

The Year in Review

Volume 51 *International Legal Developments*
Year in Review: 2016

Article 5

January 2017

International Antitrust

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Recommended Citation

Miguel del Pino et al., *International Antitrust*, 51 ABA/SIL YIR 45 (2017)
<https://scholar.smu.edu/yearinreview/vol51/iss1/5>

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International Antitrust

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This Article summarizes important developments in 2016 in international antitrust law in Argentina, Australia, Brazil, Canada, China, European Union, India, Japan, Korea, South Africa, United Kingdom, and the United States.

I. Argentina¹

A. LEGISLATIVE DEVELOPMENTS

In March, the new Administration of the Argentine Antitrust Commission (Commission) was appointed. The new President of the Commission is Esteban Greco, an economist who worked on several antitrust matters before joining the authority. Four new members have also been appointed: María Fernanda Vicens, Marina R. Bidart, Pablo Trevisan and Eduardo Stordeur.²

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

B. MERGERS

In 2016, the number of notifiable merger transactions continued to increase due to the devaluation of the Argentine Peso. The USD 200,000,000 threshold that was set out in 1999 (when the Antitrust Law was enacted) is currently equivalent to approximately USD 13,000,000. Due to the significant workload from these transactions, there has been a great delay and the timeframe for review has increased. However, with the new Administration, the review timeframe decreased from thirty-six months to an average of approximately twenty-four to thirty months (even in non-

1. The section on Argentina was authored by Miguel del Pino, Marval, O'Farrell & Mairal.

2. Pursuant to Executive Order No. 1190/2016 issued on November 22, 2016, the members of the Commission have the title of undersecretary. See Decreto 1190/2016, Nov. 22, 2016, B.O. (Arg.).

material transactions with minimum or no overlaps). In 2016, the Commission cleared fifty transactions, while no rulings imposing remedies or rejecting transactions were issued.

Regarding merger control analysis, the proposed amendment to the current Antitrust Law would principally entail (1) an increase of the merger control thresholds and the amounts for exemptions and fines, (2) a suspensory system, (3) the inclusion of a filing fee, (4) the participation of third parties, and (5) a fast track procedure for simple notification dockets.³

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On September 1, 2016, the Commission issued Resolution No. 18,⁴ requesting Prisma Medios de Pago S.A. and its shareholders (namely, the most important banks in Argentina and Visa International Inc.) to explain alleged antitrust conduct.

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

In addition to this investigation, the Commission has ordered the commencement of other market investigations in the following industries: (1) aluminum, (2) steel, (3) petrochemical, (4) mobile communications, (5) oil, (6) milk, (7) meat, (8) detergents, (9) passenger ground transportation, (10) air transportation, (11) supermarkets, and (12) pharmaceuticals.⁵

D. COURT DECISIONS

The Federal Court of Appeals of the City of Comodoro Rivadavia's decision that overturned the Commission's decision ordering almost all car

3. See Alfaro Abogados, *August 2016 Newsletter: The Argentine Antitrust Agency Will Be Sending to Congress a Bill to Introduce Positive Amendments to the Antitrust Law*, available at http://www.theworldlawgroup.com/wlg/Antitrust_Competition.asp.

4. See Org. for Econ. Co-operation and Dev. [OECD], *Latin American and Caribbean Competition Forum Session III: Addressing Competition Challenges in Financial Markets (Contribution of Argentina)* (Mar. 23, 2017), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2017\)13&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2017)13&docLanguage=En).

5. See Esteban Pablo Ropolo, *The Argentine Antitrust Commission Initiates an Investigation Against Credit Card Issuers*, LEXOLOGY GLOBAL COMPLIANCE NEWS (Sept. 6, 2016), <http://www.lexology.com/library/detail.aspx?g=58853e3a-5d88-433c-a8c9-534f1a356360> ("The market investigation is only one of the eleven market investigations initiated by the Antitrust Commission under its new leadership (other investigations include the meat market, the laundry soaps market, mobile telecommunications market and passenger transport market, among others)").

terminals active in Argentina to pay the highest fine ever for price fixing is still under review.⁶

II. Australia⁷

A. LEGISLATIVE DEVELOPMENTS

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

In 2016, Australian Government released “Exposure Draft Legislation” (*Competition and Consumer Amendment (Competition and Policy Review) Bill 2016*), aimed at implementing the majority of the Harper Review recommendations.⁸

Significantly, the Exposure Draft purports to amend section 45 of the *Competition and Consumer Act (CCA)* to provide that a corporation must not “engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect of substantially lessening competition.” This language will replace the presently narrower iteration of section 45, which requires “contracts, arrangements or understandings” to demonstrably affect competition before attracting liability.⁹

Further, the Bill included an “effects test” to the “misuse of market power” under section 46 of the *CCA*. The amended section prohibits corporations with a “substantial degree of [market] power” from engaging in conduct that “has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.”¹⁰ This will replace the current section 46 test, which requires that corporations “take advantage” of their substantial market power for some illegal purpose.

Legislation amending section 46 of the Act was introduced into Parliament on December 1, 2016, with the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*, while the additional

6. Julián Peña & Federico Rossi, *Argentina—Court of Appeals Revokes Highest Cartel Fine Imposed by Argentina’s Antitrust Authority* (Dec. 2015), http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Publications.aspx.

7. The section on Australia was authored by Elizabeth M Avery and Sally Kirk, Gilbert & Tobin.

8. *Exposure Draft – Competition and Consumer Amendment* (Competition Policy Review) Bill 2016 (Austl.), https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments/supporting_documents/Exposure_Draft.pdf.

9. Elizabeth Avery, Simon Muys, & Matt Rubinstein, *Rethinking the Competition and Consumer Act: Exposure Draft Legislation Lays Groundwork for the Most Significant Change in a Generation*, GILBERT & TOBIN INSIGHTS (Dec. 9, 2016), <https://www.gtlaw.com.au/insights/rethinking-competition-and-consumer-act-exposure-draft-legislation-lays-groundwork-most-significant>.

10. *Competition and Consumer Act 2010* (Cth) § 46 (Austl.).

amendments contained in the Exposure Draft are set to be finalized in early 2017.¹¹

B. MERGERS

During 2016, the Australian Competition and Consumer Commission (“ACCC”) made thirty-one informal merger clearance decisions¹² and provided six “public competition assessments.” Generally, such assessments are made when a merger is rejected, but also may occur when an application is approved subject to enforceable undertakings, or raises issues that the ACCC considers in the public interest.¹³ The ACCC did not oppose any of the six assessment applications, and only three were approved subject to enforceable undertakings.¹⁴

On February 18, 2016, the ACCC announced it would no longer oppose the acquisition of Cova Parts by GPF Asia Pacific Pty Ltd (GPC) from Automotive Holdings Group Limited (AHG).¹⁵ Previously, in December 2015, the ACCC rejected GPC’s original proposal, but accepted that a revised version, made subject to the attachment of a section 87B enforceable undertaking, would be unlikely to contravene section 50 of the CCA (prohibiting acquisitions likely to have the effect of “substantially lessening competition” in any market). Accordingly, the transaction was modified to exclude store acquisitions in certain areas.

In the Australian Competition Tribunal, a total of eleven decisions were delivered in 2016. Only one authorization application was made and granted, namely, Sea Swift’s proposed acquisition of Northern Territory and far north Queensland marine freight business, Toll Marine Logistics Australia. The Tribunal handed down this decision on July 1, 2016, following the ACCC’s opposition to an informal clearance application in July 2015.¹⁶ The authorization, granted subject to conditions on “public

11. Scott Morrison, *Delivering Strengthened Competition Law – Section 46 Legislation Introduced*, TREASURER OF THE COMMONWEALTH OF AUSTRALIA (Dec. 1, 2016), <http://sjm.ministers.treasury.gov.au/media-release/125-2016/>.

12. AUSTRALIAN COMPETITION & CONSUMER COMM’N (ACCC), *Public Competition Assessments*, <http://registers.acc.gov.au/content/index.phtml/itemId/751043/year/2016> (last visited Apr. 8, 2017).

13. *Id.*

14. *See id.*

15. ACCC, *Public Competition Assessment: GPC Asia Pacific Pty Ltd – Proposed Acquisition of Cova Parts From Automotive Holdings Group Limited* (Mar. 23, 2016), <http://registers.acc.gov.au/content/index.phtml/itemId/501191>.

16. Luke Woodward, Gina Cass-Gottlieb, Genevieve Rahman & Petria Lewis, *Australian Competition Tribunal Authorises Sea Swift’s Acquisition of Toll’s Marine Freight Assets*, GILBERT & TOBIN INSIGHTS (Apr. 7, 2016), <https://www.gtlaw.com.au/australian-competition-tribunal-authorises-sea-swifts-acquisition-tolls-marine-freight-assets>; *See also* AUSTRALIAN COMPETITION & CONSUMER COMM’N, *ACCC Opposes Sea Swift Pty Ltd’s Proposed Acquisition of Toll Marine Logistics*, MR 118/15 (July 9, 2015), <https://www.acc.gov.au/media-release/acc-opposes-sea-swift-pty-ltd%E2%80%99s-proposed-acquisition-of-toll-marine-logistics>.

benefits” grounds, marked only the second Tribunal determination of a merger authorization application since this avenue was introduced in 2007.¹⁷

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2016, the ACCC also commenced proceedings against two global shipping companies, Nippon Yusen Kabushiki Kaisha (NYK) and Kawasaki Kisen Kaise (K-Line), alleging cartel conduct in the transportation of vehicles from Japan to Australia between 2009 and 2012.¹⁸ These are the first two criminal proceedings brought pursuant to the criminal cartel provisions introduced in 2009 under the *Competition and Consumer Act 2010* (Cth). While NYK pled guilty to its charges on 18 July 2016,¹⁹ K-Line has not yet entered any plea, receiving a first mention in court on 15 November 2016. Sentencing for NYK is scheduled for April 2017.

In February, the Federal Court also delivered its trial judgment in the “Egg Cartel Case.” This case involved allegations by the ACCC that the Australian Egg Corporation Limited (AECL), as well as prominent egg suppliers, Farm Pride and Twelve Oaks Poultry, engaged in cartel behaviour to maintain high prices, and thwart oversupply of eggs in the market.²⁰ Justice White of the Federal Court dismissed the case, ruling that, although the defendants “intended” that members of the AECL would take action to address the oversupply, there was no attempt to induce any agreement or understanding involving culling hens or otherwise disposing of surplus eggs (as was alleged).²¹ The ACCC subsequently appealed; judgment was reserved at the time of writing.

D. DOMINANCE

In April, \$18.6 million in penalties were ordered against Cement Australia Pty Ltd. and related companies for entering into anti-competitive “flyash”

17. Woodward, Cass-Gottlieb, Rahman & Lewis, *supra* note 16.

18. The Queen v Nippon Yusen Kabushiki Kaisha [2016] NSW (Austl.), <http://www.australiancompetitionlaw.org/cases/current/2016-nsd1143-nyk.html>.

19. Elizabeth Avery, Chris Boyd, Gina Cass-Gottlieb, Steven Glass, Andrew Floro & Stephanie Wee, *Japanese Shipping Company NYK Pleads Guilty to Criminal Cartel Conduct in Inaugural Australian Prosecution*, GILBERT & TOBIN INSIGHTS (July 21, 2016), <https://www.gtlaw.com.au/insights/japanese-shipping-company-nyk-pleads-guilty-criminal-cartel-conduct-inaugural-australian-prosecution>; Rebecca Thurlow, *Japanese Shipping Company NYK Pleads Guilty to Criminal-Cartel Conduct in Australia’s Federal Court*, WALL ST. J. (July 17, 2016), <https://www.wsj.com/articles/japanese-shipping-company-nyk-pleads-guilty-to-criminal-cartel-conduct-in-australian-court-1468810382?mg=id-wsj>.

20. ACCC, *ACCC Takes Action Following Alleged Egg Cartel Attempt* (May 28, 2014), <https://www.accc.gov.au/media-release/accc-takes-action-following-alleged-egg-cartel-attempt>.

21. Sarah Danckert, *Judge Scrambles ACCC’s Egg Cartel Case*, SYDNEY MORNING HERALD (Feb. 10, 2016), <http://www.smh.com.au/business/consumer-affairs/judge-scrambles-acccs-egg-cartel-case-20160210-gmqira.html>.

agreements, in contravention of section 45 of the CCA.²² Justice Greenwood, in the Federal Court of Australia, found that contracts entered between the parties had the purpose and effect of preventing competitors from entering the concrete market, and thus, of substantially lessening competition.²³ In this case, the ACCC also alleged that the same conduct amounted to a misuse of market power under the current iteration of section 46 of the CCA. However, this claim was dismissed, as there was insufficient evidence to show that the defendants were “taking advantage” of their substantial market power. This was the only instance of alleged misuse of market power in 2016.

III. Brazil

A. LEGISLATIVE DEVELOPMENTS

On 6 September 2016, the Administrative Council for Economic Defense (CADE) published a new resolution establishing a deadline of thirty days to complete the analysis of fast-track merger filings.²⁴ Although the General Superintendence of the agency previously observed the deadline informally, the new provision provides for more legal certainty and predictability in the timing of clearance. On October 18, 2016, CADE also approved a new resolution regarding the notification of associative agreements, which are commercial contracts—generally between competitors and vertically related players—that require pre-merger notification in Brazil if certain conditions are met.²⁵ The great innovation of Resolution No. 17/2016 is the removal of the vertical relationship threshold for notification, observed, for instance, in supply and distribution agreements. It means that from November 2016 on, only certain commercial agreements between competitors will require antitrust clearance.

The third amendment on the regulation in 2016 relates to how CADE defines the relevant business activities’ revenues that will be used to calculate fines. Resolution 3, in force since 2012, provides a list of activities defendants should consider to calculate their revenues that will serve as basis for fine calculation (fines resulting from convictions for anticompetitive

22. Media Release, ACCC, *ACCC Appeals Cement Australia Level of Penalties* (June 6, 2016), <https://www.accc.gov.au/media-release/accc-appeals-cement-australia-level-of-penalties>.

23. Media Release, ACCC, *\$18.6 Million Penalties Ordered Against Cement Australia Companies For Anti-Competitive Flash Agreements* (Apr. 29, 2016), <https://www.accc.gov.au/media-release/186-million-penalties-ordered-against-cement-australia-companies-for-anti-competitive-flyash-agreements>.

24. Resolução No. 16, de 1 de Setembro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.9.2016 (Braz.), http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?NMVKAaTPZCcA-E_-x95f1SHaQ8ki5cBEA8QINRGQF44sW-07Q0WLpuBsOxNy-tVe-toJFAG_3jA1jj5dQOyMpa.

25. Resolução No. 17, de 18 de Outubro de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 18.10.2016 (Braz.), http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?ssjK4QTNM7ViqHpNE_48iLwuyZi8GbS8y0qA8QG-4hgSOtYmh59AA8GGKDFAgD1vCoXBwp2SQL6YqZEwffSBQA.

practices). CADE realized that because the existing definitions were too broad, the resulting fines were not necessarily proportionate. The new rule affords CADE more flexibility when applying Resolution 3, if they view fines as disproportionate or unfair.

B. MERGERS

On 30 March 2016, Fedex/TNT, the deal that created the largest global delivery services company and faced strong opposition from the competitor UPS, was unconditionally approved by CADE after a long review period (161 days).²⁶ CADE also approved the joint venture among broadcast TV companies SBT, Record, and RedeTV.²⁷

The new company will create and distribute TV content, channels, and programs, as well as license the digital signal for pay-TV operators. As a condition for clearance, parties agreed to behavioral remedies,²⁸ including committing to invest in content and subsidize small and medium operators.

CADE has also approved the acquisition of HSBC by Bradesco, subject to a settlement of behavioral remedies, and also the acquisition of the sexual well-being business by Reckitt Benckiser from Hypermarcas, conditioned to the divestment of the K-Y brand of personal lubricants in Brazil.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In July 2015, following several other jurisdictions, CADE opened what is internationally known as the “Forex investigation,” related to the manipulation of foreign exchange rates. The inquiry started based on a Leniency Agreement.²⁹

In 2016, CADE opened five inquiries related to the so called “Car Wash Operation,” in addition to two proceedings that began in 2015.³⁰ CADE’s General Superintendent has told the press that over 30 inquiries involving the Car Wash Operation are currently under scrutiny. So far, only seven of them have been made public. They involve public tenders related to: onshore platforms; construction of a nuclear power plant (“Angra III”) and of a hydroelectric plant; railways; urbanization projects; large size buildings; and soccer stadiums.

26. Ato de Concentração No. 08700.009559/2015-12, de 30 de março de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.4.2016 (Braz.).

27. Ato de Concentração No. 08700.006723/2015-21, de 22 de junho de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.6.2016 (Braz.).

28. Ato de Concentração No. 08700.010790/2015-41, de 17 de junho de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.6.2016 (Braz.).

29. Recesso Administrativo No. 08700.004633/2015-04, de 1 de julho de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.7.2015 (Braz.).

30. See, e.g., CONSELHO ADMINISTRATIVO DE DEFENSA ECONOMICA (CADE), *Within the Scope of the Car Wash Operation, CADE Investigates Another Cartel in Petrobras Public Bids Leniency Agreement* (last updated Dec. 6, 2016 2:33 PM), <http://en.cade.gov.br/press-releases/within-the-scope-of-the-car-wash-operation-cade-investigates-another-cartel-in-petrobras-public-bids>.

Two important cartel convictions took place in February 2016: the chemical company Solvay was fined BRL17.4 million for taking part in an international cartel in the sodium-perborate market, which would have affected the Brazilian market. The investigation was opened following a leniency agreement signed between CADE and Evonik Degussa. The second one relates to bid rigging in public tenders for laundry services in Rio de Janeiro. The fines imposed totaled R\$27.3 million. CADE has also prohibited the company Brasil Sul Industria e Comércio—deemed the cartel leader—from contracting with Government entities for the five year period.³¹

D. DOMINANCE

In February, CADE convicted three port operators (Tecon Salvador and Tecon Rio Grande—both part of the Wilson Sons Group—and Intermarítima Terminais) for imposing abusive port storage fees, applying the combined fine of R\$10.6 million.³²

Also in 2015, CADE convicted Eli Lilly for the practice of sham litigation, imposing a fine of R\$36,679,586.16.³³ CADE took the view that Eli Lilly managed to sustain a monopoly of an active ingredient used in pharmaceuticals for cancer treatments, by preventing the entry of competitors and by means of numerous court actions in multiple jurisdictions.

E. COURT DECISIONS

A lawsuit related to the merger between the chocolate companies Nestle and Garoto, which lasted approximately eleven years, is finally about to end, after an out of court settlement reached between CADE and the parties. The merger took place in 2002 and was fully rejected by CADE in 2005, when parties decided to challenge the decision in Court. CADE, Nestlé, and Garoto agreed on late remedies to end judicial discussions (remedies agreed were deemed confidential and have not been made public).³⁴

31. CADE, *Cade Condemns Bids for Hospital Laundries in Rio* (last updated Mar.3, 2016 12:44 PM), <http://webcache.googleusercontent.com/search?q=cache:http://www.cade.gov.br/noticias/cade-condena-cartel-de-licitacoes-de-lavanderias-hospitalares-no-rio>.

32. CADE, *Cade Fines Ports of Salvador (BA) and Rio Grande (RS) for Abuse of Dominant Position* (last updated Apr. 18, 2016 3:12 PM), <http://webcache.googleusercontent.com/search?q=cache:http://www.cade.gov.br/noticias/cade-multa-portos-de-salvador-ba-e-rio-grande-rs-por-abuso-de-posicao-dominante>.

33. Processo Administrativo No. 08012.011508/2007-91, de 24 de junho de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.6.2015 (Braz.).

34. Eric Kroh, *Nestle Reaches Deal with Brazil to Complete Garoto Buy*, LAW360.COM (Oct. 5, 2016), <https://www.law360.com/articles/848511/nestle-reaches-deal-with-brazil-to-complete-garoto-buy>.

IV. Canada³⁵

A. LEGISLATIVE DEVELOPMENTS

In September 2016, the federal government introduced Bill C-25,³⁶ which, when passed, will amend the affiliation rules in the Competition Act (Act)³⁷ to treat partnerships, trusts, sole proprietorships, and non-incorporated business entities similarly to how corporations are treated.

The Competition Bureau (Bureau) also released new Intellectual Property Enforcement Guidelines, providing guidance regarding the Bureau's enforcement approach to product switching, patent assertion entities, patent settlements, and standard essential patents.³⁸

B. MERGERS

Several high profile transactions cleared in 2016 without remedies.³⁹ Following abandonment by the parties, the Bureau withdrew its challenge of Staples' proposed acquisition of Office Depot⁴⁰ and cleared Superior Plus' acquisition of Canexus based on efficiencies.⁴¹

35. The section on Canada was authored by Adam S. Goodman, Dentons Canada LLP.

36. An Act to Amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-For-Profits Corporation Act and the Competition Act, Bill C-25, 1st Sess., 42nd Parl. (2015-2016) (Can.).

37. Competition Act, R.S.C. 1985, c. C-34 (Can.).

38. COMPETITION BUREAU CANADA (CCB), *Enforcement Guidelines: Intellectual Property* (Mar. 31, 2016), [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/cb-IPEG-e.pdf/\\$file/cb-IPEG-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapi/cb-IPEG-e.pdf/$file/cb-IPEG-e.pdf).

39. See CCB, *Competition Bureau Backgrounder Regarding the Proposed Acquisition by Shaw of WIND* (Feb. 4, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04027.html>; Position Statement, CCB, *Competition Bureau Statement Regarding the Proposed Acquisition by Lowe's of RONA* (May 12, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04085.html>; Press Release, CCB, *Competition Bureau Satisfied That Proposed Sale of St-Hubert Will Not Limit Consumer Choice* (May 18, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04089.html>; Position Statement, CCB, *Competition Bureau Statement Regarding Anheuser-Busch InBev's Proposed Acquisition of SABMiller and the Concurrent Divestiture of Certain Miller Brands to Molson Coors* (May 31, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04097.html>; Position Statement, CCB, *Competition Bureau Statement Regarding the Proposed Amalgamation of Modular Space Corporation and Williams Scotsman International, Inc.* (June 23, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04107.html>; Press Release, CCB, *Competition Bureau Does Not Oppose Hydro One's Acquisition of Great Lakes Power* (July 8, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04115.html>.

40. Press Release, CCB, *Competition Bureau Withdrawing its Court Challenge of Staples' Acquisition of Office Depot* (May 19, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04080.html>.

41. The efficiencies defence was established in Canada notwithstanding a challenge by the FTC in the United States and the subsequent abandonment of the transaction by the parties. See Position Statement, CCB, *Competition Bureau Statement Regarding Superior's Proposed Acquisition of Canexus* (June 28, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html>.

The Bureau obtained six gas station divestitures from Parkland regarding its acquisition of Pioneer;⁴² six local divestitures from Iron Mountain regarding its acquisition of Recall;⁴³ two pharmaceutical product divestitures from Teva regarding its acquisition of Allergan;⁴⁴ three location/asset divestitures from Crop Production Services (CPS) regarding its acquisition of WendlandAg;⁴⁵ four location divestitures from CPS again regarding its acquisition of Andrukow Group Solutions;⁴⁶ two gas station/supply agreement divestitures from Harnois regarding its acquisition of Therrien's gasoline supply agreements;⁴⁷ and two gas station divestitures from Couche-Tard regarding its acquisition of gas stations from Imperial Oil.⁴⁸

C. CARTELS AND OTHER ANTICOMPETTIVE PRACTICES

2016 saw further guilty pleas related to the Québec construction industry, related to bid-rigging for sewer services,⁴⁹ as well as to bid-rigging for a private ventilation contract.⁵⁰

Concerning the ongoing auto parts investigation, Shinowa was fined \$13 million by the Ontario Superior Court of Justice for bid-rigging related to

42. Press Release, CCB, Competition Bureau and Parkland Reach Mediated Resolution That Will See Gas Stations and Assets Sold in Ontario and Manitoba (Mar. 29, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04049.html>; Commissioner of Competition v. Parkland Industries Ltd. and Parkland Fuel Corp. (2016), Consent Agreement, Comp. Trib., File No. CT-2015-003 (Can.), http://www.ct-tc.gc.ca/CMFiles/CT-2015-003_Registered%20Consent%20Agreement_113_38_3-29-2016_2824.pdf.

43. Position Statement, CCB, *Competition Bureau Statement Regarding Iron Mountain's Acquisition of Recall* (Mar. 31, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04055.html>.

44. Position Statement, CCB, *Competition Bureau Statement Regarding Teva's Acquisition of Allergan's Generic Pharmaceuticals Business* (Apr. 28, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04065.html>.

45. Position Statement, CCB, *Competition Bureau Statement Regarding the Acquisition of WendlandAg's Agri-product Retail Locations by CPS* (May 2, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04070.html>.

46. Position Statement, CCB, *Competition Bureau Statement Regarding CPS' Proposed Acquisition of Andrukow* (Sept. 1, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04135.html>.

47. Position Statement, CCB, *Competition Bureau Statement Regarding Le Groupe Harnois Inc.'s Proposed Acquisition of Distributions Petrolieres Therrien Inc.'s Gasoline Supply Arrangements* (June 23, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04106.html>.

48. Position Statement, CCB, *Competition Bureau Statement Regarding Couche-Tard's Proposed Acquisition of Retail Gasoline Sites from Imperial Oil* (Sept. 7, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04137.html>.

49. Press Release, CCB, Quebec Company Fined \$118,000 For Participating in Sewer Services Cartel (Feb. 8, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04028.html>.

50. Press Release, CCB, Bid-Rigging Scheme Leads to \$140,000 Fines for Quebec Company and its President (Mar. 14, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04042.html>.

electronic power steering gears.⁵¹ Nishikawa Rubber pled guilty and was fined USD \$130 million in the United States related to sales in both Canada and the US.⁵²

D. ABUSE OF DOMINANCE

In April 2016, the Competition Tribunal (Tribunal) found that the Toronto Real Estate Board (TREB) had engaged in abuse of dominance by restricting access to and use of proprietary Multiple Listing Service data, adversely affecting innovation, quality, and range of real estate brokerage services in Toronto.⁵³ Although TREB did not itself compete in the adversely affected market,⁵⁴ the Tribunal found that it had a “plausible competitive interest” in protecting some of its members from new entrants in that market.⁵⁵ Following this decision, the Bureau commenced an application against the Vancouver Airport Authority for restricting access for the supply of in-flight catering at Vancouver International Airport, another market in which the alleged dominant firm did not compete.⁵⁶

In 2016, the Bureau closed its investigation into Google’s online search services⁵⁷ and TMX Group’s restrictions on market data.⁵⁸

E. COURT DECISIONS

In 2015, the Ontario Court of Appeal ruled that the “discoverability” principle⁵⁹ applied to private actions for damages based on the breach of the cartel conspiracy provisions of the Act, potentially extending the time to

51. Press Release, CCB, Japanese Auto Parts Company Fined \$13 Million for Participating in a Bid-Rigging Conspiracy (Apr. 1, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04058.html>.

52. Press Release, CCB, Unprecedented Cooperation with US Antitrust Enforcement Authority Leads to Major Cartel Crackdown (July 20, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04122.html>.

53. Commissioner of Competition v. Toronto Real Estate Board, 2016 Comp. Trib. 7, para. 2, 3, 4 (Can.). .

54. *Id.* ¶1.

55. *Id.* ¶ 279-80.

56. Press Release, CCB, Competition Bureau Takes Action Against Vancouver Airport Authority (Sept. 29, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04144.html>.

57. Position Statement, CCB, *Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by Google* (Apr. 19, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html>.

58. Position Statement, CCB, *Competition Bureau Statement Regarding its Investigation into Alleged Anti-Competitive Conduct by TMX Group Limited* (Nov. 21, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04157.html>.

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

advance claims.⁶⁰ In the same case, the court also ruled that the statutory cause of action in the Act did not foreclose the ability of the plaintiff to claim damages pursuant to tort law.⁶¹

In certifying the cathode ray tube class action, the Ontario Superior Court of Justice held that “umbrella” purchasers (who purchased alleged cartelized products from non-defendants) had valid causes of action against the named defendants pursuant to restitutionary law.⁶²

V. China⁶³

A. LEGISLATIVE DEVELOPMENTS

In 2016, the Draft Amendment of the PRC Anti-Unfair Competition Law (the law hereinafter the “AUCL”, the draft amendment hereinafter the “Draft Amendment”) passed State Council review and is anticipated to be adopted as law during 2017.⁶⁴ Notably, the Draft Amendment introduces two controversial new unfair competition behaviors, i.e., abuse of superior market position and unfair competition involving the internet.

B. MERGERS

In the first three quarters of 2016, the Ministry of Commerce (“MOFCOM”) unconditionally cleared 259 merger cases,⁶⁵ including 197 cases under its simple case procedure.⁶⁶ Most cases under the simplified procedure were cleared within phase I of the statutory review period.

In 2016, MOFCOM imposed conditions only on one merger case, while also lifting conditions previously imposed in another case. In SABMiller/Anheuser-Busch InBev, MOFCOM required that SABMiller divest its 49% interest in China Resources Snow Breweries to its JV partner.⁶⁷ This is the first MOFCOM published decision distinguishing relevant product markets

60. See *id.*

61. See *id.* ¶ 85.

62. *Fanshawe College v. Hitachi, Ltd. et al.*, 2016 ONSC 5118, paras. 46-47 (Can. Ont. Sup. Ct. J.).

63. This section on China was authored by Peter Wang & Yizhe Zhang, China.

64. See (中华人民共和国反不正当竞争法(修订草案送审稿)) [Draft Amendment of PRC Anti-Unfair Competition Law] (promulgated by State Council Legis. Office, Feb. 25, 2016) (China).

65. *The List of Concentration Cases Approved by the Operators in the First Quarter of 2016*, MOFCOM (Apr. 6, 2016 3:51 PM), <http://fldj.mofcom.gov.cn/article/zcfb/201604/20160401290524.shtml>; *The List of Concentration Cases Approved by the Operators in the Second Quarter of 2016*, MOFCOM (July 5, 2016 2:16 PM), <http://fldj.mofcom.gov.cn/article/zcfb/201607/20160701353023.shtml>; *The List of Concentration Cases Approved by the Operators in the Third Quarter of 2016*, MOFCOM (Oct. 10, 2016 8:48 AM), <http://fldj.mofcom.gov.cn/article/zcfb/201610/20161001405824.shtml>.

66. *Operators Focused on Simple Cases*, MOFCOM (last visited Apr. 15, 2017), <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/>.

67. See *Ministry of Commerce Announcement No. 38 of 2016*, MOFCOM (July 29, 2016 6:21 PM), <http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml>.

based on mass versus mid-to-high-end brands and defining geographic markets according to individual Chinese provinces rather than as China-wide.

MOFCOM published three penalty decisions for transactions that were not properly notified. Two of those cases involved joint ventures,⁶⁸ while the third involved gun-jumping in a two-step acquisition.⁶⁹ In all three cases, MOFCOM found that the unnotified transactions did not give rise to competition concerns, and thus only imposed fines and did not require reversal of the transactions.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2016, the National Development and Reform Commission (“NDRC”), the antitrust authority responsible for price-related conduct violations, issued large fines in several high-profile cases, including: (1) a fine of RMB 12 million against Haier for restricting the minimum resale price, in a case where the NDRC explicitly cited as evidence screenshots of text and chat messages contained on employees’ personal devices;⁷⁰ (2) a fine of RMB 2.96 million against five natural gas suppliers, including two subsidiaries of China National Petroleum Corp., for abusing their dominant positions in the construction of non-residential natural gas networks in local markets;⁷¹ (3) a fine of RMB 1,686,900 against Chongqing Qingyang Pharmaceutical and a fine of RMB 118,300 against Chongqing Datong Pharmaceutical for price fixing and market division,⁷² where the NDRC regarded the two affiliated companies as single economic entity due to their common largest shareholder and common sales manager.

The State Administration of Industry and Commerce (“SAIC”), the antitrust authority responsible for non-price-related conduct violations, fined Tetra Pak RMB 667.7 million for abuse of dominant market position.

68. See *Ministry of Commerce Administrative Penalty Decision (Commercial Law [2016] No. 174*, MOFCOM (May 4, 2016 2:15 PM), <http://fdj.mofcom.gov.cn/article/zxxx/201605/201605013111081.shtml>; *Ministry of Commerce Administrative Penalty Decision (Commercial Law [2016] No. 175*, MOFCOM (May 4, 2016 2:11 PM), <http://fdj.mofcom.gov.cn/article/zxxx/201605/20160501311092.shtml>.

69. See *Ministry of Commerce Administrative Penalty Determination Letter (Commercial Law [2016] No. 173*, MOFCOM (May 4, 2016 2:03 PM), <http://fdj.mofcom.gov.cn/article/zxxx/201605/201605013111079.shtml>.

70. See *Shanghai Municipal Bureau of Price Administration on the Decision on the Administrative Penalty (Chongqing, Japan and Japan Daily Necessities Sales Co., Ltd. Shanghai Branch, and Three Other Companies*, NAT’L DEV. & REFORM COMM’N (Aug. 12, 2016 10:21 AM), <http://www.shdrc.gov.cn/fzgggz/jgg/l/jghzcfjds/24137.htm?sukkey=3997c0719f151520d9d8ab22467f976c98c4d515fe7612d065f5b252164f77246e2681dc3fe38a088feeff499b492570>.

71. See Press Release, NDRC, Hubei Provincial Price Bureau on the Five Natural Gas Company Price Monopoly Punishment (July 12, 2016), http://www.sdpc.gov.cn/xwzx/xwfb/201607/t20160712_8111004.html.

72. See *Decision of the National Development and Reform Commission on Administrative Punishment [2016] No. 1*, NAT’L DEV. & REFORM COMM’N (Feb. 2, 2016), http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201602/t20160202_774116.html.

This is the highest fine imposed by SAIC to date, representing 7 percent of Tetra Pak's relevant sales in China during 2011. The accused conduct included incentives that Tetra Pak employed—performance testing, warranty limitations, accumulative volume discounts, and customized purchase requirements—to encourage customers owning or leasing Tetra Pak packaging equipment to also purchase Tetra Pak's packaging materials and aftermarket services.⁷³

D. COURT DECISIONS

As of November 28, 2016, courts nationwide had published 611 unfair competition and antitrust decisions, fifteen of which were issued under the Anti-Monopoly Law (“AML”).⁷⁴

In *Yingding v. Sinopec*, plaintiff Yunnan Yingding Bio-energy, a privately-owned bioenergy manufacturer, alleged that Sinopec, a major state-owned oil company, and its Yunnan branch abused their dominant market position by refusing to incorporate plaintiff's biofuel into Sinopec's distribution system without justification. In 2014, the Kunming Intermediate People's Court ruled in favor of the plaintiff. In 2015, the Yunnan High People's Court reversed the first-instance decision and remanded the case.⁷⁵ In 2016, the Kunming Intermediate People's Court rejected all the plaintiff's claims, finding no abuse of dominance on the grounds that (1) although the defendants had a duty to purchase biofuel from the plaintiff under the energy laws, the lack of implementing rules regarding the sales amount, price, and methods had rendered the defendants practically unable to establish a transactional relationship with the plaintiff, so defendants did not violate such duty by refusing to do so because their refusal to deal was due to objective reasons; and (2) there was no competition relationship between the parties regarding the sales of biofuel so the defendants' conduct did not give rise to negative effect on competition.⁷⁶

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

73. See *State Administration for Industry and Commerce Administrative Penalty Decision (Industrial and Commercial Case [2016] No. 1)*, SAIC (Nov. 16, 2016), http://www.saic.gov.cn/zwgk/gggs/jzzf/201611/t20161116_172375.html.

74. See CHINA REFERENCE DOCUMENTS NETWORK, <http://wenshu.court.gov.cn/>.

75. See *Yingding v. Sinopec* (Yunnan Higher People's Ct. Aug. 13, 2015) (China), available at http://www.pkulaw.cn/case/pfnl_1970324845016952.html?keywords=%E4%BA%91%E5%8D%97%E7%9B%88%E9%BC%8E&match=Exact&tiao=1.

76. See *Yunnan Trench Oil Biodiesel Private Enterprises in the Petrochemical Refusal to Resume Trial Will Still Appeal*, XINHUA NEWS AGENCY (Nov. 26, 2016 4:50 PM), http://news.xinhuanet.com/legal/2016-11/02/c_1119837390.htm.

between Abbott and Carrefour.⁷⁷ Therefore, the plaintiff did not establish that he suffered loss from his purchase of Abbott product at Carrefour as a result of Abbott's violation of the AML.

VI. European Union⁷⁸

A. LEGISLATIVE DEVELOPMENTS

Aside from facing the unprecedented challenge of handling the UK's Brexit vote, the European Commission (EC) has continued other policy efforts this year. It released the preliminary results of its sector inquiry into online commerce and digital markets, finding that obstacles remain to achieving a borderless EU-wide marketplace and signaling the potential for follow-up enforcement.⁷⁹ The EC also encouraged national governments to speed up efforts to bring their legal systems in line with EU principles before the end of the year, to further facilitate antitrust damage litigation.⁸⁰

B. MERGERS⁸¹

The ongoing wave of telecom transactions has continued to attract close scrutiny after the EC blocked Hutchison's proposed acquisition of Telefonica UK, a decision which Hutchison is challenging before the EU courts. The EC cleared the proposed Italian joint venture between Vimpelcom and Hutchinson, as well as Belgian operator Telenet's takeover of BASE, but only after in-depth investigations and securing fix-it-first divestments to allow for the creation of new market operators. The deals also further fueled the broader political debate on pan-European telecom integration.

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

77. See Junwei TIAN v. Abbott (Beijing Higher People's Ct. Nov. 4, 2016) (China), available at <http://wenshu.court.gov.cn/content/content?DocID=7ad234f9-cfdc-453a-ae0a-a8f22dc22004>.

78. The section on the European Union was authored by Laurie-Anne Grelier & Peter Camesasca, Covington & Burling.

79. Margrethe Vestager, Comm'r, *E-commerce: A Fair Deal for Consumers Online*, Speech at the Stakeholder Conference on Preliminary Findings of the E-commerce Sector Inquiry (Oct. 6, 2016), available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/e-commerce-fair-deal-consumers-online_en.

80. Margrethe Vestager, Comm'r, *Defending Competition throughout the EU*, Speech at the Eur. Competition Day (Nov. 23, 2016), available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/defending-competition-throughout-eu_en.

81. See *Merger Cases*, Eur. Comm'n, <http://ec.europa.eu/competition/mergers/cases/> (listing merger cases starting from Sept. 21, 1990).

C. ANTI-COMPETITIVE PRACTICES

Cartel fine levels broke new records as the EC imposed fines totaling 2.9 billion (approximately US\$3.2 billion) against five companies allegedly involved in the Trucks cartel case, the largest amount fined in a single case. The EC has issued three other cartel decisions thus far in 2016, levying fines totaling nearly 150 million (approximately US\$167 million).⁸²

The EC also issued its first decision on the controversial issue of price signaling since the Wood Pulp setback more than 20 years ago. It accepted commitments from 14 container shipping carriers to modify their public price announcements, and closed its investigation without making any infringement determination.⁸³

D. ABUSES OF A DOMINANT POSITION

Continuing investigations against Google that it commenced in 2010, the EC supplemented its initial charges against the technology company by forming a preliminary conclusion that Google had favoured its own internet comparison shopping products in search result pages. The EC also issued new charges targeting the company's practices towards third parties in online search advertising.⁸⁴

E. COURT DECISIONS

In the first EU judgment on reverse-payment patent settlements, the General Court (GC) upheld the EC's 146 million fine (approximately US\$162 million) against Lundbeck and four generic producers for agreements allegedly aimed at delaying generic entry for citalopram. The GC found that the agreements amounted to market sharing between rivals, such that the EC did not need to demonstrate that they adversely affected competition.⁸⁵

The EU's highest court, the Court of Justice, clarified in *VM Remonts* the conditions under which companies can be accountable for their independent agents' anticompetitive actions.⁸⁶ It also gave guidance in *Eturas* to assess

82. Press Release, Comm'r Vestager, Statement by Commissioner Vestager on decision to fine truck producers 2.93 billion for participating in a cartel (Jul. 19, 2016), available at http://europa.eu/rapid/press-release_STATEMENT-16-2585_en.htm.

83. Press Release, Eur. Comm'n, Antitrust: Commission accepts commitments by container liner shipping companies on price transparency (Jul. 7, 2016), available at http://europa.eu/rapid/press-release_IP-16-2446_en.htm.

84. Press Release, Eur. Comm'n, Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules (Jul. 14, 2016), available at http://europa.eu/rapid/press-release_IP-16-2532_en.htm.

85. Case T-472/13, H. Lundbeck A/S and Lundbeck Ltd. v. Comm'n, EU:T:2016:449, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183148&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=389862>.

86. Case C-542/14, SIA 'VM Remonts', formerly SIA 'DIV un KO' and SIA 'Ausma grupa', v. Konkurences padome, and Konkurences padome, v. SIA 'Pärtikas kompānija', EU:C:2016:578,

competitor coordination through online platforms and the platform provider's facilitator role.⁸⁷

VII. India⁸⁸

A. LEGISLATIVE DEVELOPMENTS

This year witnessed a number of measures to further liberalize merger provisions. The Government extended the target based *de minimis* exemption from filing for acquisitions, while also increasing the thresholds. The regular merger notification thresholds contained in the *Competition Act* were also enhanced substantially. The Government additionally exempted groups exercising less than 50% of voting rights from the application of section 5 of the *Competition Act*.⁸⁹ The Competition Commission of India (CCI) amended its merger regulations to clarify the conditions for the exemption from filing for minority acquisitions, provide parties a right of hearing before invalidation of a filing, further ease the filing process, and clarify the trigger document for filing in the absence of a binding agreement.⁹⁰

B. CARTELS AND OTHER AGREEMENTS

After the Competition Appellate Tribunal (COMPAT) set aside fines imposed by the CCI on cement companies on procedural grounds last year, the CCI re-heard the parties and issued a fresh decision. This decision imposed penalties of USD 1 billion on ten cement companies and their trade association for indulging in price-fixing and sharing of commercially sensitive information.⁹¹ Trade associations continued to be on the CCI's radar as it imposed penalties for controlling entry into the market on a chemist and druggist association in Karnataka. Lupin, a pharmaceutical

available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=181950&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=397904>.

87. Case C-74/14, 'Eturas' UAB and Others v. Lietuvos Respublikos konkurencijos taryba, EU:C:2016:42, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=173680&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=447079>.

88. The section on India was authored by Vinod Dhall and Mansi Tewari.

89. Ministry of Corporate Affairs, 2016, Gazette of India, pt. II sec. 3(ii) (Mar. 4, 2016), <http://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf>.

90. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016, Gazette of India, pt. III sec. 4 (Jan. 7, 2016), http://www.cci.gov.in/sites/default/files/regulation_pdf/167506.pdf.

91. *In re: Alleged Cartelisation by Cement Manufacturers (2016) RTPE No. 52 of 2006*, MRTPE Comm'n, available at http://cci.gov.in/sites/default/files/522006_1.pdf.

company was also penalized in this case for entering into an anti-competitive agreement with the association.⁹²

C. MERGERS

The CCI imposed a hybrid remedies package as a condition for approval of PVR's proposed acquisition of multiplex/single screen cinema halls from DT Cinemas. Apart from directing the parties to exclude certain assets from the scope of the deal, the CCI imposed commitments on the parties, including an undertaking not to expand in the affected relevant markets for five years, modification of the non-compete clause, and removal of a right of first offer to PVR for the seller's future projects.⁹³

D. DOMINANCE

The CCI initiated an investigation against the Gas Authority of India Limited for alleged abuse of dominance by imposing one-sided and discriminatory terms in its dealings with customers.⁹⁴

E. COURT DECISIONS

The Delhi High Court brought much needed clarity on the issue of interaction between patent law and competition law by ruling that the CCI has jurisdiction to investigate cases of abuse of dominance by standard essential patent holders. It also noted that although the two overlap to some extent, there is no irreconcilable conflict between patent law and competition law in India.⁹⁵

The CCI suffered setbacks when the COMPAT set aside several of its decisions, both on procedural and substantive grounds. The CCI's penalty of USD 258 million imposed on Coal India for abuse of dominance was set aside on due process grounds, as a few members of the CCI who signed the order were not present during the hearings. COMPAT also set aside the

92. *M/s Maruti & Company v. Karnataka Chemists & Druggists Association and Others* (2016) Case No. 71 of 2013, Competition Comm'n of India, at 38, 43-44, available at <http://www.cci.gov.in/sites/default/files/712013.pdf>.

93. Notice under Section 6(2) of the Competition Act, 2002 given by PVR Ltd., 2016, C-2015/07/288, at 5-6 of Appendix-A, available at http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-07-288.pdf.

94. *In Re: Rico Auto Industries Limited, In Re: Omax Autos Limited, In Re: Omax Autos Limited, In Re: Rico Auto Industries Limited, In Re: Rico Castings Limited v. GAIL (India) Limited* (2016) Cases No. 16, 17, 18, 19 and 20 of 2016, Competition Comm'n of India, at 4, 13-14, available at http://www.cci.gov.in/sites/default/files/Case%2016-20_2016%20S%2026%281%29%2003102016.pdf.

95. *Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Comm'n of India and Another, W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014*, at 129-30, 161, High Ct. of Delhi (Mar. 30. 2016), <http://lobis.nic.in/ddir/dhc/VIB/judgement/30-03-2016/VIB30032016CW4642014.pdf>.

penalties on Sanofi and GlaxoSmithKline for alleged bid rigging, due to the lack of sufficient evidence.⁹⁶

VIII. Japan⁹⁷

A. LEGISLATIVE DEVELOPMENTS

In May, the Japan Fair Trade Commission (JFTC) amended the “Guidelines Concerning Distribution Systems and Business Practices Under the *Antimonopoly Act*” to broaden the scope of conduct that falls within the “safe harbor”⁹⁸ of the Guidelines. According to the new guidelines, some types of non-price related restrictions on distributors (such as restrictions on selling competitive products and area of distribution) will not be illegal if they are imposed by a business entity which is a new entrant in the market or which has a market share of 20% or less.⁹⁹

B. MERGERS

In 2016, the JFTC cleared two cases after Phase II review without conditions: the acquisition of shares by Osaka Steel in Tokyo Kohtetsu, and the business alliance between Nippon Paper Industries and Tokushu Tokai Paper.¹⁰⁰ Several other Phase II cases, including the contemplated business integration between JX Group and Tonen General Group,¹⁰¹ are still pending as of the date of this writing.

96. Competition Appellate Tribunal New Delhi, In the Matter of GlaxoSmithKline Pharmaceuticals Ltd. v. Competition Comm’n of Ind., Bio-Med (P) Ltd., Sanofi Pasteur Ind. Private Ltd., & Director General (Stores), Medical Store Depot, Ministry of Health and Family Welfare, Appeal No. 85/2015 at 144-46 (Nov. 8, 2016), *available at* <http://compat.nic.in/Judgements.aspx>.

97. The section on Japan was authored by Shigeyoshi Ezaki, Anderson Mori & Tomotsune.

98. Prior to the amendment, the safe harbor was a market share of less than 10% and ranking lower than 4th place in the relevant market. See Jones Day, *Partial Amendments to the “Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act”*, JAPAN LEGAL UPDATE, July 2016, vol. 16, <http://www.jonesday.com/files/Publication/4cb3f87f-5e37-448e-b2d0-17f048aaf296/Presentation/PublicationAttachment/40b908ba-be8f-4a21-a8f5-3149cc2de755/Japan%20Legal%20Update%20July%202016.pdf>.

99. Press Release, Secretary General of the Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act, at 34 (May 27, 2016), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2016/May/160527.files/160527_2.pdf.

100. See Press Release, Japan Fair Trade Comm’n, The JFTC Reviewed the Proposed Acquisition of Shares of Tokyo Kohtetsu Co., Ltd. by Osaka Steel Co., Ltd. (Jan. 28, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/January/160128.html>; See also Press Release, Japan Fair Trade Comm’n, The JFTC Reviewed the Proposed Transactions including Establishment of Joint Selling Company for Containerboards etc by Nippon Paper Industries Co., Ltd. and Tokushu Tokai Paper Co., Ltd. (Mar. 18, 2016), *available at* <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160318.html>.

101. Press Release, Japan Fair Trade Comm’n, The JFTC Opens Secondary Review Concerning the Proposed Business Integration Between JX Group and TonenGeneral group

In June, the JFTC made an unusual statement on Canon's acquisition of share options in Toshiba Medical Systems, stating that the acquisition was part of an entire acquisition scheme. As Canon failed to notify the JFTC of the acquisition, the JFTC considered that such activity could lead to a possible violation of the *Antimonopoly Act*. Though the JFTC decided not to impose a penalty in this case, it issued a caution to Canon and warned companies to notify the JFTC prior to entering similar transactions.¹⁰²

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March, the JFTC imposed administrative fines of approximately JPY 6.7 billion to five out of seven manufacturers of aluminum and tantalum electrolytic capacitor products that were investigated for cartel conduct.¹⁰³ This is the only decision JFTC issued in 2016 that involved an international cartel.

In November, the JFTC made an announcement that the conduct of One-Blue LLC, a patent pool of standard essential patents (SEPs) relating to Blu-ray discs, constituted an unfair trade practice under the Antimonopoly Act.¹⁰⁴ According to the JFTC, One-Blue, whose patent holders declared that they will license the SEPs on FRAND terms but were not able to reach a license-fee agreement with Imation (a manufacturer of Blu-ray discs), unlawfully interfered in the transactions between Imation and its distributors in Japan. One-Blue's conduct involved sending letters to these distributors, warning that the patent holders had a right to demand an injunction against them. The JFTC, however, merely made the above announcement and did not issue an order against One-Blue, as it had discontinued the conduct in question.

D. COURT DECISIONS

In January, the Tokyo Appellate Court rejected an appeal from Samsung SDI (Malaysia) Bhd. in a cartel case relating to the production and sale of television cathode-ray tubes (CRTs) by foreign companies such as Samsung.¹⁰⁵ Samsung disputed the JFTC's ability to apply the *Antimonopoly*

and Solicits Comments from Third Parties (Mar. 30, 2016), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160330.html>.

102. Press Release, Japan Fair Trade Comm'n, Regarding the proposed acquisition of shares of Toshiba Medical Systems Corporation by Canon Inc. (Jun. 30, 2016), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2016/June/160630.html>.

103. Press Release, Japan Fair Trade Comm'n, The JFTC Issues Cease and Desist Orders and Surcharge Payment Orders to the Manufacturers Selling Aluminum Electrolytic Capacitor and Tantalum Electrolytic Capacitor (Mar. 29, 2016), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160329.html>.

104. Press Release, Japan Fair Trade Comm'n, Closing the investigation on the suspected violation by One-Blue, LLC of the Antimonopoly Act (Nov. 18, 2016), available at <http://www.jftc.go.jp/en/pressreleases/yearly-2016/November/161118.html>.

105. In 2009 and 2010, the JFTC ordered administrative fines of approximately JPY 4.2 billion against six CRT manufacturers that were involved in a cartel conduct to manipulate the prices

Act to foreign companies.¹⁰⁶ The Tokyo Appellate Court ruled that the *Antimonopoly Act* was applicable because the cartel was targeting the Japanese television manufacturers who were the main purchasers of the CRTs.¹⁰⁷

IX. Korea¹⁰⁸

A. LEGISLATIVE DEVELOPMENTS

During 2016, the Korea Fair Trade (KFTC) made a series of amendments to the leniency regime in cartel investigations. As part of these changes, on March 29, 2016, the Monopoly Regulation and Fair Trade Law (FTL) was amended to introduce a new provision that denied leniency benefits to an applicant that had previously benefitted from the program in the last five years.¹⁰⁹ Effective April 15, 2016, the KFTC further amended the regime to require officers or employees of the applicant to attend the KFTC hearing and imposed non-disclosure obligations.

On July 26, 2016, the KFTC proposed to amend the Fair Transactions in Franchise Business Act to, among other things, toll the statute of limitations on claims that may be brought before judicial courts while mediation is pending.¹¹⁰

B. MERGERS

In 2016, the KFTC remained active and continued to strengthen its review of global mergers and acquisitions. During the first half of 2016, KFTC reviewed a total of 272 business combination filings totalling KRW

of CRTs. This was the first time the JFTC ordered fines against foreign companies. These orders were upheld at the subsequent hearing procedures of the JFTC. See Josh Gottlieb, *Appeals against JFTC fines for foreign CRT cartel go down the tube*, LEXOLOGY, June 8, 2015, <http://www.lexology.com/library/detail.aspx?g=67a9b94c-cd0b-450b-922b-ac138e694f1f>.

106. In 2009 and 2010, the JFTC ordered administrative fines of approximately JPY 4.2 billion against six CRT manufacturers that were involved in a cartel conduct to manipulate the prices of CRTs. This was the first time the JFTC ordered fines against foreign companies. These orders were upheld at the subsequent hearing procedures of the JFTC. See Josh Gottlieb, *Appeals against JFTC fines for foreign CRT cartel go down the tube*, LEXOLOGY, June 8, 2015, <http://www.lexology.com/library/detail.aspx?g=67a9b94c-cd0b-450b-922b-ac138e694f1f>.

107. The summary of the Jan. 29, 2016 Tokyo Appellate Court decision is found in JFTC's Feb. 9, 2016 issue, available at LEX/DB L07120373, <http://www.jftc.go.jp/houdou/merumaga/backnumber/2016/160209.html>.

108. The section on Korea was authored by Youngjin Jung & Gina Jeehyun Choi, Kim & Chang.

109. See KFTC Press Release on Monopoly Regulation and Fair Trade Law, 28 April 2016, available at http://www.ftc.go.kr/policy/legi/legiView.jsp?lgslt_noti_no=218&type_cd=&currpage=4&searchKey=&searchVal=&search_start_date=&search_end_date.

110. See KFTC Press Release on Fair Transactions in Franchise Business Act, 26 July 2016, available at http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6864&tribu_type_cd=&report_data_div_cd=&currpage=1&searchKey=&searchVal=&업결합&startdate=&enddate=.

266 trillion, of which 63 combinations (aggregate value of KRW 253 trillion) involved an overseas entity.¹¹¹

The KFTC, in conjunction with the U.S. Department of Justice and MOFCOM also probed into the proposed merger of Lam Research Corp. (“Lam”) and KLA-Tencor Corp. (“KLA-Tencor”). After nearly ten months, Lam and KLA-Tencor formally withdrew their application for approval of the business combination and called off the merger.¹¹²

In November of 2016, the KFTC imposed a corrective order regarding the asset swap deal between Boehringer Ingelheim International GmbH and Sanofi SA and ordered one of the companies to sell off its assets in Korea related to certain pet pharmaceutical products.¹¹³

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March 2016, the KFTC imposed a KRW 59 million fine against two financial institutions in Korea for colluding on foreign exchange swap bids.¹¹⁴ This was the first time the KFTC imposed a fine against banks for colluding in the foreign exchange market.

In April 2016, the KFTC imposed a combined fine of KRW 351.6 billion against thirteen construction companies, including Samsung C&T and Hyundai Engineering & Construction, for bid rigging projects to construct liquefied natural gas (LNG) tanks.¹¹⁵

D. DOMINANCE

In February 2016, the KFTC imposed a fine of KRW 3.2 billion against Incheon International Airport Corp. (“Incheon Airport”) for abusing its

111. See Press Release, KFTC, 2016년 상반기 기업결합 동향 [Trend of Business Combination – 1H 2016] (Sept. 13, 2016), available at http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6927&tribu_type_cd=&report_data_div_cd=&currpage=1&searchKey=3&searchVal=기업결합&stdate=&enddate=.

112. See Press Release, KFTC, 세계 2,5위 글로벌 반도체 제조장비 업체 간 합병 철회 건 [The Withdrawal of LAM Research-KLA Tencor Merger] (Oct. 7, 2016), available at http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6964&tribu_type_cd=&report_data_div_cd=&currpage=8&searchKey=&searchVal=&stdate=&enddate=.

113. See Press Release, KFTC, 글로벌 동물약품 제조사 간 기업결합에 시정조치 [The Boehringer Ingelheim International GmbH-Sanofi Merger] (Nov. 23, 2016), available at <http://www.ftc.go.kr/news/ftc/reportboView>.

114. See Press Release, KFTC, 외환스왑 관련 외국계은행 2개 사업자의 부당한 공동행위 건 [Foreign Exchange Swap Bid] (Mar. 15, 2016), available at http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6615&tribu_type_cd=&report_data_div_cd=&currpage=32&searchKey=&searchVal=&stdate=&enddate=.

115. See Press Release, KFTC, 한국가스공사 발주 LNG 저장탱크 건설공사 입찰 관련 13개 사업자의 [Korea Gas Corporation LNG Tank Bid Rigging Case] (Apr. 26, 2016), available at http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6701&tribu_type_cd=&report_data_div_cd=&currpage=26&searchKey=&searchVal=&stdate=&enddate=.

market dominant position against Hanjin Heavy Industries, its contractor in the development of a terminal.¹¹⁶

E. COURT DECISIONS

On August 17, 2016, the Seoul High Court overturned the corrective orders and administrative fines charged by the KFTC against three commercial freight vehicle manufacturers for allegedly colluding to fix prices.¹¹⁷

X. South Africa¹¹⁸

A. LEGISLATIVE DEVELOPMENTS

Criminal liability for certain competition law breaches was introduced in South Africa through section 73A of the Competition Amendment Act, No 1 of 2009.¹¹⁹ This law provides that directors and persons with management authority which cause a firm to engage in collusion are guilty of an offense and may be liable for a fine and/or imprisonment.¹²⁰ The amendment had been on the books, waiting for promulgation, since 2009.

The Competition Commission (Commission) published its final Guidelines on the Assessment of Public Interest Provisions in Merger Regulation.¹²¹ The guidelines are intended to clarify how the Commission will evaluate the public interest consequences of mergers (including impacts on employment).

B. MERGERS

The Competition Tribunal (Tribunal) imposed the highest administrative penalty to date for failure to notify a merger and prior implementation when it confirmed a consent agreement between the Competition Commission

116. See KFTC Press Release on Incheon International Airport's Abuse of Market Dominance Case, 23 February 2016, available at http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6579&tribu_type_cd=&report_data_div_cd=&currpage=36&searchKey=searchVal=&state=&enddate=

117. See Seoul High Court Decision, decision numbers 2014nu46951, 2014nu719 and 2014nu41239, 17 Aug. 2016.

118. The section on South Africa was authored by Lara Granville. The Author would like to thank Roxanne Bain for her assistance.

119. Proclamation No. 25 of 2016, GG 39952 (22 April 2016), available at http://www.gov.za/sites/www.gov.za/files/39952_proc25.pdf.

120. Section 73A of the Competition Amendment Act, 2009, GN 875 of GG 32533, at 16 (28 August 2009), available at http://www.gov.za/sites/www.gov.za/files/32533_875.pdf.

121. Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998, GN 309 of GG 40039 (31 May 2016), available at http://www.gov.za/sites/www.gov.za/files/40039_gen309.pdf.

and Life Healthcare Group (Proprietary) Limited and Joint Medical Holdings Limited, under which the parties agreed to pay (R10 million).¹²²

The Tribunal approved the mergers between Anheuser-Busch Inbev SA/NV and SABMiller plc (ABInbev/SABMiller)¹²³ and Coca-Cola Beverages Africa Limited and Various Coca-Cola Bottling and Related Operations (Coca-Cola).¹²⁴ Both mergers included the imposition of stringent conditions to address public interest concerns following extensive engagement with the Minister of Economic Development. In ABInbev/SABMiller, in addition to a moratorium on retrenchments which is to endure indefinitely, the merging parties undertook to invest R1 billion for the development of agricultural outputs and the promotion of black farmers in South Africa. Similarly, in Coca-Cola, the merging parties agreed to establish an enterprise development fund to which they must contribute at least R400 million.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

After many years of facing multiple competition complaints for its conduct in the flat steel, long steel, and scrap metal sectors, ArcelorMittal South Africa Limited (AMSA) agreed to settle all the complaints against it and pay an administrative penalty of R1.5 billion.¹²⁵ This amount is the largest fine for anticompetitive conduct imposed on a single company in South Africa's history. Furthermore, AMSA agreed to cap its profits over a period of five years and committed to R4.5 billion capital expenditure over the same period.

The Commission conducted several dawn raids at companies operating in the glass, packaging, and cargo shipping industries as part of its investigations into alleged anticompetitive practices.¹²⁶

122. *Competition Comm'n v. Life Healthcare Group Ltd. and Joint Medical Holdings, Ltd.* 2016, Competition Tribunal (S. Afr.), available at http://www.comptrib.co.za/cases/consent-order/retrieve_case/2056.

123. Anheuser-Busch Inbev SA/NV and Sabmiller PLC, Annexure A: Conditions, LM211JAN16(023283), Competition Tribunal at 10, 19-20, 23, available at <http://www.comptrib.co.za/assets/Uploads/INBEV/Final-Conditions-PUBLIC-VERSION-signature-document-2.pdf>.

124. Mergers and Acquisitions' Report, CT Case No. 021154, Competition Tribunal, at 118 (19 March 2015), available at <http://www.comptrib.co.za/assets/Uploads/Coca-Cola/Non-confidential%20report%20with%20additional%20confidential%20info%20redacted%20201%20...pdf>.

125. In the matter between Competition Comm'n of S. Afr. And Arcelorimttal S. Africa Ltd., CR092Jan07/SA090Aug16, Competition Tribunal at 18 (22 Aug. 2016), available at <http://www.compcom.co.za/wp-content/uploads/2016/01/AMSA-Non-Confidential.pdf>.

126. See Media Release, Competition Comm'n Raids Cargo Shipping Companies, Competition Comm'n (28 Sept. 2016), http://www.compcom.co.za/wp-content/uploads/2016/01/Media-Statement_Competition-Commission-raids-cargo-shipping-companies_28Sep16.pdf; Media Release, Competition Comm'n Raids Offices of Suppliers of Packaging Paper, Competition Comm'n (26 May 2016), <http://www.compcom.co.za/wp-content/uploads/2016/01/Competition-Commission-raids-offices-of-suppliers-of-paper-packaging-products.pdf>.

The Commission's market inquiries into the healthcare sector, the retail grocery sector and the liquid petroleum gas industry are still ongoing. The healthcare inquiry panel released papers for comment on medical schemes claims data, market definition for the financing of healthcare, and a consumer survey.¹²⁷ The retail grocery inquiry panel has received submissions on its statement of issues.¹²⁸ The Commission has released draft recommendations in the LPG inquiry.¹²⁹

D. ABUSES OF DOMINANCE

Media24 was found to have contravened section 8(c) of the Act by engaging in predatory pricing to force a rival newspaper out of the market.¹³⁰ As this was Media24's first contravention of section 8(c), an administrative penalty was not imposed. The Tribunal therefore imposed a "credit guarantee remedy" under which Media24 was to ensure that current or new participants in the relevant market shall be entitled to credit terms with an associate company of Media24. Media 24 has appealed both the finding of a contravention as well as the remedy imposed, while the Commission has lodged a cross-appeal, seeking an order that Media24 contravened section 8(d)(iv) of the Act, namely "selling goods or services below their marginal or average variable cost," rather than section 8(c). This offense triggers an administrative penalty for a first time offender.

E. Court Decisions

In August 2016, the High Court of South Africa ordered South African Airways Limited to pay R104.6 million in damages to Nationwide Airlines Proprietary Limited (Nationwide) for abusing its dominance in the airline industry and causing Nationwide's demise.¹³¹

127. *Healthcare Inquiry*, THE COMPETITION COMM'N OF S. AFR. (Nov. 18, 2016), <http://www.compcom.co.za/healthcare-inquiry/>.

128. *Retail Market Inquiry*, THE COMPETITION COMM'N OF S. AFR., <http://www.compcom.co.za/retail-market-inquiry/>.

129. *Liquefied Petroleum Gas ("LPG") Market Inquiry*, THE COMPETITION COMM'N OF S. AFR. (May 2016), <http://www.compcom.co.za/wp-content/uploads/2014/09/LPG-Market-Inquiry-recommendations-for-Comments-10052016F.pdf>.

130. Supplementary Affidavit, *In the matter between: The Competition Comm'n and Media24 Ltd.*, 92/CR/OCT11 at 3, available at <http://www.comptrib.co.za/assets/Uploads/Media24/Supplementary-Affidavit.pdf>.

131. *Nationwide Airlines (Pty) Ltd. (In Liquidation) v. South Africa Airways (Pty) Ltd.* 2016 ZAGPJHC 213, (6) SA 19 (GJ), (4) All SA 153 (GJ), <http://www.saflii.org/za/cases/ZAGPJHC/2016/213.html>.

XI. United Kingdom¹³²

A. LEGISLATIVE DEVELOPMENTS

In comparison to 2015, when the enactment of the *Consumer Rights Act 2015* substantially changed the landscape for private enforcement of competition law violations, there have been far fewer legislative developments of note. The most significant change of 2016 is yet to occur, when before December 27, 2016, the UK Government is required to implement the EU Damages Directive, which is intended to harmonize the rules governing private enforcement of competition claims across the EU.¹³³

The UK's private enforcement regime already largely conforms to the Damages Directive, but there are several areas requiring legislative changes for compliance. The most significant changes will be codifying the right of defendants to use the passing-on defense, the nature and scope of which is currently unclear under UK law, and giving courts the power to quantify harm where it is excessively difficult for a claimant to do so on the evidence. The Damages Directive also introduces a rebuttable presumption that cartels cause harm.¹³⁴

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

B. MERGERS

In July, the CMA provisionally approved Celesio's takeover of Sainsbury's 277 pharmacies (which are mostly located within Sainsbury's own supermarkets). To avoid a substantial reduction of competition, the CMA has required Celesio, which already operates around 1540 pharmacies across the UK, to sell pharmacies in twelve areas where it currently competes particularly closely with Sainsbury's for the takeover to go ahead. It may not close the pharmacies.¹³⁵

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

To date, no prosecutions have been brought under the new criminal cartel offense introduced in 2014, but in March an individual, Barry Cooper,

132. The section on the United Kingdom was authored by Jonathan Tickner & Jasvinder Nakhwal, Peters & Peters.

133. Cleary Gottlieb Steen & Hamilton, *UK Implementation of EU Antitrust Damages Directive: Significant Changes to Rules on Antitrust Damages Actions* (Jan. 25, 2017), <https://www.law.ox.ac.uk/business-law-blog/blog/2017/01/uk-implementation-eu-antitrust-damages-directive-significant-changes>.

134. *Id.*

135. Press Release, Competition and Markets Authority, Pharmacy Merger Gets Conditional Go-Ahead (July 29, 2016), <https://www.gov.uk/government/news/pharmacy-merger-gets-conditional-go-ahead>.

pleaded guilty under the old offense as part of an ongoing CMA investigation into “price-fixing and market-sharing in the supply of precast concrete drainage products.”¹³⁶ The CMA decided last year to close its other two open investigations into criminal cartels.¹³⁷

Civil penalties of £2.2m and £826,000 were imposed on a fridge supplier¹³⁸ and a bathroom supplier¹³⁹ respectively, for seeking to prevent dealers or retailers offering online discounts. In its civil investigation into a cartel relating to galvanized steel tanks, which was the subject of criminal proceedings last year, the CMA announced that three parties agreed to pay £2.6m in fines.¹⁴⁰

D. COURT CASES

In *Deutsche Bahn AG v MasterCard Incorporated*,¹⁴¹ the Court made a number of comments regarding the use of counterfactuals in competition law cases. MasterCard argued in its Defence that, absent the conduct at issue, its prices would have been no different, to which the claimants replied that this was only because MasterCard was engaging in a separate form of anti-competitive conduct, about which no complaint had been made in the original claim. The Court found that a claimant may argue that any unlawful aspects of a defendant’s conduct, including those not previously at issue, should not form part of the counterfactual, even if that conduct was not raised in the Defence. Moreover, claimants may be allowed to amend their Particulars to include time-barred allegations about unlawful aspects of the defendant’s conduct, provided any new claims arise out of facts already at issue.

136. Dr. Michael Grenfell, CMA Executive Director – Enforcement, Speech at the IFLR Competition Law Forum (Nov. 9, 2016), <https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-progress-in-enforcing-competition-law>.

137. *Id.*

138. Press Release, Competition and Markets Authority, Fridge Supplier Fined £2.2 million for Restricting Online Discounts (May 24, 2016), <https://www.gov.uk/government/news/fridge-supplier-fined-22-million-for-restricting-online-discounts>.

139. Press Release, Competition and Markets Authority, Bathroom Supplier Fined £826,000 for Restricting Online Prices (Apr. 26, 2016), <https://www.gov.uk/government/news/bathroom-supplier-fined-826000-for-restricting-online-prices>.

140. Press Release, Competition and Markets Authority, Water Tank Firms Admit Cartel and Agree to Pay £2.6 Million Fines (Mar. 21, 2016), <https://www.gov.uk/government/news/water-tank-firms-admit-cartel-and-agree-to-pay-26-million-fines>.

141. *Deutsche Bahn AG and Others v. MasterCard Inc. and Others*, [2015] 2015 EWHC 3749 (CH), available at <https://competitionlawblog.files.wordpress.com/2016/02/deutsche-bahn-ag-and-others-v-mastercard-incorporation-and-others.pdf>.

XII. United States¹⁴²

A. LEGISLATIVE DEVELOPMENTS

The House passed a bill to amend the Clayton and Federal Trade Commission Acts to align the merger review standards and processes for the Federal Trade Commission (FTC) with those of the Department of Justice Antitrust Division (DOJ).¹⁴³ The bill is now under consideration by the Senate.

B. MERGERS

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

The FTC brought district court proceedings to challenge two significant hospital mergers. In both cases, two different district courts denied the FTC a preliminary injunction on the grounds that the FTC had not met its burden to establish an appropriate geographic market.¹⁴⁴ On appeal, both decisions were overturned.¹⁴⁵ Both appellate courts endorsed the FTC's approach to geographic market definition, relying on the "hypothetical monopolist" test outlined in the agencies' Horizontal Merger Guidelines,¹⁴⁶ and stressed that in the hospital merger context the appropriate "consumers" that may be subject to immediate anticompetitive impact are insurers, not patients.

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

142. The section on the United States was authored by Lisl Dunlop, Manatt, Phelps & Phillips, LLP.

143. H.R. 2745, 114th Cong. (2015), available at <https://www.congress.gov/bill/114th-congress/house-bill/2745>.

144. Fed. Trade Comm'n. v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552, 564 (M.D. Pa. 2016), *rev'd and remanded*, 838 F.3d 327 (3d Cir. 2016); Fed. Trade Comm'n. v. Advoc. Health Care, 15 C 11473, 2016 WL 3387163, at *13 (N.D. Ill. June 20, 2016), *rev'd and remanded sub nom*; Fed. Trade Comm'n. v. Advoc. Health Care Network, 841 F.3d 460 (7th Cir. 2016).

145. Fed. Trade Comm'n. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 353-54 (3d Cir. 2016); Fed. Trade Comm'n. v. Advoc. Health Care Network, 841 F.3d 460, 476 (7th Cir. 2016).

146. *Horizontal Merger Guidelines* (August 19, 2010), U.S. Dep't of Justice & Fed. Trade Comm'n., at 8, available at <http://ftc.gov/os/2010/08/100819hmg.pdf>; see *Penn State*, 838 F.3d at 336; *Advoc. Health*, 841 F.3d at 473.

as Medicare Advantage plans.¹⁴⁷ Those cases are being tried in two district court proceedings in late 2016.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The DOJ has focused its criminal antitrust enforcement on domestic investigations in industries such as public real estate foreclosure and tax lien auctions, water treatment chemicals, heir location services, and online poster sales. The DOJ also continues to investigate and prosecute companies and executives for conspiracies in several global industries: automotive parts; cathode ray tubes; capacitors; LIBOR; and “roll-on, roll-off” ocean cargo.

Overall, in 2016 DOJ collected approximately \$400 million in fines, obtained guilty pleas for jail terms for individual corporate executives, and obtained a number of criminal indictments for both individuals and corporations. The DOJ continues to make identifying and punishing culpable individuals a high priority.¹⁴⁸

D. COURT DECISIONS

American Express successfully appealed a district court decision ruling that the company’s “anti-steering” rules violated antitrust law.¹⁴⁹ The Second Circuit Court of Appeals said that the lower court incorrectly focused on the impact of the restrictions on merchants without considering the benefits American Express delivers to consumers. The DOJ and plaintiff states have sought a rehearing en banc.

The Second Circuit also vacated a \$147 million district court judgment against two Chinese companies relating to the Vitamin C cartel at the request of the Chinese Ministry of Commerce. The Second Circuit said that “courts are bound to grant deference to a foreign government’s interpretation of its own laws and that the lower court abused its discretion by asserting jurisdiction in the case.”

147. See *Justice Department and State Attorneys General Sue to Block Anthem’s Acquisition of Cigna, Aetna’s Acquisition of Humana*, (July 21, 2016), Dep’t of Justice, <https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s>.

148. *Deputy Assistant Attorney General Brent Snyder Delivers Remarks at the Yale Global Antitrust Enforcement Conference* (Feb. 21, 2016), Dep’t of Justice, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.

149. The anti-steering rules prohibited merchants from encouraging customers to use credit cards other than American Express. See *U.S. v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

