 175/20.

28 CCT 123/19.

XIII. SPAIN*

The pandemic has not halted the activity of the Spanish Competition Authority (the ***CNMC***) and courts enforcing antitrust law in 2020. We set out below the most important developments in Spain in 2020.

A. LEGISLATIVE DEVELOPMENTS

Future amendments to the Spanish Competition Act

On July 31, 2020, the Spanish Government launched a public consultation on the proposed amendments to the Spanish Competition Act which seek to implement the Directive (EU) 2019/1 (the ***ECN+ Directive***)[1] and fine-tune the Spanish Competition Act.[2] Nevertheless, on April 26, 2021, the Spanish Government ultimately decided to approve Royal Decree-law 7/2021 amending the Spanish Competition Act in order to implement Directive (EU) 2019/1 the ECN+ Directive. This reform came into force as early as on 28 April 2021 and will apply to proceedings initiated following that date.

The amendments are largely focused on the requirements of the ECN+ Directive, most of whose provisions were already contained in Spanish competition rules. However, the reform has brought relevant changes in relation to cooperation duties between competition authorities in the European Union, investigation powers and the sanctioning regime, including an increase in fines for certain antitrust infringements.

Nevertheless, this may not be the last modification of the Spanish Competition Act going forward in the near future, as the initial draft bill published in July 2020 went beyond the ECN+ Directive and sought to fine-tune additional provisions of the Spanish Competition Act, including merger control thresholds. While the lapse of the ECN+ Directive's implementation deadline prompted the Spanish Government to expedite the implementation of the ECN+ Directive, it remains possible that further amendments may be approved in the course of the reform's legislative passage.

Guidelines on antitrust compliance programmes

On 10 June 2020, the CNMC published a set of guidelines on antitrust compliance programmes. The guidelines provide relevant insights for companies seeking to develop and implement effective compliance programmes enabling them to prevent, detect and eradicate

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1 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.

2 The proposed amendments are available at https://portal.mineco.gob.es/en-us/ministerio/participacionpublica/audienciapublica/Pages/ECO_Pol_AP_20200731_APL_ECN.aspx

antitrust infringements.[3] In parallel, the guidelines also address the possibility of mitigating companies' liability as well as other benefits for establishing effective compliance programmes.

B. MERGERS

Increased scrutiny by the CNMC

Merger control proceedings were affected by the COVID-19 pandemic, as decision deadlines were suspended for more than 2 months. Nevertheless, the CNMC managed to review and decide on 64 transactions in 2020.[4] Among these, the CNMC cleared 55 unconditionally in Phase I, while three were approved with commitments following a Phase I investigation. The authority reviewed three cases in depth,[5] one of which was still pending as of September 2021.[6]

On 29 September 29, 2020, the CNMC cleared the acquisition of Cemex's white cement business by the Turkish operator Çimsa subject to remedies.[7] The CNMC conducted an in-depth investigation of the effects on the markets for white cement arising from the transaction. The CNMC was particularly concerned with Çimsa's high market shares in bulk and bagged white cement, particularly in certain areas in the south of Spain, and potential coordinated effects deriving from the reduction in the number of players active in the market.

The CNMC accepted the remedies offered by Çimsa which consisted of the divestment of a white cement port terminal to a third party, and the commitment to continue the supply of white cement to customers in the south of Spain for a period of two years.

First dawn raids in the context of merger control proceedings

One of the most important developments in Spanish merger control in 2020 has been the CNMC's use of dawns raids in the context of merger control proceedings. In September 2020, the CNMC conducted inspections at the business premises of the parties involved in a merger in the funeral services sector, which is currently under in-depth review by the CNMC.[8]

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3 *See* the CNMC's press release, available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas de prensa/2020/20200610_NP_guia de compliance_def ENG.pdf

4 See the CNMC's 2020 annual report, available at https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/Memorias/WEB%20Memoria%20CNMC-2020-media.pdf

5 Cases C/1086/19 Santalucía/Funespaña; C/1052/19 Çimsa/Activos Cemex; and C/1134/20 Mooring Port Services S.L./Cemesa Amarres Barcelonas, S.A.

6 Cases C/1086/19 Santalucía/Funespaña.

7 *See* Case C/1052/19 Çimsa/Activos Cemex.

8 The CNMC's press release is available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas de prensa/2020/20200914_NP_Inspecciones_Seguros_Funerarias_ENG.pdf.

According to the CNMC's press release, the authority is reviewing a number of suspected infringements and, particularly, whether the investigated companies implemented several notifiable transactions without filing the required notification (*i.e.*, *gun-jumping*).

As a result of the dawn raids, the CNMC recently opened a formal investigation against Funespaña, a subsidiary of Mapfre, one of the main players in the insurance sector in Spain. The investigation concerns the implementation of a reportable acquisition in the market for funeral services in a municipality of the Canary Islands, which met the market share threshold and had not been notified. The CNMC ultimately confirmed the existence of an infringement and imposed a EUR 100,000 fine on Funespaña for gun-jumping.[9] More recently, the CNMC has also imposed a EUR 300,000 fine on Santa Lucía's subsidiary Albia for implementing a notifiable transaction in the funeral services sector without notification.[10] This is the highest fine to date imposed by the CNMC for gun-jumping. It is worth mentioning that the CNMC became aware of both transactions in the context of its ongoing phase II investigation into the proposed acquisition of Funespaña by Santalucía.

Against this background, companies contemplating transactions in Spain should always seek specific guidance from antitrust experts as regards the need to notify a transaction, particularly in markets which have no EU or Spanish precedent.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

Vertical restrictions concerning online sales and advertising[11]

On November 22, 2018, the CNMC opened antitrust proceedings against Adidas Spain to review whether the company engaged in anticompetitive practices on account of the conditions of sale contained in its franchise agreements. The CNMC investigated several clauses imposing restrictions on online sales and advertising and limiting cross-supplies and post-contractual competition. Most notably, the CNMC was concerned with clauses broadly limiting the franchisees' ability to use the Adidas brand in their domain names.

In the end, the CNMC accepted the package of commitments offered by Adidas which amended the relevant contractual clauses identified by the authority. In particular, Adidas committed to clarifying the requirement to be given prior notice of the internet addresses used by the franchisees.

This case shows that restrictions on online sales are increasingly attracting the attention of the CNMC and further scrutiny is expected in the coming years. Indeed, on October 26, 2020, the CNMC opened antitrust proceedings against ISDIN, a Spanish manufacturer of sun care products

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[9] The CNMC's press release is available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas de prensa/2021/20210521_NP_Sancionador_Funespan%CC%83a_ENG.pdf.

[10] The CNMC's press release is available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20210721_NP_Sancionador_Albia-Tanatorios-M%C3%B3stoles_en_GB.pdf.

[11] Case S/0631/18 Adidas España.

and other cosmetics for suspected restrictions on online sales concerning the resale price of sun care products.[12]

Antitrust liability of a company participating in a cartel without being active in the market affected by the agreements or practices[13]

On May 21, 2020, the Spanish Supreme Court held that a company participating in the adult diapers cartel[14] may be declared liable even it is does not operate in the market affected by the cartel if its participation facilitated the collusion, irrespective of whether it obtained direct benefit or not. The Supreme Court upheld the appeal of the State Attorney against the 2018 ruling of the High Court, which had overruled the CNMC decision on the basis that the sanctioned company was not active in the affected market.

The judgment of the Supreme Court follows the case law of the Court of Justice of the European Union in the *Treuhand* case and notes that "*Article 101 TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the specific market in which the parties operate*".[15]

The Spanish Supreme Court confirms its case law on the antitrust liability of legal representatives and managers[16]

Since 2016, the CNMC has imposed fines on legal representatives and managers (which can amount to EUR 60,000) in a number of cases, giving rise to significant judgments of the Supreme Court clarifying the degree of participation necessary to hold managers and legal representatives liable.

Against this background, on January 28 and November 12, 2020, the Supreme Court confirmed that legal representatives and managers of an infringing company may be held liable even if they played only a limited role in the infringement.

Antitrust liability of legal representatives and managers is expected to gain relevance in the future, as the proposed amendments to the Spanish Competition Act include a stricter sanctioning regime, increasing the level of fines to a maximum amount of EUR 400,000.

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12 Case S/0049/19 ISDIN.

13 Judgment of the Supreme Court of 21 May 2020, case 1087/2020.

14 Case S/DC/0504/14 AIO.

15 *See* judgment of the Court of Justice of the European Union of 22 October 2015 in case C-194/14 P AC-Treuhand AG/European Commission, paragraph 35.

16 Judgments of the Supreme Court of 28 January (case 95/2020) and 12 November (case 1518/2020).

High Court judgments concerning single and continuous infringements[17]

In 2020, the Spanish High Court quashed a number of CNMC decisions on the basis of a lack of evidence in relation to single and continuous infringements. These judgments imply that the CNMC will have to provide extensive evidence and prove to the requisite legal standard the link of complementarity between the string of conducts in the process of establishing the existence of single and continuous infringements in the future.

D. DOMINANCE

Refusal to supply in two-sided markets

On June 4, 2020, the CNMC decided not to open a formal investigation against Interflora, a flower sale and delivery platform, for refusal to supply.[18] The CNMC reviewed the complaint of several florists who accused Interflora of unlawfully terminating their agreements on a unilateral basis in the context of a corporate dispute between Interflora's shareholders.

The CNMC decision provides valuable guidance as regards unilateral conduct in two-sided markets which could be deemed as a refusal to supply. Among other factors, the CNMC found that Interflora's agreements are not exclusive and allow florists to multihome between alternative platforms in a dynamic two-sided market. On this basis, the CNMC concluded that Interflora's conduct did not have the effect of preventing competitors from entering the market.

Excessive pricing under scrutiny

On December 22, 2020, the CNMC opened proceedings against the pharmaceutical company Leadiant for an alleged abuse of dominant position concerning the price level of the orphan drug CDCA-Leadiant, which is used to treat patients with a rare disease.[19]

The formal investigation was opened as a result of the complaint of a consumer organization and follows the ongoing antitrust investigations against the company in other Member States. The opening of the case illustrates the increasing focus on pricing policies in the pharmaceutical sector, as shown recently in the commitments decision issued by the European Commission in the *Aspen* case.[20]

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[17] Judgments of the High Court of 18 February 2020 (appeal 658/2015) and 21 December (appeal 501/2016).

[18] Case S/0009/19 Fleurop-Interflora.

[19] Case S/0028/20 Leadiant.

[20] *See* Case AT.40394 – Aspen.

XIV. TURKEY*

2020 was a year of significant changes to Turkish Competition Law ("**TCL**"). The turbulence and the questions at the beginning of the Covid-19 pandemic did not slow down the efforts of the Turkish Competition Authority ("**TCA**") to modernize the TCL in order to keep up with international developments and to be prepared for the post-pandemic economic environment. Key developments include changes to the merger test which grant the TCA with new powers and scope of authority. On the procedural front, the TCA has been armed with long awaited powers with respect to initiating, pursuing and terminating investigative processes. The TCA was not hesitant to use its newly acquired powers in 2020.

A. LEGISLATIVE DEVELOPMENTS

With an amendment[1] to the TCL (the "**Amendment**"), a "significant impediment of effective competition" test ("**SIEC test**") has been introduced to the Turkish Competition Law's merger control rules. While previously, the rules only prohibited transactions that created or strengthened a dominant position, the SIEC test enables the TCA to analyze, and if necessary prohibit or cure, post transaction market structures that fall short of a dominant position yet raise significant competitive concerns. The new standard creates considerable uncertainties regarding the potential application of precedent case law (applying the old "dominant position" standard) and the outcome of the TCA review of a transaction. Turkish competition law practice is expected to refer to the European case law, which has been using SIEC test since 2004, for guidance.

From a procedural perspective, the Amendment provides greater flexibility to the TCA.

First, the Amendment enables the TCA to opt not to initiate an investigative procedure if the detrimental effect of a violation is negligible (so-called *de minimis* violations). Secondary legislation[2] sets out a bright-line test: the TCA has discretion not to initiate an investigative procedure against breaches that arise from horizontal or vertical agreements between parties with a combined market share of less than 10% or 15% respectively. However, the *de minimis* exception does not apply to so called 'grave and apparent violations' (i.e. hard core restrictions) such as horizontal cartels and resale price maintenance.

Second, the Amendment creates a commitment mechanism which allows companies to voluntarily submit commitments during preliminary investigations or investigations to eliminate competition law concerns. The TCA issued a specific secondary legislation[3] to outline an interactive procedure that involves third parties alongside the TCA and the investigated parties, for determining such commitments. Based on its assessment of the commitments proposed, the

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1 The Law numbered 7246 entered into force on June 24, 2020 amending the Law on Protection of Competition numbered 4054 (the "**Turkish Competition Law**")

2 The Communiqué on Practices that Do Not Significantly Impede Effective Competition[2] was published by the TCA on March 16, 2021

3 The Communiqué on Commitments to be Submitted during Preliminary Investigations or Investigations Concerning Agreements, Concerted Practices and Decisions Limiting Competition and Abuse of Dominant Position, dated March 16, 2021 numbered 2021/2

TCA may decide not to initiate an investigation or end an ongoing investigation without completing the entire investigation procedure. However, the TCA is not allowed to accept commitments regarding hardcore infringements, *e.g.*, price fixing, allocation of markets or customers or restricting supply.

Third, the Amendment implements a settlement procedure. After an investigation commences, the TCA may decide on a settlement procedure *ex officio* or upon request of the parties. With this procedure, the relevant party/parties admit(s) its participation in the competition law breach and in return, they may receive a reduction of up to 25% on the fine to be imposed by the TCA. The settlement procedure gives the TCA the flexibility to finalize the investigation at an early stage (*i.e.* without completing all investigation procedures) and without judicial review. As at the date of this article the TCA has issued a draft secondary legislation that sets out the details of the settlement procedure, for public review and comment.

In addition to major procedural changes summarized above, the Amendment brought clarification in two important areas. The TCA has been able to issue decisions that ordered the parties to conduct or refrain from certain behavior in order to terminate a breach and re-establish competition. Under the Amendment, the TCA is now able to order structural remedies (*e.g.* transfer of certain operations, shares or assets of an undertaking) to prevent and remedy the violations of competition law. Nevertheless, the law still prioritizes behavioral remedies over structural remedies, specifying that structural remedies shall be the last resort if behavioral ones are ineffective.

The Amendment also clarified and broadened TCA's powers regarding the documents it can examine and copy during an on-site inspection. The TCA now has explicit authority to examine and take copies of any and all kinds of data and documents that are stored in a physical or an electronic environment or in the information systems of the undertakings concerned during on-site inspections. General principles for exercising such authority were established by guidelines of the TCA[4], which set forth a surprising aspect of such authority: During on-site inspections, the inspectors are not only permitted to inspect specified vehicles used for business purposes but are permitted to "quickly" inspect personal mobile devices (*e.g.*, personal mobile phones, personal tablets) to determine whether such mobile devices are used for business purposes.

Lastly, the Amendment involves the courts for the first time with respect to the individual exemption assessments. Since 2005, the entities have been able to self-assess whether an agreement qualified for an individual exemption, i.e. to evaluate whether the benefits of an agreement to the economy and the consumers outweigh the harm to the competition. If legal certainty is essential, parties may request an official evaluation of the matter through an individual exemption application to the TCA. Pursuant to the Amendment, the parties may now opt to apply to a court with a request for an individual exemption.

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[4] Guidelines on Examination of Digital Data during On-site Inspections[4] (the "**Guidelines**") published on October 8, 2020

B. MERGERS

In 2020, the TCA prohibited one transaction on the basis of the brand new SIEC test. The TCA raised objections to the Marport TIL transaction[5] where a jointly controlling parent company intended to acquire sole control over the joint venture that is active in the container terminals market. In its decision, the TCA referred to the provisions of the law that prohibit transactions that significantly impede effective competition without engaging in a full dominance assessment. As the change in control in this transaction was from joint to sole control of the same parent company (i.e. the parent company was already and would remain in the control structure of the target company), this decision raised questions among the competition law community as to how strictly the TCA intends to interpret the SIEC test.

In its Synthomer Omnova decision[6] the TCA took the commitments submitted to the EU Commission into consideration. Synthomer, the acquirer, committed to the EU Commission to carve out its global VP Lateks business to eliminate competition law concerns. The TCA found that these commitments would also cure the competitive concerns in Turkey. Hence, the TCA approved the transaction on condition that the commitments submitted to the EU Commission were also implemented to cover the Turkish market. This is not the first time that the TCA has relied on commitments proposed to another competition authority which would change the scope of the transaction and eliminate the competition law issues in Turkey.

C. CARTELS AND ANTI-COMPETITIVE PRACTICES

2020 was not the year of striking cartel discoveries in Turkey. The year began with the closing of the postal/cargo transportation investigation[7] that involved 36 companies (including well known global parcel companies like DHL, UPS and TNT), on allegations that local or global parcel companies had agreed with their Turkish resellers not to poach each other's customers. The TCA imposed a fine of approx. EUR 6 million. The TCA referred to a then recent decision of the Spanish Competition Authority regarding a very similar case involving some of the same global parcel companies, though it diverted from the Spanish example in deciding that the subject matter was vertical in nature. The Spanish Competition Authority found a horizontal cartel in the considerably similar subject matter.

The TCA also considered vertical restriction of competition in respect of resale price maintenance (RPM) of fuel distribution companies. The Turkish Competition Law prohibits RPM and setting of minimum resale prices. In 2020, the TCA fined fuel distribution companies including Turkish subsidiaries of global giants such as BP and Shell as well as some of their local competitors a total of approx. EUR 265,371 million, a new record for the TCA. The fine imposed on the companies was calculated as 1% of the 2018 annual gross Turkish revenue of each company.

In 2020, the TCA also initiated two investigative processes. First, TCA initiated an investigation against major grocery chains and their suppliers in Turkey. The companies under investigation include Unilever, Procter & Gamble, Colgate-Palmolive, Johnson & Johnson, Nivea

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5 Decision No. 20-37/523-231 of August 13, 2020

6 Decision No 20-08/90-55 of February 6, 2020

7 Decision No 20-04/47-25 of January 16, 2020

and Henkel together with a number of other producers and suppliers. TCA announced that this investigation was initiated due to excessive price increases during COVID-19 pandemic[8] especially with respect to food and cleaning/hygiene products.

The TCA also commenced a pre-investigation against commercial banks that conduct foreign exchange operations with a Turkish Lira leg. The pre-investigation involves about 20 international and domestic banks including JPMorgan Chase, ING and Citibank. The subject matter resembles that of FX cartel cases previously investigated by the DOJ and the EU Commission. TCA has requested massive amounts of data files regarding the communications of the traders from the banks involved and the review by the TCA is ongoing.

The TCA's recent focus has been on e-commerce and protection of competition in that context. TCA has been modernizing its approach to the competition law restrictions in the e-commerce area. The rise of e-commerce in response to curfews imposed during the Covid-19 pandemic brought a new dimension to the ever-increasing importance of e-commerce. In response, TCA initiated a sector review for e-marketplace platforms[9], stating that the power of the e-marketplace platforms owing to their data ownership and network effects, together with their roles as both the platform owner and seller, raised concerns for abuse of market power. The TCA also stated that due to the possibility that e-marketplaces can conduct exclusionary and/or exploitative practices by way of pricing, platform services and procurement behavior, they have been becoming more and more of a competition law concern throughout the world. In accordance with the cases before the TCA, the TCA has found that the sector has different competition dynamics and with this aspect, contains a different and complicated structure and functioning than what is envisaged within the traditional legal framework.

D. DOMINANCE

The Turkish competition law prohibits the abuse of a dominant market position by way of excessive pricing among others. The TCA investigated and fined several excessive pricing cases, latest of which was the case of *Sahibinden.com,* the largest online platform operating in Turkey. The TCA fined sahibinden.com for significantly increasing its prices for posts of professional users. The Turkish Administrative Court ("**Court**") annulled the fining decision based on the standard of proof. In its decision, the Court stressed that clear and precise evidence without any doubt is required for imposing sanctions due to excessive pricing and concluded that the TCA's decision had been established based on observation, without any concrete and indisputable evidence, and therefore considered it unlawful. Accordingly, the Court decided to annul the TCA's decision. Currently, the case is under review/reassessment by the TCA.

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[8] Turkish Competition Authority, "*Investigation Concerning 29 Undertakings Including Supermarket Chains Initiated (7.5.2020) (11.5.2020)*": https://www.rekabet.gov.tr/en/Guncel/investigation-concerning-29-undertakings-11bb860f5993ea11811a00505694b4c6

[9] Turkish Competition Authority, "*Competition Board launched a Sector Inquiry concerning E-Marketplace Platforms (11.8.2020)*": https://www.rekabet.gov.tr/en/Guncel/competition-board-launched-a-sector-inqu-513a2d5acbdbea11811e00505694b4c6

XV. UKRAINE*

A. LEGISLATIVE DEVELOPMENTS

By the end of 2020, the Antimonopoly Committee of Ukraine ("AMCU" or "Agency") had completed its work on proposals for amending the existing competition legal framework. The long-awaited draft law envisages amendments to the Ukrainian competition legislation to align it with EU standards. In particular, the proposed amendments include:

- merger control (excluding the seller's financial indicators from calculating the thresholds);
- strengthening the powers of the AMCU during investigations;
- strengthening the procedural rights of the parties to the case;
- establishing the leniency and settlement procedure; and
- joint and several liability for the payment of fines.

The competition law reform remains one of the highest priorities of the Ukrainian Parliament for 2021.

B. MERGERS

Despite the reduced M&A activity both across the world and in Ukraine, in particular, due to the COVID-19 situation, the AMCU cleared about 470 transactions last year. This figure does not really correspond to the actual number of deals, since, based on Ukrainian law, some transactions technically require several clearances to cover the deal as a whole. The AMCU has not announced any intention to change this bureaucratic process in the near future. Nevertheless, the total number of clearances granted in 2020 was still larger than in 2019 (439) and 2018 (447). A significant share of these deals were global foreign-to-foreign deals, which are still subject to mandatory clearance in Ukraine if some domestic nexus exists.

2020 did not include a large number of high-profile merger control cases, and the most sophisticated ones were related to the energy and mining industries. Based on the AMCU's annual report for 2020, the Agency did not block any transactions following its consideration on merits. The Agency also evidenced a preference for behavioral, rather than structural, remedies. Behavioral remedies typically include reporting obligations for the acquirer for a period of several years. Thus, e.g., last year, the merger of Peugeot and Fiat-Chrysler was cleared subject to the remedies in the form of submission of reports to the AMCU. Similarly, the AMCU imposed a reporting obligation on Metinvest - the internationally known Ukrainian large mining and metals company - for acquisition of metallurgical coal assets.

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In early 2020, the concession of two Ukrainian seaports by large international investors was cleared, which became the first PPP–concession implemented in Ukraine.

Acquisitions of distilling plants by the private investors were further cleared in the course of privatization of the state-monopoly "UKRSPYRT", the largest producer of alcohol and alcohol products in Ukraine. Privatization of the state-owned assets of the industry was the next logical step to follow the decision of the government to abolish the state monopoly on ethyl alcohol (spirit) production. A large number of other high-profile assets in this and other industries are in the privatization pipeline.

As mentioned above, a number of foreign-to-foreign transactions are still subject to Ukrainian regulations due to the low notification thresholds and the fact that assets and sales value of the seller are still to be counted towards the target while assessing and clearing the merger. The situation may change soon, since contemplated antitrust legislation reform envisages, *inter alia*, to exclude the seller's assets and sales in assessing which mergers must be reported. Instead, the new criteria will require at least EUR 2m in target assets or sales in Ukraine. The proposed legislative amendments may reduce administrative pressure on business, since the regulatory focus would shift from a large number of foreign-to-foreign transactions to transactions with tangible local nexus.

Apart from the usual merger control powers, in the years following the most recent Russian – Ukrainian conflict, the AMCU was vested with *"unnatural"* powers to block *"undesirable"* transactions with sanctioned parties in the perimeter of the deal, even if the transaction did not pose specific antitrust issues. These powers have established the AMCU as a state body with authorities of a quasi - investment - control council. While Ukraine is seriously considering introduction of FDI – screening, the proposed amendments will likely also result in AMCU's loss of "investment - control" powers.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

Anti-competitive concerted practices

In November 2020, the AMCU fined a leading global life science company and its distributors in Ukraine a total of about EUR 5.7m. The AMCU accused the manufacturer and its distributors of participating in an alleged cartel resulting in setting artificially high prices for drugs produced by the Novo Nordisk Group.[1] This fine is the latest focus on the pharmaceutical market from the Agency. In the past, the AMCU has also imposed fines for alleged anticompetitive practices on other well-known international drug manufacturers, such as Servier, Roche, and Sanofi.

Bid Rigging

In July 2020, the Agency accused the construction companies "Ukrbudmontazh" LLC and "Ukrenergomontazh" PJSC from the "UKRBUD" Corporation – of the alleged distortion of

[1] AMCU decision on competition law infringement and imposing a fine, No.680-p, issued on November 3, 2020: https://amcu.gov.ua/npas/pro-porushennya-zakonodavstva-pro-zahist-ekonomichnoyi-konkurenciyi-ta-nakladennya-shtrafu-153

bidding results and imposed a fine of about EUR 3.6m. The Agency found that the companies participated in tenders concerning construction services to be provided at the Chernobyl Nuclear Power Plant, with the total cost of the tenders amounting upward of EUR 31m. Apart from imposing the fine, the AMCU banned both companies from participating in public procurements for 3 years.[2]

It is noteworthy that according to the Agency's annual report 2020, bid-rigging cases constitute about 50% of all the anti-competitive concerted practices investigated by the Agency in 2020. Thus, an upward trend of exceptional attention to the bid-rigging violation paid by the Agency can be observed.

In October 2020, the AMCU imposed a fine of more than EUR 2.1m. on "INTERPIPE UKRAINE" LLC and other manufacturers of spare parts for railway transport for a similar offense. The tenders were held by JSC "Ukrainian Railways" – state railway monopoly – with the expected cost of procurement procedures of about EUR 21m. Besides that, the AMCU banned the companies from participating in public procurement for 3 years.[3]

D. ABUSE OF DOMINANCE

The AMCU continues focusing on energy, telecommunications, transport and infrastructure markets in abuse of dominance cases.

In December 2020, the AMCU imposed fines of EUR 8.1m on two companies of the DTEK Group - the largest private energy company in Ukraine – for the alleged abuse of monopoly position on the regional market for commercial electricity sales and balancing.[4] The AMCU accused DTEK of setting excessive and economically unjustified prices. The case was complicated by a jurisdictional component created by the existence of potential competitors (importers) from Hungary, Slovakia, and Romania. DTEK has indicated that it views the decision as groundless due to the fact that AMCU had ignored significant competition experienced by DTEK with other market participants, as well as existing administrative price regulation by the respective State regulatory authority.

At the end of 2020, the AMCU accused the "Regional Gas Company" Group - one of the largest operators in the Ukrainian natural gas market, which includes18 companies holding a monopoly position of the natural gas distribution services market - of allegedly abusing its monopoly position through imposing additional requirements on economic entities during the

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[2] AMCU decision on competition law infringement and imposing a fine, No.5-p/тк, issued on July 27,2020: https://amcu.gov.ua/storage/app/uploads/public/5f2/cfb/25d/5f2cfb25d38d9816228746.pdf

[3] AMCU decision on competition law infringement and imposing a fine, No. 677-p, issued on October 29, 2020: https://amcu.gov.ua/npas/pro-porushennya-zakonodavstva-pro-zahist-ekonomichnoyi-konkurenciyi-ta-nakladennya-shtrafu-152

[4] AMCU decision on competition law infringement and imposing a fine, No. 780-p, issued on December 15, 2020: https://amcu.gov.ua/npas/pro-porushennya-zakonodavstva-pro-zahist-ekonomichnoyi-konkurenciyi-ta-nakladennya-shtrafu-165

tenders.[5] As a result, the AMCU fined all 18 regional gas companies a total of about EUR 11m. In 2019, the AMCU imposed fines on a number of the same companies in 2019 for abuse of monopoly position in the market of complex services for distribution and supply of natural gas to the end consumers.

[5] AMCU decision on competition law infringement and imposing a fine, No. 810-p, issued on December 24, 2020: https://amcu.gov.ua/npas/pro-porushennya-zakonodavstva-pro-zahist-ekonomichnoyi-konkurenciyi-ta-nakladennya-shtrafu-176

XVI. UNITED KINGDOM*

A. LEGISLATIVE DEVELOPMENTS

The UK formally exited the European Union (**EU**) on 31 January 2020 following the entry into effect of the *European Union (Withdrawal Agreement) Act 2020*.[1] The transitional period agreed between the UK and the EU expired on 31 December 2020, following which, broadly speaking, EU law ceased to be directly applicable in the UK. However, EU Directives and other law which had been fully incorporated into UK law continue to apply and some other parts of EU law have the status of retained UK law (in both cases, until such time as they are repealed).

On 24 December 2020, the EU and the UK announced that they had agreed a draft Trade and Cooperation Agreement (**TCA**) governing the terms of their future relationship. The draft agreement was published on 26 December 2020. Following ratification by their respective Parliaments, the TCA was published in final form in April 2021[2] and took effect on 1 May 2021. The *European Union (Future Relationship) Act 2020* of 31 December 2020[3] gives effect to the TCA in the UK. Section 29(1) of that Act provides that existing UK law has effect with such modifications as are required for the purposes of implementing the TCA insofar as necessary for the purposes of complying with the UK's international obligations under the TCA. This appears to have the effect that provisions of UK law must be interpreted in light of the TCA provisions, though the issue has not yet been judicially considered.

So far as competition law is concerned, among other things, the TCA requires each of the EU and the UK to:

- maintain a system of competition law covering anti-competitive agreements, abuse of a dominant position and mergers with significant anti-competitive effects, backed up by appropriate enforcement;
- maintain operationally independent competition authorities and to apply competition law in a transparent and non-discriminatory manner, respecting the principles of procedural fairness, including the rights of defence; and
- maintain an effective system of subsidy control, but without a requirement for prior approval of subsidies as is the case under the EU system of state aid (albeit certain types of subsidy are in principle prohibited, for example, unlimited guarantees).[4]

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* Neil Cuninghame, Ashurst LLP

1 https://www.legislation.gov.uk/ukpga/2020/1/contents/enacted

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_ UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf

3 https://www.legislation.gov.uk/ukpga/2020/29/contents/enacted

4 Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part, Articles 359, 360 and 366, available at

A key impact of the UK exiting the EU is that cases which would previously have been dealt with solely by the European Commission under the EU Merger Regulation or Articles 101/102 of the EU Treaty may now be considered in parallel by UK competition authorities. The Competition and Markets Authority (**CMA**) has significantly increased the size of its staff to deal with the expected increase in workload.

B. MERGERS

Statistics suggest that the CMA has become more interventionist in recent times. Out of 11 Phase 2 cases which concluded in 2020, only 2 were cleared unconditionally: 1 was prohibited, 2 required remedies, and 6 were abandoned, in 3 instances following adverse provisional findings.

Some CMA decisions have been controversial. For example, the *Sabre/Farelogix* deal, involving two US companies involved in the supply of IT solutions to airlines, was prohibited after it had received US clearance.[5] The CMA concluded it had jurisdiction under the "share of supply test", which requires a transaction to create or enhance a share of supply of 25% or more in the UK or a substantial part of the UK. The goods or services considered for the purposes of the share of supply test need not accord with a relevant market in economic terms. Farelogix had very limited activities relating to the UK, but the CMA took jurisdiction on the basis that Farelogix was engaged in "supply" to British Airways "in the UK", largely due to Farelogix's supply of technology to American Airlines, which included an interline component with British Airways.[6] The decision was appealed unsuccessfully on jurisdictional grounds, illustrating the broad scope of the share of supply test.[7]

The CMA has also increasingly imposed procedural fines. For example, it fined JD Sports and its parent £300,000 in relation to the acquisition of Footasylum, finding that JD Sports had infringed its interim enforcement order (**IEO**) requiring the businesses to be managed separately pending the CMA's determination. However, the fine was subsequently withdrawn.[8]

In the context of the completed Facebook/Giphy transaction, the CMA successfully defended a challenge to its decision to decline to grant a derogation from the IEO it had imposed. Facebook had asked for a large part of its business to be released from the IEO. The CMA felt unable to grant this request because it believed it did not have the necessary information from Facebook to reach a decision. This decision was upheld by the Competition Appeal Tribunal

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf

5 https://www.gov.uk/government/news/cma-blocks-airline-booking-merger.

6 https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf

7 https://www.catribunal.org.uk/sites/default/files/2021-05/1345_Sabre_Judgment_210521.pdf

8 *See* https://www.gov.uk/cma-cases/jd-sports-fashion-plc-footasylum-plc-merger-inquiry, 15 October 2020 entry.

(**CAT**) on 13 November 2020,[9] and by the Court of Appeal on 13 May 2021.[10] These judgments effectively confirm that if parties choose to complete a merger without waiting for CMA clearance (as they are entitled to do under the UK "voluntary" merger control system), they must accept the likelihood of having a broad IEO imposed on them which may restrict their ability to carry out actions seemingly unrelated to the transaction, with the burden being on them to satisfy the CMA that derogations from the IEO are merited.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

The Government introduced exceptional measures due to COVID-19. For example, the Government made temporary exclusion orders under the Competition Act 1998 covering groceries providers, health services providers, the dairy sector and Isle of Wight ferries.[11] These were intended to allow cooperation between competitors which might otherwise have been prohibited, to facilitate a rapid response to issues presented by the coronavirus pandemic.

The CMA continued actively to pursue anti-competitive behaviour, imposing fines in 11 cases in 2020, considerably more than in previous years.

The CMA fined ComparetheMarket £17.9 million for the use of "most-favoured nation" provisions.[12] These clauses prevented home insurers from quoting lower prices on rival price comparison websites. This meant that rival comparison sites were restricted in gaining a price advantage over ComparetheMarket, for example, by lowering their commission fees to encourage insurers to quote lower prices on their platforms. The CMA found that this was likely to have resulted in higher insurance premiums. It is notable that, despite CompareTheMarket's persistent high market share, which appears to have been in excess of 50% for some time, the CMA chose to pursue the case solely as an infringement of the prohibition on anti-competitive agreements contained in Chapter I of the Competition Act 1998 (and Article 101 of the EU Treaty), and not as an abuse of dominance case.

The CMA continued to take infringement decisions relating to online sales restrictions, particularly in the music sector. For example, Fender and Roland were fined £4.5 million and £4 million, respectively, for resale price maintenance (**RPM**) regarding online sales of guitars (Fender) and electronic drum kits (Roland).[13] In a separate RPM case relating to the digital piano, digital keyboard and guitar sectors, the CMA chose to impose a fine on the reseller, whereas in

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9 https://www.catribunal.org.uk/sites/default/files/2020-11/1366_Facebook_%20judgment_%5B2020%5D_CAT_23_131120_0.pdf

10 https://www.catribunal.org.uk/sites/default/files/2021-05/%5B2021%5D%20EWCA%20Civ%20701%20Facebook%20v%20CMA.pdf

11 https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19

12 https://www.gov.uk/government/news/cma-fines-comparethemarket-17-9m-for-competition-law-breach

13 https://assets.publishing.service.gov.uk/media/5e79d8aed3bf7f52efedfcad/20200320_50565-3_-_DECISION.pdf, https://assets.publishing.service.gov.uk/media/5f171ab43a6f40727ebfb440/Non-confidential_infringement_decision.pdf

most RPM cases, it has tended to impose a fine only on the supplier which imposes the RPM policy on its resellers.[14]

The Court of Appeal also confirmed that the CMA had correctly found that Ping's ban of online sales of its golf clubs constituted a restriction of competition by object.[15] Although the Court of Appeal recognised Ping's legitimate interest in ensuring that golf clubs sold were suitable for is customers, it did not accept that a complete ban on internet sales could be justified.

The CMA also reached various infringement decisions in the pharmaceutical sector, relating to non-compete arrangements,[16] market sharing and price fixing[17] and information exchange.[18]

The CMA continued to seek disqualification for directors of companies that have infringed competition law. For example, disqualifications were agreed or imposed in two estate agents price fixing cases[19] and pharmaceutical market sharing cases.[20] The disqualification periods ranged from 5 years to 7 years.

In an important judgment relating to collective competition damages actions, on 11 December 2020, the Supreme Court dismissed an appeal by Mastercard against a ruling of the Court of Appeal that had annulled the CAT's refusal to grant a collective proceedings order (**CPO**).[21] The claim arose out of the European Commission's 2007 decision that Mastercard had breached competition law by fixing a default 'interchange fee' as part of its payment card schemes between 1992 and 2007. Mr, Merricks issued a collective proceedings claim against Mastercard, arguing that the difference between the interchange fee banks would have paid but for Mastercard's breach of competition law, and the interchange fee that they did in fact pay, is an 'overcharge' which retailers paid to their banks and which retailers then passed onto their customers, resulting in higher prices for goods and services. Mr. Merricks sought to bring the collective proceedings as the class representative on behalf of all UK resident adult consumers of goods and services

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14 https://assets.publishing.service.gov.uk/media/5f5749eae90e070997bc8efa/GAK_decision_-_web_-.pdf

15 [2020] EWCA Civ 13 (21 January 2020)

16 https://assets.publishing.service.gov.uk/media/5f746219e90e0740c86c7611/50455_Non-confidential_Public_Decision_.pdf

17 https://assets.publishing.service.gov.uk/media/5f115b4dd3bf7f5baab7a5e4/Market_Sharing_Decision.pdf

18 https://assets.publishing.service.gov.uk/media/5ef469bcd3bf7f7142efc039/Information_Exchange_Decision.pdf

19 https://www.gov.uk/government/news/estate-agent-directors-disqualified-for-roles-in-illegal-cartel and Competition and Markets Authority v Michael Christopher Martin ([2020] EWHC 1751 (Ch)).

20 https://www.gov.uk/government/news/pharma-company-director-disqualified-for-competition-law-breaches

21 Mastercard Incorporated and others v Walter Hugh Merricks CBE [2020] UKSC 51.

purchased in the UK during the infringement period from retailers accepting Mastercard, unless the consumer opts out. Clearly, this is a very broad class. The CAT had declined to certify the claim by making a CPO.

On appeal, the Supreme Court concluded that the CAT should not have denied the CPO due to difficult quantification issues, noting that courts frequently have to deal with difficult issues in calculating damages. The court must do its best on the available evidence. Justice required that damages be quantified in order to vindicate a claimant's rights, especially where anti-competitive conduct may not otherwise be restrained if individual consumers are in practice unable to bring claims.

The case has been remitted to the CAT for it to re-consider the CPO application. The Supreme Court's judgment seems likely to facilitate collective competition damages actions in the UK courts. Among other collective competition cases, two rival cases are currently pending for certification before the CAT relating to the European Commission foreign exchange cartel decisions.[22]

D. DOMINANCE

On 10 March 2020, the Court of Appeal largely dismissed an appeal by the CMA against the CAT's annulment of its 2016 infringement decision finding that Pfizer and Flynn had each abused a dominant position by charging excessive and unfair prices for phenytoin sodium capsules (an anti-epilepsy drug).[23] The Court of Appeal agreed with the CAT that the case should be remitted back to the CMA for reconsideration of whether abuses had occurred following very significant price increases. Among other things, the Court of Appeal found that the CMA's approach had been unduly rigid by relying solely on a cost plus analysis as to the unfairness of a price and essentially ignoring evidence on comparator products. The Court of Appeal did however agree with the CMA that it was not necessary for it to establish a hypothetical benchmark price.

[22] Case 1329/7/7/19 Michael O'Higgins v Barclays Bank plc etc., and Case 1336/7/7/19 Phil Evans v Barclays Bank plc etc.

[23] https://www.bailii.org/ew/cases/EWCA/Civ/2020/339.pdf, [2020] EWCA Civ 339, Case No: C3/2018/1847 & 1874.

The Government announced that a Digital Markets Unit (**DMU**) would be set up to enforce a new code governing the behaviour of powerful online platforms like Google and Facebook.[24] This followed a CMA online platforms market study which found that existing laws did not effectively regulate concerns such as weak competition and the degree of control that users have over how their personal data is used.[25] The DMU has since been established within the CMA and it is intended that it will oversee a new regulatory regime for the most powerful digital firms. The Government has committed to consulting on proposals for the new regime in 2021 and to introducing the necessary legislating when parliamentary time allows.[26]

[24] https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated

[25] https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

[26] https://www.gov.uk/government/collections/digital-markets-unit

XVII. UNITED STATES*

A. TECH INDUSTRY SCRUTINY

Despite disruption from the global Coronavirus pandemic, antitrust issues remained high on the political and enforcement agenda throughout 2020. In addition to the ongoing work of the U.S. antitrust agencies in reviewing major transactions and prosecuting cartels, there has been a focus on antitrust enforcement in the digital economy in Congress, and federal and state antitrust enforcement agencies. This focus has led to the initiation of litigation against Facebook and Google and will likely prompt other cases in the coming years.

The House Judiciary Committee's Antitrust Subcommittee conducted an in-depth investigation of digital markets in 2020, including a series of hearings which culminated in the publication of a landmark report ("House Report").[1] The House Report argued that the large tech firms—Amazon, Facebook, Apple, and Google—each possess significant market power over large swaths of the U.S. economy, and that each company has expanded and exploited that power in anticompetitive ways.[2] The Report makes a wide variety of broad-ranging recommendations, including imposing structural and line-of-business separations between digital platforms and their downstream businesses[3] and discouraging mergers resulting in 30 percent or more market share or acquisitions of nascent competitors.[4] The Report also recommends new regulation in the areas of non-discrimination, data portability, and interoperability, including an access regime for platforms that are essential facilities.[5]

Shortly after the release of the House Report, the U.S. Department of Justice Antitrust Division ("DOJ"), in conjunction with eleven state Attorneys General, filed a long-expected lawsuit against Google in federal district court.[6] The complaint alleges that Google has unlawfully maintained monopolies in the search and search advertising markets through anticompetitive and exclusionary practices.[7] Such practices include requiring Google be the preset default general search engine on mobile devices and computers worldwide, prohibiting preinstallation of

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1 Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial & Admin. Law of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

2 *Id.* at 6.

3 *Id.* at 378-81.

4 *Id.* at 388, 396.

5 *Id.* at 382, 384.

6 Press Release, Dep't of Justice, Justice Dep't Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws (The DOJ is joined in the action by the states of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas.).

7 *Id.*

competitor search engines, and bundling Google apps.[8] The European Commission made similar allegations against Google in 2018, resulting in a fine of €4.34 billion for abusing the dominance of its Android mobile phone operating system.[9] Google has responded that the DOJ's lawsuit is "deeply flawed" and "would do nothing to help consumers," arguing that it "would serve only to artificially prop up lower-quality alternatives, raise phone prices," and hinder consumer access to desired search services.[10] In November, Google told the Court that it would not file a motion to dismiss, but fight the case going forward on the merits.

2020 also saw significant private litigation against tech companies. In *Epic Games, Inc. v. Apple, Inc.*,[11] Epic, the maker of the popular game Fortnite, brought antitrust litigation against Apple for removing it from the Apple App Store. Epic had allowed users to use its in-app currency for in-app purchases, bypassing Apple's app store payment system and its 30% fee. Apple removed the Fortnite app from its app store on the grounds that Epic breached its contract with Apple by bypassing the App Store payment system. In addition, Apple suspended Epic's access to developer tools.

Epic sought a preliminary injunction, arguing that Apple monopolized phone applications via its "exclusive distribution through the iOS App Store, and the in-app purchase ("IAP") system through which Apple takes 30% of certain IAP payments."[12] The court denied the preliminary injunction to reinstate Fortnite to the app store but granted the preliminary injunction as to reinstating Epic's access to developer tools pending trial.[13] The trial was completed in the first half of 2021.

In *FTC v. Qualcomm*,[14] the Ninth Circuit overturned a district court injunction requiring Qualcomm to license its chips on fair, reasonable, and non-discriminatory ("FRAND") terms. Notably, the DOJ filed an amicus brief in the 9th Circuit, urging the appeals court to overturn the district court decision (and thereby the Federal Trade Commission's ("FTC") theory of harm). The Ninth Circuit held that Qualcomm did not have a duty to deal and the FTC did not sufficiently establish that Qualcomm engaged in anticompetitive behavior.[15]

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8 *Id.*

9 Press Release, Eur. Comm'n, Antitrust Comm'n Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

10 Press Release, Google, A Deeply Flawed Lawsuit That Would Do Nothing To Help Consumers (Oct. 20, 2020), https://blog.google/outreach-initiatives/public-policy/response-doj.

11 *Epic Games, Inc. v. Apple Inc.*, 493 F. Supp. 3d 817 (N.D. Cal. 2020).

12 *Id.* at 827.

13 *Id.* at 853.

14 *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

15 *Id.* at 1005.

B. MERGER ENFORCEMENT

The U.S. Federal antitrust agencies, the FTC and the DOJ continue to be active in reviewing and enforcing mergers. In fiscal year 2019, the federal antitrust agencies received 2,089 premerger notification filings under the Hart-Scott-Rodino Act (commonly referred to as "HSR filings"), a slight decrease of one percent from the previous year.[16] Of these filings, the antitrust agencies took action in 21 of the proposed mergers.[17] In these 21 actions, ten were decided by consent decrees, 9 were abandoned or restructured, and two resulted in proceedings in federal court.[18] Based on informal figures published by the FTC's Premerger Notification Office, there were 2,023 HSR filings in 2020, with several enforcement actions filed.

The antitrust agencies brought several merger enforcement actions on a nascent competitor or potential competition theory. The theory of harm in these cases is that large competitors are purchasing smaller or potential competitors to prevent future competitive threats. According to this theory, purchasing nascent competitors will decrease innovation and prevent future competitive constraints on the acquiring firm. The FTC pursued six such cases in 2020 – BMS/Celgene, Illumina/PacBio, Altria/Juul, Edgewell/Harry's, Ossur/College Park, and Abbvie/Allergan.[19] The FTC required divestitures in three of these cases, two were abandoned by the parties, and one case is ongoing.[20] The FTC is likely to continue challenging mergers under this theory.

The DOJ also initiated a merger enforcement action based on a nascent competition theory. In Sabre/Farelogix, the DOJ challenged Sabre's acquisition of Farelogix in the airline ticket booking industry, arguing that it would "eliminate a disruptive competitor that has introduced new technology to the travel industry and is poised to grow significantly."[21] The District Court rejected the DOJ's theory, holding that the proposed acquisition did not violate the Clayton Act. Despite this victory for the parties in the United States, the United Kingdom's Competition and Markets Authority held that the acquisition would be anticompetitive and the parties abandoned the merger.[22]

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16 Federal Trade Comm'n & U.S. Dep't of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2019 1 (July 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf. The fiscal year covers the period from October 1, 2018 to September 30, 2019.

17 *Id.* at 2.

18 *Id.*

19 Ian R. Conner, Bureau of Competition, Fed Trade Comm'n, "A Fiscal Year Like No Other" (Oct. 6, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/10/fiscal-year-no-other.

20 *Id.*

21 U.S. DEP'T OF JUSTICE, Justice Department Sues to Block Sabre's Acquisition of Farelogix (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

22 Sabre Corp. v. Competition and Markets Authority (2021) No. 1345/4/12/20, ¶ 4–5 (Competition Appeal Tribunal), https://www.catribunal.org.uk/sites/default/files/2021-05/1345_Sabre_Judgment_210521.pdf.

In addition, 2020 saw the resolution of a challenge by several states to a merger that had been cleared by the DOJ. *New York v. Deutsche Telekom AG*[23] was a high-profile challenge to the merger of wireless telecommunication carriers, Sprint and T-Mobile, brought by a group of 13 states and the District of Columbia. The United States Federal Communications Commission ("FCC") and the DOJ conducted lengthy reviews and ultimately cleared the transaction subject to conditions. However, the states disagreed and brought their own proceedings claiming that the merger was anticompetitive. After a bench trial, the District Court for the Southern District of New York denied the states' request to enjoin the merger. A key factor in the District Court's decision was the parties' efficiencies claims. Despite skepticism about the "efficiencies defense" expressed by some other courts, the Court stated that it considered the evidence of efficiencies "given courts and federal regulators' increasingly consistent practice of doing so."[24] Another important aspect of the decision was the proposed divestiture of business units and spectrum to DISH, designed to facilitate DISH's entry as a fourth national carrier.[25] This divestiture had been agreed with the DOJ and FCC, neither of which opposed the transaction. The decision provides useful perspectives on the types of evidence that can be persuasive, as well as the impact of efficiencies and planned divestitures on the ultimate analysis.

C. VERTICAL MERGER GUIDELINES

The federal antitrust agencies released new Vertical Merger Guidelines in 2020.[26] The agencies released draft guidelines in January, held public workshops and received comments, and then issued revised guidelines in June. The last guidance on vertical mergers dated from 1984 and no longer reflected agency practice.

The three primary theories described are foreclosure and raising rivals' costs, access to competitively sensitive information, and facilitating collusion. The guidelines also cover harms from mergers that increase the cost of entry into a relevant market; mergers that disadvantage rivals through the acquisition of a complementary product; and "diagonal" mergers, i.e., those that combine firms or assets at different stages of competing supply chains.

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[23] *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020).

[24] *Id.* at 208.

[25] *Id.* at 226–29.

[26] FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, VERTICAL MERGER GUIDELINES (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

D. CRIMINAL LIABILITY FOR NO POACH AGREEMENTS

The DOJ has begun to focus aggressively on pursuing enforcement, including criminal charges, for violations in labor markets. The DOJ had announced in 2016 that it would pursue criminal prosecutions of no-poach and wage-fixing agreements,[27] and that commitment was reiterated by the DOJ leadership in 2019.[28] In December 2020, the DOJ filed its first criminal prosecution of a wage-fixing agreement among employers, charging an executive at a physical therapist staffing company with conspiring with its competitors to suppress wages for physical therapists.[29]

E. IMPACT OF COVID

The 2020 COVID-19 pandemic impacted all sectors of the U.S. economy, including antitrust enforcement. In response to pandemic-related restrictions, the federal antitrust agencies made practical adjustments, such as e-filing and remote depositions. In March 2020, when much of the country went into lockdown, the federal antitrust agencies issued a statement outlining a temporary expedited procedure for the agencies to provide guidance on their enforcement intentions with respect to collaborations to address aspects of the COVID-19 pandemic.[30] The DOJ provided positive guidance to two such collaborations: one to expedite and increase manufacturing, sourcing, and distribution of personal-protective equipment and medication;[31] and the second concerning the manufacture of monoclonal antibodies that may be developed to treat COVID-19.[32]

F. PHARMACEUTICAL INDUSTRY LITIGATION

The antitrust agencies were active in pursuing cases in the pharmaceutical industry. For example, the FTC filed a suit in *Impax Labs v. FTC* alleging that Impax engaged in "pay for delay"

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[27] FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE ANTITRUST GUIDANCE FOR HUMAN RESOURCES PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[28] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), https://www.justice.gov/atr/video/opening-remarks-makan-delrahim-assistant-attorney-general-antitrust-public-workshop.

[29] Indictment, US v. Jindal, No. 4:20-cr-358, (Dec. 9, 2020), ECF 1, https://www.justice.gov/atr/case-document/file/1344601/download.

[30] FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, JOINT ANTITRUST STATEMENT REGARDING COVID-19 (Mar. 24, 2020), https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19.

[31] M. Delrahim, Response to McKesson Corporation, Owens & Minor, Inc., Cardinal Health, Inc., Medline Industries, Inc., and Henry Schein, Inc. Business Review Request Pursuant to COVID-19 Expedited Procedure (Apr. 4, 2020), https://www.justice.gov/atr/page/file/1266511/download.

[32] M. Delrahim, Response to Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK Business Review Request Pursuant to COVID-19 Expedited Procedure (July 23, 2020), https://www.justice.gov/atr/page/file/1297161/download.

which violated Section 5 of the FTC Act.[33] Specifically, the FTC focused on a settlement agreement with a "no authorized generic" provision.[34] This provision is an agreement of the branded manufacturer not to launch its own generic version of the drug to compete with other generic manufacturers after the expiration of the branded manufacturer's patent exclusivity. The Commission held that the agreement was unlawful. The Fifth Circuit recently upheld the FTC's ruling on appeal.[35]

The DOJ was also active in the pharmaceutical industry, prosecuting generic pharmaceutical companies and executives for alleged price fixing. This includes using Deferred Prosecution Agreements, which allows the charged company to continue to participate in federal health care programs. The generic manufactures prosecuted by the DOJ for alleged price fixing include Sandoz, Apotex, Glenmark, Taro, and Teva.

In addition, two civil antitrust litigations confronted the issue of "pay-for-delay" settlements in the pharmaceutical industry. In *Glumetza*[36] and *Staley*,[37] the courts considered settlements between a branded and generic manufacturer with a no authorized generic provision (similar to the provision at issue in *Impax*). In both cases, the court denied defendants' motion to dismiss as to this provision.

G. NEW ANTITRUST LEGISLATION

Congress considered revising and enacting new antitrust legislation in 2020. Senator Amy Klobuchar introduced legislation in March 2020 that would amend the Clayton Act to prohibit exclusionary conduct. Specifically, the bill would shift the burden of proof for companies with substantial market power to establish that their exclusionary conduct does not harm competition.[38] It would also eliminate the requirement for plaintiffs to plead a relevant market.[39] Currently, there are other proposals and legislation being considered to amend or revise antitrust law.

2020 was a Presidential election year in the U.S., including a change of in 2021. With the Democratic Party having control of Congress, there is the potential for major legislative changes, as well as changes in agency enforcement policy, in the antitrust laws over the next several years.

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[33] FEDERAL TRADE COMM'N, U.S. Court of Appeals for the Fifth Circuit Upholds FTC's Opinion against Generic Pharmaceutical Company Impax Laboratories, LLC (Apr. 13, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/us-court-appeals-fifth-circuit-upholds-ftcs-opinion-against.

[34] *Id.*

[35] *Impax Labs., Inc. v. FTC*, 994 F.3d 484 (2021).

[36] *In re Glumetza Antitrust Litig.*, No. C 19-05822 WHA, 2020 WL 1066934 (N.D. Cal. Mar. 5, 2020).

[37] *Staley v. Gilead Scis., Inc.*, 446 F. Supp. 3d 578 (N.D. Cal. 2020)

[38] Senator Amy Klobuchar, Press Release, Klobuchar Introduces Legislation to Deter Anticompetitive Abuses (Mar. 10, 2020), https://www.klobuchar.senate.gov/public/index.cfm/2020/3/klobuchar-introduces-legislation-to-deter-anticompetitive-abuses.

[39] *Id.*