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International Antitrust

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International Antitrust

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Antitrust

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This article outlines the year's most important antitrust developments in twelve jurisdictions.

I. Argentina

A. LEGISLATIVE DEVELOPMENTS

The Argentine Antitrust Commission ("Commission") has remitted an antitrust bill ("Bill") to Congress that is expected to pass it in 2018.¹

B. MERGERS

One of the most important modifications introduced by the Bill is the creation of a new merger control system that (i) increases the amounts of the notification threshold and the *de minimis* exemption; (ii) seeks to reduce review timeframes; and (iii) sets out a suspensive system.²

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1. Bill 0049-CD-2017, Congress act to amend Argentine antitrust law, 14th Session, Period N°135 (Nov. 22, 2017). See Miguel del Pino & Santiago del Rio, *The Path Towards a More Efficient Antitrust Enforcement in Argentina*, CPI ANTITRUST CHRONICLE AUGUST 2017, <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/08/CPI-Pino-Rio.pdf>.

2. *Id.*

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

46 THE YEAR IN REVIEW

[VOL. 52]

Prior to the new Administration, average review timeframes were approximately thirty months. The following chart shows the reduction in review terms undertaken since 2016.

Statistics	2016 (all)	2016 (Filed after December 2015)	2017 (January-June)	2017 (January-June) (Filed after December 2016)
Average of delay (months)	23.16	8.38	27.31	7.15

Source: Internal estimations based on resolutions published on www.cndc.gov.ar³

The Bill permits the Commission to set up a fast-track system for those transactions that would not evidence competition concerns.

The Commission has been working on updating its merger control review processes and has recently unveiled a white paper for comments on its new Merger Control Guidelines (“Guidelines”).⁴

The Guidelines set out a review procedure—identifying the stages that transactions undergo, setting out an initial objective filtering approach (namely, market shares and concentration indexes)—to be complemented with investigative matters if necessary.

The Guidelines provide for a more complete approach on the techniques used by the Commission. They incorporate the notion of Upward Pricing Pressure and other factors, such as the competition from imported products, countervailing buyer power, the creation of a portfolio effect, and the failing firm doctrine.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

1. *Credit Cards’ Investigation*

In 2016, the Commission notified Prisma Medios de Pago S.A. (“Prisma”), the holder of the Argentine license of VISA, and its fourteen shareholder banks of an undergoing investigation for alleged anticompetitive conduct.⁵

In 2017, the Commission accepted a settlement agreement filed by Prisma. Under the agreement, Prisma’s shareholders would divest the company to a third party, eliminating any possible foreclosure from its

3. Internal estimations based on resolutions published on NATIONAL COMMISSION FOR THE DEFENSE OF COMPETITION, <https://www.argentina.gob.ar/defensadelacompetencia>.

4. See *Project of Modification of the Listings for the Control of Economic Concentrations*, NATIONAL COMMISSION FOR THE DEFENSE OF COMPETITION (Jul. 2017), https://www.argentina.gob.ar/sites/default/files/proyecto_lineamientos_concentraciones_0.pdf.

5. Resolution n° 17; Commission (Aug. 29, 2017), https://www.argentina.gob.ar/sites/default/files/cndc_resol_invmerc_tarjetas_2.pdf.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 47

shareholding banks, and guaranteeing access to the Visa system to any downstream competitors.⁶

2. *Clinics' Investigation*

The Commission imposed individual fines and initiated a market wide investigation against the Argentine Confederation of clinics, medical facilities, and hospitals for setting referential prices for medical services.⁷

This resolution stemmed from a claim filed on May 21, 2012 by Swiss Medical S.A. against several medical institutions for an alleged collusive agreement and price fixing.⁸

The Commission found evidence of a concerted horizontal practice. Specifically, it noted: (i) the companies did not face threats of new companies entering the market with lower prices; (ii) it is easier to carry out an agreement between similar firms; (iii) the product is homogeneous, and (iv) the market demand for medical services is inelastic.

D. COURT DECISIONS

The National Supreme Court of Justice (“NSCJ”) reaffirmed the Commission’s enforcement functions and powers.⁹

II. Australia

A. LEGISLATIVE DEVELOPMENTS

The majority of the Harper Review recommendations came into effect through the passage of two amending Acts: the Competition and Consumer Amendment (Misuse of Market Power) Act 2017¹⁰ (“CCA-MMP”) and the Competition and Consumer Amendment (Competition Policy Review) Act 2017¹¹ (“CCA-CPR”). These both amended the Competition and Consumer Act 2010 (“CCA”).

6. News release, Commission, Commission accepted PRISMA’s divestment (Sept. 27, 2017), <https://www.produccion.gob.ar/2017/09/27/defensa-de-la-competencia-acepto-el-compromiso-de-desinversion-de-la-empresa-prisma-67403>.

7. Publications, Marval, O’Farrell & Mairal, “New Cartel Case in Argentina” (Sept. 29, 2017), <https://www.marval.com/publicacion/nuevo-caso-de-cartel-en-la-argentina-13052/>.

8. *Id.*

9. Case 340:951, NSCJ (Jul. 11, 2017) <http://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7384812&cache=1510586612982>.

10. Competition and Consumer Amendment (Misuse of Market Power) Act 2017, *available at*, <https://www.legislation.gov.au/Details/C2017A00087> [hereinafter “CCA”].

11. Competition and Consumer Amendment (Competition Policy Review) Act 2017, *available at*, <https://www.legislation.gov.au/Details/C2017A00114>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

48 THE YEAR IN REVIEW

[VOL. 52

B. MISUSE OF MARKET POWER

The CCA-MMP repeals prior section 46, which prohibited a corporation with a substantial degree of power in a market from taking advantage of that power for a proscribed purpose. Instead, the CCA-MMP prohibits against engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in any market.¹²

C. CONCERTED PRACTICES

The CCA-CPR amends section 45 of the 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.”¹³ This replaces the previously narrower iteration that required “contracts, arrangements or understandings” to demonstrably affect competition before attracting liability.¹⁴

D. MERGERS

The Australian Competition and Consumer Commission (“ACCC”) issued twenty-one informal merger clearance decisions¹⁵ and provided one “public competition assessment.”¹⁶ The one assessment considered was not opposed by the ACCC as it was not deemed to substantially lessen competition.¹⁷

Notably, with the Harper reforms, merger parties will no longer be able to seek authorization in the Australian Competition Tribunal in the first instance. Rather, merger parties can only seek a review if necessary.¹⁸

E. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The CCA-CPR includes amendments regarding cartel conduct. The geographic reach of such conduct has been narrowed to “trade or commerce

12. *Id.* at § 46(1).

13. *Id.* at § 45(1)(c).

14. Insights, Gilbert + Tobin, “Rethinking the Competition and Consumer Act: Exposure draft legislation lays groundwork for the most significant change in a generation” (Sept. 12, 2016), <https://www.gtlaw.com.au/?q=rethinking-competition-and-consumer-act-exposure-draft-legislation-lays-groundwork-most-significant>.

15. See ACCC’s mergers register by year, <http://registers.accc.gov.au/content/index.phtml/itemId/751043>.

16. See ACCC’s information on public competition assessments <http://registers.accc.gov.au/content/index.phtml/itemId/501191>.

17. See PMP Limited’s proposed merger with IPMG Group, <http://registers.accc.gov.au/content/index.phtml/itemId/501191>.

18. Insights, Gilbert + Tobin, “It’s time: Harper changes to competition law pass through Parliament” (Oct. 18, 2017), <https://www.gtlaw.com.au/insights/harper-review-changes-competition-law-pass-parliament>.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 49

within Australia or between Australia and places outside Australia.”¹⁹ Further, the CCA-CPR modifies the joint venture exception to cartel conduct in section 44ZZRO.²⁰ Now, the cartel provision must be for the purposes of a joint venture and reasonably necessary to undertake the venture. Further, the joint venture may not be carried on for the purpose of substantially lessening competition: section 44ZZRO(1)(a) and (ba).

In a landmark decision, the Federal Court imposed the second highest fine in the history of Australia’s competition law. It convicted Japanese shipping company, Nippon Yusen Kabushiki Kaisha, of criminal cartel conduct and imposed a fine of \$25 million, based on a guilty plea and an agreed statement of facts.²¹

III. Brazil

A. LEGISLATIVE DEVELOPMENTS

The most relevant and expected legislative development of 2017 is how Conselho Administrativo de Defesa Econômica (“CADE”) will treat the confidentiality of documents submitted in leniency and settlement agreements. CADE has been discussing the issue of encouraging private enforcement through damages claims versus the risk that such claims may pose to leniency and settlement programs.²² A new resolution covering CADE’s position on the matter is expected by the end of 2017.

B. MERGERS

The year 2017 was marked by three blocking decisions revealing a new pattern on CADE’s merger assessments.

It started with *Estacio/Kroton*, which involved the largest private institutions of higher education in Brazil. The decision focused on the lack of remedies available to address the competition concerns arising from the creation of a giant in the education market.²³ The second deal blocked was the acquisition of Alesat by Ipiranga, which involved regional fuel

19. CCA § 44ZZRD(4).

20. See CCA § 44ZZRO(1)(a) and (b) which now include joint ventures contained in arrangements or understandings in addition to contracts, and joint ventures for the acquisition of goods and services in addition to the supply and production of goods and services.

21. Media Release, ACCC, “NYK convicted of criminal cartel conduct and fined \$25 million” (Aug. 3, 2017), <https://www.accc.gov.au/media-release/nyk-convicted-of-criminal-cartel-conduct-and-fined-25-million>.

22. 23rd Annual International Competition Defense Seminar. Ibrac. Campos do Jordão, Brazil (Oct. 25/27, 2017).

23. Merger Case No. 08700.006185/2016-56, CADE (Jun 28, 2017), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yNSFTfj8USwu3IKyBSpljRFDorzc2mqubLKVOS1AUB1gEDsdnGi56oAeENrgA4by7RtNniEU5mwyw4Z6C8BywqD.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

50 THE YEAR IN REVIEW

[VOL. 52]

distribution markets.²⁴ CADE saw, in addition to high concentration levels, a major concern in eliminating a maverick (Alesat), which would have an important role in a market historically known to be prone to collusion. The third deal blocked was *JBS/Mataboi*.²⁵ Concerns arose from a high concentration in the cattle-slaughtering and in the fresh meat markets. A key issue was the family link between the individuals that control the JBS and JBJ Groups (which both active in the same markets). These relations were taken into account for the competition assessment, despite the lack of corporate links between the two.

Finally, by November 2017, six transactions cleared with remedies, including the global deals *Dow/DuPont*²⁶, *AT&T/Time Warner*²⁷, the acquisition of Citi's retail business by Itaú,²⁸ and the merger between BM&F and Bovespa.²⁹ Despite a clear preference for structural remedies, behavioral commitments proved to be an important tool to address merger concerns.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

CADE's efforts continue to concentrate on cartels. Settlement agreements were possibly the highpoint in 2017. The total amount paid in settlements (until Nov. 2017) represented nearly five times the fines resulting from convictions.³⁰

24. Merger Case No. 08700.006444/2016-49, CADE (Aug. 2, 2017), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yPLPk9WF58aqhX1Hw6pzY_3WzwrRplh-817ZDMjBU_23BA bFe9qoU6joIBs-l6MQIBBHfTaCbaCgOPjjrepKOii.

25. Merger Case No 08700.007553/2016-83, CADE (Oct. 24, 2017), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yOXPsAD-kWwOaQmcqVW2FMnAfuMP4iDLpIFsYDQ1E AnNuT6Prx00je50NexZTuc7PmpwH98M4Ov3RL22j8McHInp.

26. Merger Case No 08700.005937/2016-61, CADE (May 17, 2017); see press release *available at* <http://www.cade.gov.br/noticias/superintendencia-geral-conclui-parecer-sobre-operacao-entre-dow-e-dupont>.

27. Merger Case No. 08700.001390/2017-14, CADE (Oct. 18, 2017), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yO11hYLduJjx4bEV7sWvxxsYdCXaTnXXfj6dd7Y3z0U5q7N iht5GYOX4hDVoa96z0IqhgZxzwJlWfnKYGUMv-tm.

28. Merger Case No 08700.001642/2017-05, CADE (Aug. 16, 2017), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yNF1IICDDQCndX0bPSLORBDkK7p-ovVP8emzsSwSLc8HCX 5Ffi3vXsr4KfQsqMd0zcL6TCgMZ1ESD7FBLluls.

29. Merger Case No 08700.004860/2016-11, CADE (Mar. 22, 2017), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQA8mpB9yNz7AKCGcAFOLKCPGLjrGrbtGnEadAg2JS9MWoksLI5xfyi K_fj8nkkSFU2_qqjvFLYnIAVCw1MUVZQge9duirR.

30. Available on "CADE EM NÚMEROS".

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 51

D. DOMINANCE

In the past years, CADE prioritized cartel investigations over dominance cases, due to the lack of internal resources to give both the same level of attention and efforts. But, the General-Superintendent anticipated that unilateral conducts will be a focus again.³¹

In the era of *Big Data* discussions, CADE is monitoring closely international debates and cases, but fears that any intervention at this moment could hinder innovation.

E. COURT DECISIONS

While no innovative court decisions on antitrust matters occurred in 2017, there was an important institutional development on private antitrust enforcement: the National Council of Justice approved the creation of federal courts specialized in competition and international trade subjects.³²

IV. Canada**A. LEGISLATIVE DEVELOPMENTS**

Although not significant, two bills—one introducing an antitrust immunity process for airline joint ventures,³³ the other amending the affiliation rules³⁴ of the Competition Act (“Act”)³⁵—made their way to the Senate.

B. MERGERS

The Competition Bureau (“Bureau”) obtained divestitures in six transactions, including *Dow Chemical/DuPont*,³⁶ *Abbott Laboratories/Alere Inc.*,³⁷ and *Sherwin-Williams/The Valspar Corporation*.³⁸

31. Interview with Alexandre Cordeiro on the 23rd Annual International Competition Defense Seminar carried out by Ibrac (Oct., 2017).

32. Resolution No 445/2017 (Jun. 12, 2017).

33. Bill C-49, Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts, 1st Sess., 42nd, 2015-2017.

34. Bill C-25, Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act, 1st Sess., 42nd, 2015-2017.

35. Competition Act, R.S.C. 1985, c. C-34.

36. Position Statement, Bureau, “Competition Bureau statement regarding the merger between Dow and DuPont” (Jun. 27, 2017), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04247.html>.

37. Position Statement, Bureau, “Competition Bureau statement regarding the acquisition by Abbott of Alere” (Sept. 28, 2017), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04308.html>.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

52 THE YEAR IN REVIEW

[VOL. 52]

The Bureau cleared *Canexus Corporation/Chemtrade Logistics Income Fund*,³⁹ a merger previously aborted in 2016 after the U.S. Federal Trade Commission commenced a challenge.⁴⁰ In both cases, the Bureau applied the statutory “efficiencies defence” to approve an otherwise anticompetitive merger because of efficiency gains.⁴¹

C. CARTELS

There were fewer Canadian cartel developments in 2017 with enforcement centered on domestic cartels.⁴²

In October, the Bureau announced proposed changes to its Immunity Program that would modify automatic immunity for directors, officers, and employees, and alter evidentiary procedures, among other things.⁴³

D. ABUSE OF DOMINANCE AND OTHER ANTICOMPETITIVE PRACTICES

The Bureau in the Competition Tribunal commenced one new proceeding—against HarperCollins for developing an “Agency Model” restricting retail price competition in the North American e-books market. Other e-book publishers settled.⁴⁴

38. Position Statement, Bureau, “Competition Bureau statement regarding the acquisition of Valspar by Sherwin-Williams” (May 26, 2017), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04244.html>.

39. News Release, Government of Canada, “Acquisition of Canexus by Chemtrade will not be challenged” (Mar. 8, 2017), https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html.

40. Press Release, Federal Trade Commission, “FTC Challenges Proposed Merger of Canadian Chemical Companies Superior Plus Corp. and Canexus Corp.” (Jun. 27, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/ftc-challenges-proposed-merger-canadian-chemical-companies>.

41. Competition Act, *supra* note 35, § 96.

42. *See, e.g.*, News Release, Government of Canada, “Aquarehab pleads guilty to rigging bids for municipal contracts, pays a \$160,000 fine” (Feb. 17, 2017), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04184.html>; “Company fined \$140,000 for bid-rigging in Montreal” (Jun. 20, 2017), https://www.canada.ca/en/competition-bureau/news/2017/06/company_fined_140000forriggingbidsinmontreal.html; “Individual pleads guilty to rigging bids for ventilation contracts in Montreal” (Oct. 10, 2017), https://www.canada.ca/en/competition-bureau/news/2017/10/individual_pleadsguiltytoriggingbidsforventilationcontractsinmon.html; “Cardinal Ventilation fined \$375,000 for rigging bids for ventilation contracts in Montréal” (Oct. 27, 2017), https://www.canada.ca/en/competition-bureau/news/2017/10/cardinal_ventilationfined375000forriggingbidsforventilationcontr.html.

43. Draft for Public Consultation, Bureau, “Immunity Program under the *Competition Act*” (Oct. 26, 2017), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04316.html>.

44. *See* Competition Tribunal, Case Details, CT-2017-002, <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=409>.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 53

The Bureau closed two significant civil investigations in 2017, one concerning Apple's iPhone marketing contracts,⁴⁵ and the other regarding Northern Canadian air passenger and cargo services.⁴⁶

E. COURT DECISIONS

2017 was an active year for private litigation. The Supreme Court of Canada held that Crown immunity precluded the plaintiffs in a retail gas cartel class action from examining the Bureau's chief investigator.⁴⁷ The Federal Court of Appeal upheld a Competition Tribunal decision denying a company leave to pursue a civil remedy under the Act's refusal to deal and exclusive dealing provisions.⁴⁸

V. China

A. LEGISLATIVE DEVELOPMENTS

In November 2017, the National People's Congress of China passed the amended Anti-Unfair Competition Law.⁴⁹ The key changes include adding provisions relating to regulatory scrutiny of unfair competition in the internet sector and removing provisions overlapping with the Anti-Monopoly Law ("AML"), such as prohibitions on tying.

On July 2017, the National Development and Reform Commission ("NDRC") published the Guidelines for Price Behavior of Industrial Associations.⁵⁰ These Guidelines focus, among other things, on conduct by industrial associations that may influence pricing behaviors or facilitate collusion between members.

B. MERGERS

The Ministry of Commerce ("MOFCOM") unconditionally cleared 254 merger cases,⁵¹ including 203 cases under its simple case procedure.⁵²

45. News Release, Government of Canada, "No abuse of dominance found related to contracts with Canadian wireless carriers" (Jan. 6, 2017), <https://www.canada.ca/en/competition-bureau/news/2017/01/bureau-closes-apple-iphone-investigation.html>.

46. Government of Canada, News Release, "Competition Bureau completes extensive investigations into northern airlines" (Aug. 22, 2017), <https://www.canada.ca/en/competition-bureau/news/2017/08/competition_bureaucompletesextensiveinvestigationsintonorthernai.html>.

47. *Canada (Attorney General) v. Thouin*, 2017 SCC 46.

48. *Cargurus, Inc. v. Trader Corporation*, 2017 FCA 181.

49. See Anti-Unfair Competition Law amended by National People's Congress of China (Nov 4, 2017), http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm.

50. See The Guidelines for the Price Behavior of Industrial Associations, NDRC (Jul. 25, 2017) http://jjs.ndrc.gov.cn/zcfg/201707/t20170725_855401.html.

51. List of Unconditional Clearance of Concentrations of Undertakings, <http://fldj.mofcom.gov.cn/article/zcfb/201704/20170402552108.shtml>, <http://fldj.mofcom.gov.cn/article/zcfb/201707/20170702603665.shtml>, <http://fldj.mofcom.gov.cn/article/zcfb/201710/20171002654398.shtml>.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

54 THE YEAR IN REVIEW

[VOL. 52]

MOFCOM conditionally approved five merger cases. These include the mergers of *Dow/DuPont*,⁵³ *Broadcom/Brocade*,⁵⁴ *HP/Samsung*,⁵⁵ *Agrium/PotashCorp.*,⁵⁶ and *Maersk/Hamburg*.⁵⁷

MOFCOM published nine penalty decisions for transactions not properly notified.

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

NDRC investigated and issued large fines in several high-profile cases, including fining eighteen Chinese PVC manufacturers RMB 457 million for price fixing in the market for PVC.⁵⁸

The State Administration for Industry and Commerce (“SAIC”) released high-profile decisions including fining and confiscating illegal gains by a pharmaceutical company. The company abused its dominance in the market for methyl salicylate by acquiring the exclusive distributorship of the only two manufacturers of that ingredient, raising prices by three to five times, and imposing other unfair trading conditions.⁵⁹

D. COURT DECISIONS

As of November 2017, courts nationwide have handled 734 unfair competition and antitrust cases, 66 of which were decided under the AML.

A landmark case is *Yingding/Sinopec*. The plaintiff Yingding, a privately-owned bioenergy manufacturer, alleged that Sinopec, a major state-owned oil company, and its Yunnan branch abused their dominant market position by unjustifiably refusing to incorporate plaintiff’s biofuel into Sinopec’s distribution system. The High Court held the defendants had not engaged

52. List of cases under MOFCOM Simple Case Procedure, <http://fldj.mofcom.gov.cn/article/jyzjzjyajs/>.

53. News Release, MOFCOM, Conditional Approval of The Dow Chemical Company’s Acquisition of E.I. Du Pont De Nemours And Company (May 2, 2017) <http://fldj.mofcom.gov.cn/article/ztxx/201705/20170502568075.shtml>.

54. News Release, MOFCOM, Conditional Approval of Broadcom Limited’s Acquisition of Brocade Communications Systems, Inc. (Aug. 22, 2017), <http://fldj.mofcom.gov.cn/article/ztxx/201708/20170802632065.shtml>.

55. News Release, MOFCOM, Conditional Approval of HP Inc.’s Acquisition of Samsung Electronics Co. (Oct. 5, 2017), <http://fldj.mofcom.gov.cn/article/ztxx/201710/20171002654063.shtml>.

56. News Release, MOFCOM, Conditional Approval of the Merger between Agrium and Potash Corporation of Saskatchewan Inc. (Nov. 6, 2017), <http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102666641.shtml>.

57. News Release, MOFCOM, Conditional Approval of Maersk Line A/S’s Acquisition of Hamburg Südamerikanische Dampfschiffahrts -Gesellschaft KG (Nov. 8, 2017) <http://fldj.mofcom.gov.cn/article/ztxx/201711/20171102667566.shtml>.

58. Report, NDRC, Administrative penalty decisions against 18 PVC companies (Sept. 27, 2017), http://zys.ndrc.gov.cn/xwfb/201709/t20170927_861736.html.

59. Notice, SAIC, Administrative penalty decision against Wuhan Xinxing Jingying Pharmaceutical (Mar. 9, 2017), http://www.saic.gov.cn/fldyfbzdjz/jzfgg/201703/t20170309_232297.html.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 55

in abusive refusal to deal. The decision noted that (1) there was no actual communication of an intention to deal; (2) Sinopec had reasonable justifications to refuse to deal with Yingding given the immature quality of Yingding's product; and (3) the lack of detailed implementation rules for the purchase of biofuel made it difficult for Sinopec to purchase Yingding's products.⁶⁰

VI. European Union

A. LEGISLATIVE DEVELOPMENTS

Alongside tackling the implications of the UK's Brexit vote, in 2017, the European Commission ("EC") progressed its policy agenda in technology and digital sectors. It released its online commerce and digital markets inquiry, finding that obstacles remain to achieve a borderless EU-wide marketplace and signaling further enforcement activities.⁶¹ In parallel, the EC pushed forward proposed legislation to prevent "geo-blocking" European consumers' access to goods or digital content based on their location.⁶² The EC also set up a task force to study the impact of Big Data and artificial intelligence on competition.⁶³ In contrast, the EC has delayed issuing guidance on the hot topic of standard essential patents.

B. MERGERS⁶⁴

Concerns regarding competition in the clearing of fixed income instruments led the EC to block the proposed merger between Deutsche Börse and the London Stock Exchange, an opposition reminiscent of Deutsche Börse's failed attempt to takeover NYSE Euronext five years ago. The EC also blocked HeidelbergCement and Schwenk's proposed takeover of Cemex's assets in Croatia, consistent with its appraisal of previous cement deals.

Consolidation in the agrochemical space equally attracted close scrutiny and underscored the EC's current focus on innovation. The EC cleared the mergers *Dow/Dupont*⁶⁵ and *ChemChina/Syngenta*⁶⁶ upon in-depth examinations and subject to divestments, including of R&D and/or pipeline

60. See *Yingding/Sinopec*, <http://wenshu.court.gov.cn/content/content?DocID=92ce6152-86f2-44d5-b4dd-a7fe00c710cd>.

61. Press release, EC, "Antitrust: Commission publishes final report on e-commerce sector inquiry" (May 10, 2017), http://europa.eu/rapid/press-release_IP-17-1261_en.htm.

62. Press release, EC, "Digital Single Market: EU negotiators agreed to end unjustified geoblocking" (November 20, 2017), http://europa.eu/rapid/press-release_IP-17-4781_en.htm.

63. Announcement/Speech, EC, "How competition can build a better market" (September 19, 2017), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-can-build-better-market_en.

64. The following is the EC merger webpage: <http://ec.europa.eu/competition/mergers/cases/>.

65. *Mergers: Dow/Dupont*, EUR. COMM'N, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_663.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

56 THE YEAR IN REVIEW

[VOL. 52]

assets. It further opened an investigation into Bayer's planned acquisition of Monsanto.⁶⁷ In another innovation-driven sector, the EC resumed its in-depth review of Qualcomm's plan to acquire semiconductor-maker NXP, after suspending its review twice.⁶⁸

The EC also actively enforced suspected non-compliance with the merger review process. It issued fines or formal charges against three companies for allegedly providing incorrect information concerning their respective transactions. It further adopted formal charges against Altice and Canon for "gun jumping."⁶⁹

C. ANTICOMPETITIVE PRACTICES

The EC continued its long-standing policy of vigorously prosecuting cartels, imposing fines totaling almost 2 billion on companies allegedly involved in cartels in the car battery recycling, car air conditioning, car lighting, trucks and car occupant safety sectors. It started investigating suspected cartel activities, *inter alia*, in the ethylene purchasing, kraft paper, and car sectors.⁷⁰

In parallel, following on sector-wide inquiries, the EC opened or continued investigations into a "reverse-payment" patent settlement between Teva and Cephalon, and the online distribution and licensing arrangements of Nike, Guess, Sanrio, and Universal Studios.⁷¹

D. ABUSES OF A DOMINANT POSITION

Completing long-running, politically laden investigations, the EC imposed a 2.4 billion fine on Google for favoring its internet comparison-shopping products.⁷²

66. *Mergers: ChemChina/Syngenta*, EUR. COMM'N, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7962.

67. *Mergers: Bayer/Monsanto*, EUR. COMM'N, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084.

68. *Mergers: Qualcomm/NXP Semiconductors*, EUR. COMM'N, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8306.

69. Press release, EC, "Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules" (July 6, 2017), http://europa.eu/rapid/press-release_IP-17-1924_en.htm; Press release, EC, "Mergers: Commission alleges Altice breached EU rules by early implementation of PT Portugal acquisition" (May 18, 2017), http://europa.eu/rapid/press-release_IP-17-1368_en.htm

70. *Cartels: Cases*, EUR. COMM'N, <http://ec.europa.eu/competition/cartels/cases/cases.html>.

71. *Antitrust: Antitrust Cases*, EUR. COMM'N, <http://ec.europa.eu/competition/antitrust/cases/index.html>.

72. Press release, EC, "Statement by Commissioner Vestager on Commission decision to fine Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service" (June 27, 2017), http://europa.eu/rapid/press-release_STATEMENT-17-1806_en.pdf.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 57

E. COURT DECISIONS

In the equally mediatized *Intel* appeal, the EU's top court remanded the case for reexamination, telegraphing a more economics-oriented approach to assess rebate practices by dominant players.⁷³

VII. India

A. LEGISLATIVE DEVELOPMENTS

There have been three significant developments:

- The Competition Appellate Tribunal (“COMPAT”) merged with the National Company Law Appellate Tribunal⁷⁴;
- Modifications of the merger control regime: (i) the 30-day filing deadline has been removed; and (ii) the *de-minimis* exemption now applies to acquisitions, mergers, and amalgamations. For acquisitions, the regime extends to enterprises and the portion, division or business being acquired;⁷⁵ and
- On leniency regime: (i) leniency is now expressly available to individuals and enterprises; (ii) it may be extended to more than three applicants provided “*significant added value*” over the information available is provided; and (iii) defendants can access a non-confidential version of the leniency application after the investigation report is provided.⁷⁶

B. CARTELS AND OTHER ANTI-COMPETITIVE AGREEMENTS

The Competition Commission of India (“CCI”) has published its first leniency decision.⁷⁷ The CCI reduced the penalty granted to the leniency applicant and the applicant’s officers by 75 percent, as they had approached the CCI only after receiving a notice during an investigation. The leniency applicant provided the cartel’s *modus operandi* and “missing links” in the investigation.

In its first decision on resale price maintenance, the CCI found that Hyundai imposed restrictive conditions on its car dealers, amounting to an

73. *Intel Corporation Inc./European Commission/Association for Competitive Technology Inc.*, Case C-413/14 P, Grand Chamber (September 6, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=194082&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=944580>.

74. Notification, Ministry of Finance (May, 26 2017), <http://compatarchives.nclat.nic.in/upload/Notification%20attached%20here%20under.pdf>.

75. Overview, Shardul Amarchand Mangaldas & Co, “Merger control in India: Overview” (2017), [https://uk.practicallaw.thomsonreuters.com/0-501-2861?transitionType=default&contextData=\(Sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-501-2861?transitionType=default&contextData=(Sc.Default)&firstPage=true&bhcp=1).

76. Notification, CCI, CCI (Lesser Penalty) Amendment Regulations (Aug. 22, 2017), http://www.cci.gov.in/sites/default/files/whats_newdocument/178210.pdf.

77. *In re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items*, Suo Moto Case No. 3 of 2014, CCI.

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

58 THE YEAR IN REVIEW

[VOL. 52

adverse effect on competition. It did not rely on market shares to assess the vertical restraint.⁷⁸

C. MERGERS

The CCI has been busy with mega transactions. These include *Vodafone/Idea Cellular*, which created the largest telecommunications player,⁷⁹ and global agrochemical deals, including the conditionally approved *Syngenta/Chemchina* merger.⁸⁰

D. DOMINANCE

The CCI dismissed allegations of predatory pricing against WhatsApp. Whilst *prima facie* finding WhatsApp was dominant in the market for “instant messaging services using consumer communication apps through smartphones” in India, the CCI did not find any abuse.⁸¹

The CCI dismissed cases against taxi aggregators filed by competitors in the traditional radio taxi market.⁸² The CCI observed that Ola and Uber posed competitive constraints on each other and were not dominant. The CCI also expressed that any interference at this nascent stage would disturb market dynamics and risk prescribing a sub-optimal solution.

Separately, following the setting aside and remand of the case against Coal India regarding alleged imposition of unfair terms in fuel supply agreements by COMPAT last year, the CCI re-examined these agreements and again found a contravention.⁸³ But, the CCI reduced its penalty from USD 273 million to USD 91 million.

E. COURT DECISIONS

In a landmark decision, the Supreme Court held that while levying a penalty involving multi-product firms, the “*relevant*” product turnover covered by the infringement must be considered, rather than the “*total*” turnover.⁸⁴

78. *Fx Enterprise Solutions v Hyundai Motor*, Case Nos. 36 and 82 of 2014, CCI.

79. C-2017/04/502, CCI.

80. C-2016/08/424, CCI.

81. *Vinod Kumar Gupta v WhatsApp Inc.*, Case No. 99 of 2016, CCI.

82. *Fast Track Call Cab* and *Meru Travel Solutions v ANI Technologies*, Case Nos. 6 and 74 of 2015, CCI.

83. *Maharashtra State Power Generation Company v Mahanadi Coalfields, etc.*, Case Nos. 3, 11 and 59 of 2012, CCI.

84. *Excel Crop Care v CCI*, Civil Appeal No. 2480 of 2014, Supreme Court.

**PUBLISHED IN COOPERATION WITH
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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 59

VIII. Japan**A. LEGISLATIVE DEVELOPMENTS**

In April 2017, the Japan Fair Trade Commission (“JFTC”) issued an interim report of the “Antimonopoly Act Study Group” regarding possible revisions to the current surcharge system under the Antimonopoly Act (“AMA”). These revisions include a discretionary surcharge system under which the JFTC will have a wider discretion to adjust fines, which will ensure fines are more aligned with international practices.⁸⁵ This should allow the JFTC to enforce more vigorously and effectively the competition rules, and increase incentives for companies to cooperate with the JFTC. Although discussions are ongoing, it is anticipated that the JFTC will prepare a bill to amend the AMA.

In June, the JFTC amended the Guidelines Concerning Distribution Systems and Business Practices under the AMA (“Distribution Guidelines”).⁸⁶ The rationale was to streamline the structure of the Distribution Guidelines and to capture the recent changes in distribution and trade practices. The Distribution Guidelines further crystalized the factors to find illegal conduct in the context of vertical relationships and added explanations on possible vertical restraints on internet transactions and platform businesses.

In January, the JFTC set out procedural rules for a new commitment system, under which the parties subject to investigations may seek an agreed resolution for alleged violation of the AMA (except for cartel and bid-rigging cases). These rules are anticipated to come into effect when the Trans-Pacific Partnership Agreement becomes effective.⁸⁷

B. MERGERS

The JFTC cleared the acquisition of Nisshin Steel Co., Ltd.’s shares by Nippon Steel & Sumitomo Metal Corporation after a Phase II review of the parties’ proposed remedies.⁸⁸ The JFTC originally expressed concerns that the acquisition would substantially restrain competition in certain markets. The parties, however, offered remedies to facilitate new entries in the market, which the JFTC considered sufficient to eliminate its concerns.

85. Press release, JFTC, “The Study Group on the Antimonopoly Act Released the Report” (April 25, 2017), <http://www.jftc.go.jp/en/pressreleases/yearly-2017/April/170425.html>.

86. Press release, JFTC, “Amendments of the ‘Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act’” (Jun. 16, 2017), <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170616.html>.

87. Press release, JFTC, Rules on the commitment procedure of the FTC (Jan. 19, 2017), <http://www.jftc.go.jp/houdou/pressrelease/h29/jan/170119.html>.

88. Press release, JFTC, “JFTC Reviewed the Proposed Acquisition of Shares of Nisshin Steel Co._C Ltd_D by NIPPON STEEL & SUMITOMO METAL CORPORATION” (Jan. 30, 2017), <http://www.jftc.go.jp/en/pressreleases/yearly-2017/January/170130.html>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

60 THE YEAR IN REVIEW

[VOL. 52]

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Regarding cartels, the JFTC issued a warning to Deutsche Securities Inc. for a possible violation of the AMA concerning the dealing of European government bonds.⁸⁹ The company allegedly exchanged information with competitors on customer inquiries and prices and arranged bidding procedures for certain transactions of European government bonds.

Regarding vertical restriction, the JFTC announced that it investigated Amazon Japan G.K. (“Amazon”) for the “most favored nation” (“MFN”) clauses⁹⁰ it imposed on independent retailers wishing to sell on Amazon Marketplace. The JFTC originally had concerns that MFN clauses could restrict the business activities of independent Marketplace retailers and reduce incentives to compete. The JFTC closed its investigation because Amazon agreed to take voluntary measures to stop enforcing MFN clauses.

IX. Korea

A. LEGISLATIVE DEVELOPMENTS

In 2017, the Monopoly Regulation and Fair Trade Law (“FTL”) was amended to strengthen the penalty provision for interfering with the Korea Fair Trade Commission (“KFTC”) investigations. It introduced imprisonment of up to two years or fines of up to 150 million Korean won for hiding, destroying, forging, modifying, or denying access to documents during a KFTC raid, failing to produce evidence, or submitting false information to the KFTC. Formerly, the FTL only imposed an administrative fine.⁹¹

In addition, amendments to the FTL’s Enforcement Decree increased merger filing thresholds. A transaction will be reportable where one of the parties has total assets or annual turnover of 300 billion Korean won or more and the other party 30 billion Korean won or more. Before, the thresholds were set at 200 billion Korean won and 20 billion Korean won, respectively. Also, for foreign-to-foreign mergers, the local nexus threshold will be increased to the annual Korean turnover of 30 billion Korean won or more from 20 billion Korean won or more.⁹²

89. Press release, JFTC, “The JFTC issued warning to the company dealing European Government Bond” (Mar. 15, 2017), <http://www.jftc.go.jp/en/pressreleases/yearly-2017/March/170315-1.html>.

90. Press release, JFTC, “Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Amazon Japan G_DK.” (Jun. 1, 2017), <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.html>.

91. See Park Kwang-Chun, *South Korea: Amendment of Korean Fair Trade-Related Laws*, IN-HOUSE COMMUNITY (Oct. 13, 2017), <http://www.inhousecommunity.com/article/south-korea-amendment-korean-fair-trade-related-laws/>.

92. See Yulchon LLC, *The State Council Approves Amendment to the Presidential Enforcement Decree of the Monopoly Regulation and Fair Trade Act*, LEXOLOGY (2017), <https://www.lexology.com/library/detail.aspx?g=8ea21e3a-cdd4-4908-867f-a0c1f071888e> (last visited Mar 31, 2018).

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 61

B. MERGERS

In 2017, the KFTC continued to strengthen its review of global mergers and acquisition that may have a significant competitive impact on the market. During the first half of 2017, the KFTC reviewed 295 business combination filings amounting to 247.6 trillion Korean won in value, of which eighty combinations (aggregate value of 206.1 trillion Korean won) involved overseas entities.⁹³

The KFTC probed into the proposed merger of Dow Chemical Company and E.I. DuPont de Nemours and Company. The KFTC, in cooperation with foreign antitrust authorities ordered one of the companies to sell its acid co-polymer-related assets within six months from the completion of the merger.⁹⁴

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The KFTC remained active in monitoring and sanctioning bid rigging and international cartel activities. It also continued with its enforcement efforts by filing criminal referrals to the prosecutors' office on numerous cases.

The KFTC imposed corrective orders and a combined fine of 2.021 billion Korean won against four Japanese and German manufacturers for price fixing vehicle bearings supplied to local parts companies, and for market division.⁹⁵

Moreover, the KFTC imposed corrective orders against ten car-shipping companies and imposed combined fines of 43 billion Korean won against nine of those companies. The KFTC also filed criminal complaints against eight of the companies. According to the KFTC, these companies engaged in price fixing and market division.⁹⁶

D. DOMINANCE

In 2017, the KFTC paid special attention to intellectual property rights abuses. The KFTC imposed the record administrative fine of 1.03 trillion Korean won against Qualcomm Incorporated and two of its affiliates (collectively, "Qualcomm"), which license companies around the world to

93. Press Release, KFTC, Trend of Business Combination – 1H 2017 (Sept. 4, 2017), http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=7409&tribu_type_cd=&report_data_div_cd=&currpage=7&searchKey=&searchVal=&stdate=&enddate=.

94. Press Release, KFTC, Violation of Merger Control Regime by Dow and DuPont (Apr. 7, 2017), http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=7251&tribu_type_cd=&report_data_div_cd=&currpage=20&searchKey=&searchVal=&stdate=&enddate=.

95. Press Release, KFTC, Four Vehicle Bearing Manufacturers' Cartel Case (Jun. 26, 2017), http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=7333&tribu_type_cd=&report_data_div_cd=&currpage=14&searchKey=&searchVal=&stdate=&enddate=.

96. Press Release, KFTC, Car Shipping Companies' Cartel Case (Aug. 21, 2017), http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=7392&tribu_type_cd=&report_data_div_cd=&currpage=8&searchKey=&searchVal=&stdate=&enddate=.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

62 THE YEAR IN REVIEW

[VOL. 52]

design, manufacture, and sell chipsets.⁹⁷ The KFTC found that Qualcomm violated its FRAND commitments by refusing or restricting the licensing of mobile communications SEPs to rival chipmakers and tying the supply of chipsets and patent license agreements.

X. South Africa

A. LEGISLATIVE DEVELOPMENTS

After the 2016 new criminal liability provisions, the Minister of Economic Development announced that further changes to the Competition Act are to be published. These changes will address high levels of concentration and racially skewed ownership profiles.

Amendments to the Competition Act increased merger thresholds by 8 percent and 25 percent (for intermediate and large mergers respectively) and filing fees by 50 percent and 43 percent.⁹⁸

The Competition Commission (“COMPCOM”) issued draft guidelines on information exchange⁹⁹ and penalties for failure to notify of a merger.¹⁰⁰

B. MERGERS

The COMPCOM prohibited eleven mergers, more than in any past year, including the mergers *Greif International BV/Rbeem South Africa (Pty) Ltd* and *Corruseal Group (Pty) Ltd/Boxlee (Pty) Ltd*. This year, Tribunal conditionally approved three mergers previously prohibited by the COMPCOM.¹⁰¹

97. *Qualcomm* on Abuse of Market Dominant Position, KFTC (Jan. 20, 2017), <http://www.ftc.go.kr/laws/book/judgeSearchView.jsp?cano=20151267&filename=20170120101739623.hwp&blno=의결2017-025>.

98. See Competition Act (89/1998): Amendment of the Determination of Merger Thresholds as set out in General Notice 216 of 2009, GN 1003 of GG 41124, (15 Sept. 2017), available at <https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41124-dated-2017-09-15.pdf>; See also Competition Act (89/1998): Amendment to Rule 10 (5) of the Rules for the conduct of proceedings in the Competition Commission, GN 1005 of GG 41124, (15 Sept. 2017), available at <https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41124-dated-2017-09-15.pdf>.

99. Competition Act (89/1998) (as amended): Competition Commission South Africa: Draft Guidelines on the Exchange of Information between Competitors under the Competition Act, GN 684 of GG 40980 (14 Jul. 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Info-exchange-guidelines.pdf>.

100. Competition Act (89/1998) (as amended): Draft Guidelines for the Determination of Administrative Penalties for Failure to Notify a Merger and Implementation of Mergers Contrary to the Competition Act, GN 147 of GG 40628 (17 Feb. 2017), <http://www.compcom.co.za/wp-content/uploads/2015/01/Government-Gazette-Guidelines.pdf>.

101. The mergers are the following: intermediate merger between *Italtile Ltd, Ceramic Industries (Pty) Ltd, Ezee Tile Adhesive Manufacturers (Pty) Ltd* And Competition Commission/IM077Aug16/PIL107Aug16; large merger between *Hollard Holdings And Regent Insurance Company Case No LM253Mar16*; large merger between *SA Warranties (Pty) Ltd (SAW), Motor Compliance Solutions*

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 63

The Competition Appeal Court (“CAC”) confirmed the prohibition in Imerys transaction—the first prohibition which withstood appellate scrutiny.¹⁰²

C. CARTELS AND OTHER ANTI-COMPETITIVE PRACTICES

The COMPCOM conducted dawn raids in the edible oils,¹⁰³ fresh produce,¹⁰⁴ meat,¹⁰⁵ and fire protection industries.¹⁰⁶ The High Court dismissed a lawfulness challenge to a dawn raid in the fresh produce market.¹⁰⁷

The COMPCOM referred a case of price fixing and market allocation in the forex trading market against fourteen banks.¹⁰⁸

2017 also saw the expansion of the COMPCOM’s market inquiry activities. Retail market inquiries were initiated or continued in the mobile

(Pty) Ltd (MCS), Paintech Maintenance (Pty) Ltd (Paintech), and Anvil Premium Finance (Pty) Ltd (Anvil) and MotoVantage Holdings (Pty) Ltd.

102. *Imerys South Africa (Pty) Limited and Andalusite Resources (Pty) Limited*, <http://www.saflii.org/za/cases/ZACAC/2017/1.pdf>.

103. Media release, COMPCOM, “Competition Commission Raids Manufacturers Of Margarine, Edible Oils And Baking Fats” (Dec, 8, 2016), http://www.compcom.co.za/wp-content/uploads/2016/01/Oils-Media-Release-_final1.pdf.

104. Media release, COMPCOM, “Competition Commission Raids Fresh Produce Market Agents For Suspected Price Fixing” (Mar. 23, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/CompCom-raids-fresh-produce-market-agents.pdf>; media release, COMPCOM, Commission Extends Raid To Cape Town & Durban Fresh Produce Agents (Mar. 24, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Fruit-and-Veg-Raid-extended-to-Cape-Town-and-KZN.pdf>.

105. Media statement, COMPCOM, “Meat Suppliers In Three Provinces Raided On Suspicion Of Price Fixing” (Jun. 14, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Meat-suppliers-statement-14-June-2017.pdf>.

106. Media statement, COMPCOM, “Commission Raids 25 Sites Of Fire Sprinkler Installers” (Aug. 2, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Fire-raid-3-Aug-2017-final.pdf>.

107. *Farmers Trust v Competition Commission of South Africa* (20188/17) [2017] ZAGPPHC 488 (May 11, 2017).

108. Media statement, COMPCOM, “Competition Commission prosecutes banks (currency traders) for collusion” (Feb. 15, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Competition-Commission-prosecutes-banks-currency-traders-for-collusion-15-Feb-2016.pdf>.

**PUBLISHED IN COOPERATION WITH
 SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

64 THE YEAR IN REVIEW

[VOL. 52]

data,¹⁰⁹ grocery retail market,¹¹⁰ healthcare,¹¹¹ and public passenger transport sectors.¹¹²

D. ABUSES OF DOMINANCE

Many cases focus on exclusivity. In potato seeds¹¹³ and Rooibos tea markets,¹¹⁴ the COMPCOM alleges that exclusivity arrangements resulted in exclusion of competitors to the detriment of competition.

E. COURT DECISIONS

The High Court ordered SAA to pay Comair approximately R1.15bn in follow-on damages for abuse of dominance conduct.¹¹⁵ The case took approximately fourteen years to prosecute. It is only the second successful damages claim brought pursuant to a breach of the Act.

XI. United Kingdom

A. LEGISLATIVE DEVELOPMENTS

On March 29, 2017, the UK Government served formal notice under Article 50 of the Treaty of Lisbon,¹¹⁶ commencing the process to terminate its EU membership. The details of how this separation will impact competition law are unknown. In part, it depends on the model agreed on with the EU and adopted by the UK Government.¹¹⁷ The EU competition rules will continue to apply to agreements or conduct of UK businesses that have an effect within the EU; however, the Commission will no longer have

109. Market Inquiry, COMPCOM, Data Services, <http://www.compcom.co.za/wp-content/uploads/2017/09/Data-Market-Inquiry-ToR.pdf>.

110. Media advisory, COMPCOM, “Grocery Retail Market Inquiry: Pretoria Public Hearings” (Oct. 29, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Media-Advisory-Grocery-Retail-Pretoria-Public-hearings.pdf>.

111. Media statement, COMPCOM, “Competition Commission Announces Changes To The Current Administrative Timetable Of The Healthcare Market Inquiry” (Aug. 24, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/HMI-media-release-24-Aug-2017.pdf>.

112. Media statement, COMPCOM, “Public Passenger Transport Market Inquiry, Release of Guidelines and Call for Submissions” (Jul. 17, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Transport-media-release-17-July.pdf>.

113. Media statement, COMPCOM, “Seed Potato Supplier And Agent Charged For Anti-Competitive Conduct” (Apr. 3, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Potato-Media-Statement-1.pdf>.

114. Media statement, COMPCOM, “Rooibos Limited Charged For Abuse Of Dominance” (June 19, 2017), <http://www.compcom.co.za/wp-content/uploads/2017/01/Rooibos-limited-charged-for-abuse-of-dominance.pdf>.

115. *Comair Limited/South African Airways*, Case No 2008/23443 and 2011/34079, <http://www.saflii.org/za/cases/ZAGPJHC/2017/10.pdf>.

116. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306.

117. “Competition law and Brexit: the challenges ahead”, Sir Peter Roth, *Competition Law Journal* [2017] Comp Law 5.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 65

power to carry out dawn raids in the UK or ask the Competition and Markets Authority (“CMA”) to do so on its behalf. The substance of UK competition law is almost identical to that of EU competition law, and it is unlikely that there will be immediate erosion in consistency.¹¹⁸ Nonetheless, UK courts can no longer refer questions to the European Court of Justice, which has proven to encourage consistency.¹¹⁹

Moreover, mergers that meet both the UK and EU thresholds will have to face both systems.

B. MERGERS

The CMA has found the merger *Just Eat/Hungryhouse* does not raise competition concerns. Just Eat and Hungryhouse are two well-known online food-ordering platforms in the UK with similar business models. With the entry of ‘Deliveroo’ and ‘UberEats,’ these companies were found to provide greater competition.¹²⁰

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In November, the CMA set out provisional findings in its Statement of Objections that Concordia abused its dominant position to overcharge the NHS by over £34m for an essential thyroid drug. The CMA alleged an increase of around 6000 percent from the price charged in 2006.¹²¹ The CMA is currently pursuing another seven investigations into several drug companies about pricing and competition issues.¹²²

D. COURT CASES

The Competition Appeal Tribunal (“CAT”) handed down judgment on the first ever application for a “collective proceedings order” (“CPO”) under the new regime introduced by the Consumer Rights Act 2015.

In *Gibson v Pride Mobility Products Limited*,¹²³ the Applicant sought a CPO for certification as the representative of an opt-out class. The class consisted of people who purchased the Respondent’s scooters in the UK during the period where the Respondent was found by the OFT to have infringed

118. *Id.*

119. *Id.*

120. “The CMA clears Just Eat/Hungryhouse merger,” CMA, 16 November 2017, <https://www.gov.uk/government/news/cma-clears-just-eat-hungryhouse-merger>

121. <http://www.independent.co.uk/news/business/news/nhs-drug-overcharging-concordia-thyroid-million-of-pounds-competition-markets-authority-a8066586.html>.

122. Press Release, CMA, Drug Company Accused of Abusing Its Position to Overcharge the NHS (Nov. 21, 2017), <https://www.gov.uk/government/news/drug-company-accused-of-abusing-its-position-to-overcharge-the-nhs>.

123. *Dorothy Gibson v Pride Mobility Products Limited*, [2017] CAT 9, available at <http://www.catribunal.org.uk/237-9255/1257-7-7-16-Dorothy-Gibson.html>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

66 THE YEAR IN REVIEW

[VOL. 52]

competition law in the mobility scooter market.¹²⁴ The CAT analysed the Consumer Rights Act 2015, focusing on whether the potential claimants' damages claims raised common issues.

The CAT considered a Canadian decision:¹²⁵ in establishing commonality of loss to the class members, economic evidence must “offer a realistic prospect of establishing loss on a class wide basis.”¹²⁶ The CAT found that the Applicant needed to review her economic evidence in support of her definitions of sub-classes as their claim to damages was beyond the scope of the OFT decision. This demonstrates the CAT is keen to create an effective mechanism for collective redress for consumers, and they are prepared to scrutinize evidence to demonstrate commonality.¹²⁷

XII. United States

A. LEGISLATIVE DEVELOPMENTS

In September 2017, two bills aimed at strengthening antitrust enforcement and making it easier for the agencies to challenge mergers were introduced in the Senate. The first bill would lower the threshold for a prohibited merger from one that may “substantially” lessen competition to one that may “materially” lessen competition and shift the burden to the parties to establish that the transaction is not anticompetitive when a merger leads to a significant increase in market concentration or is over a certain size.¹²⁸ The second bill includes reporting requirements for settled mergers, changes the HSR filing fees and size-of-transaction thresholds, and directs studies of merger remedies.¹²⁹

B. MERGERS

The agencies received 1,832 HSR filings in the 2016 fiscal year. One thousand seven hundred seventy eight (1,778) transactions (97 percent) were granted early termination or the waiting period expired without a Second Request. Settlements, restructurings, or withdrawals after challenge occurred in only forty-seven transactions (2.7 percent).¹³⁰

Once again, healthcare has been a notable field for merger enforcement. In June 2017, the FTC and the North Dakota Attorney General challenged

124. “Collective Proceedings in the CAT: mobility scooters roll on for now”, Tom Coates, 6 April 2017, <https://competitionbulletin.com/2017/04/06/collective-proceedings-in-the-cat-mobility-scooters-roll-on-for-now/>.

125. *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 (Rothstein J).

126. *Id.* at 6.

127. *Id.*

128. S.1812, Consolidation Prevention and Competition Promotion Act of 2017.

129. Merger Enforcement Improvement Act, S.1811, 115th Cong. (2017).

130. Federal Trade Commission Bureau of Competition & Department of Justice Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2016, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-anti-trust-division-hart-scott-rodino/p110014_fy_2016_hsr_report_final_october_2017.pdf.

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2018]

ANTITRUST 67

Sanford Health's proposed acquisition of Mid Dakota Clinic, despite the transaction falling below the HSR notification thresholds.¹³¹ The Department of Justice ("DOJ") completed its successful challenge to significant health insurer mergers when, in April 2017, the D.C. Circuit affirmed the lower court's decision to block Anthem's acquisition of Cigna.¹³²

In September 2017, the DOJ challenged Parker-Hannifin Corporation's consummated \$4.3 billion acquisition of CLARCOR Inc., alleging the transaction substantially lessened competition in U.S. markets for aviation fuel filtration products.¹³³ Then, in November 2017, the DOJ challenged *AT&T/DirectTV's* proposed acquisition of TV network owner Time Warner arguing that the vertical integration would give the merged firm the power to demand higher prices for content from rival distributors and slow the industry's transition to new video distribution models.¹³⁴

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 auctions, generic drugs, and canned seafood. The DOJ also continues to investigate and prosecute companies and executives for their roles in conspiracies in global industries including automotive parts, capacitors, LIBOR, and "roll-on, roll-off" ocean cargo.

D. AGENCY GUIDANCE AND ADVOCACY

In January 2017, the FTC and the DOJ announced updated Antitrust Guidelines for International Enforcement and Cooperation.¹³⁵ Updates include a discussion of investigative tools, confidentiality safeguards, the legal basis for cooperation, information exchanges and waivers of confidentiality, remedies and special considerations in criminal investigations, and the application of U.S. antitrust law to conduct involving foreign commerce, foreign sovereign immunity, and foreign sovereign compulsion.

131. Press Release, FTC, "FTC and State Attorney General Challenge Physician Group Acquisition in North Dakota" (Jun. 22, 2017), <https://www.ftc.gov/news-events/press-releases/2017/06/ftc-state-attorney-general-challenge-physician-group-acquisition>.

132. *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017).

133. Press Release, DOJ, "Justice Department Files Antitrust Lawsuit Against Parker-Hannifin Regarding the Company's Acquisition of CLARCOR's Aviation Fuel Filtration Business" (Sept. 26, 2017), <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s>.

134. Press Release, DOJ, "Justice Department Challenges AT&T/Directv's Acquisition of Time Warner" (Nov. 20, 2017), <https://www.justice.gov/opa/pr/justice-department-challenges-atdirectv-s-acquisition-time-warner>.

135. Press Release, FTC, "Federal Trade Commission and Department of Justice Announce Updated International Antitrust Guidelines" (Jan. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/federal-trade-commission-department-justice-announce-updated>.

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