The Year in Review

International Antitrust

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I. Argentina*

A. National Competition Authority

On May 24, 2018, the National Congress enacted the new Antitrust Law No. 27,442 ("Antitrust Law") bringing a wide range of changes to antitrust enforcement in Argentina. The Antitrust Law creates a new decentralized antitrust authority within the Executive Branch, the National Competition Authority ("NCA"). The existing system of the Antitrust Commission and the Secretary of Trade will remain in force until the appointment of the members of the NCA.

B. Mergers

The Antitrust Law implements a suspensive system under which companies will not be able to close a transaction prior to approval from the NCA. This system will enter into force one year after the creation of the new authority (expected in the first quarter of 2020). Until then, the post-closing notification system remains applicable.

The Antitrust Law also increased the notification and de minimis exception thresholds; basing them on Adjustable Units ("AU"), to be annually updated.

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* Miguel del Pino of Marval, O’Farrell & Mairal. All resources are dated as of 26 November, 2018.

2. Id. art. 18.
3. Id. art. 80.
4. Id. art. 14, 55(a), 55(d).
5. See id. art. 84.
to prevent inflation and devaluation distortions that characterize the Argentine economy.\(^6\)

The Antitrust Law also increased the late filing fine and introduced a gun-jumping fine (applicable once the pre-closing system enters into force) and a filing fee for parties that file an economic concentration.\(^7\)

In terms of procedural innovations, interested third parties are now allowed to make statements and submit objections to an economic concentration. Those statements will not be binding on the antitrust authority.\(^8\)

Under the new Antitrust Law, the antitrust authority must approve transactions within 45 working days after receipt of a correct and complete filing.\(^9\) If the regulator has concerns, it will produce a statement of objections and summon a hearing to consider remedies. In these cases, the review timeframe will be extended for an additional 120 working days. There is also a summary proceeding (fast-track) for transactions that do not raise competition concerns.

Finally, this year the Secretary of Trade issued new Guidelines for Merger Control Review.\(^10\) These unify years of jurisprudential criteria and provide clearer rules for parties interested in carrying out a merger control notification in Argentina.\(^11\)

C. **CARTELS AND OTHER ANTICOMPETITIVE CONDUCTS**

In order to enhance cartel prosecution, the Antitrust Law now presumes that certain behaviors (hard-core cartels) are absolute restrictions to competition.\(^12\) Such agreements are null and have no effect. The new antitrust authority may, however, grant waivers to enter into these kinds of per se illegal contracts if they do not harm the general economic interest.

Fines for both companies and natural persons that engage in anticompetitive conduct have also been increased.\(^13\)

The new law also creates a leniency program. The program establishes two possible benefits for those who apply for leniency: exemption or reduction of fines, as well as immunity from certain criminal sanctions (with certain specific exceptions).\(^14\)

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6. The AU has been set in ARS 20 for 2018; Law No. 27442, art. 85, May 15, 2018, [No. 33,870] B.O. 3 (Arg.).
7. Id. art. 33, 55(d), 59.
8. Id. art. 13.
9. Id. art. 14.
11. Id.
13. Id. art. 55
14. Id. art. 60.
Lastly, the Antitrust Commission has published a draft version of the Guidelines for the Analysis of Cases of Abuse of Dominance for public consultation. These guidelines are expected to be issued soon.

II. Australia*

A. LEGISLATIVE DEVELOPMENTS

It has been one year since the “Harper Reforms” significantly changed Australia’s competition laws. The reforms, which amended the Competition and Consumer Act 2010 (Cth) (“CCA”) in November 2017, introduced a concerted practices provision, amended the misuse of market power provision to include an “effects test,” and changed the merger process.

B. MERGERS

As of 21 November 2018, the Australian Competition and Consumer Commission (“ACCC”) issued twenty-one informal merger clearance decisions: seventeen were approved, three were approved subject to undertakings and one was opposed. In addition, 252 transactions were “pre-assessed.” No merger authorization applications have been made.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

This year saw criminal cartel charges laid against individuals for the first time. Criminal cartel charges have been laid against:
- Country Care, its Managing Director and a former employee for cartel conduct involving assisted technology products;

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16. Id.
17. Competition and Consumer Act 2010 (Cth) pt IV div 2 s 45(1)(c) (Austl.).
18. Id. at pt IV div 2 s 46(1).
19. Id. at pt VII div 1 s 90(7).
• Citigroup, Deutsche Bank, ANZ and six senior executives for entering a cartel to restrict the supply of, or maintain the price of, ANZ shares;\textsuperscript{24} and
• The Construction, Forestry, Maritime, Mining and Energy Union and its Divisional Branch Secretary for attempting to induce suppliers of steel fixing and scaffolding services to enter a cartel with builders.\textsuperscript{25}

In 2017, Nippon Yusen Kabushiki was convicted and fined AUD 25 million after pleading guilty to a charge of cartel conduct involving fixed freight prices for transporting vehicles to Australia.\textsuperscript{26} In April 2018, Kawasaki Kisen Kaisha pleaded guilty to similar conduct, with judgment now pending.\textsuperscript{27}

The largest civil penalty to date for breach of the CCA was handed down in 2018. On appeal, Yazaki Corporation was ordered to pay AUD 46 million for a civil contravention of coordinating quotes with a competitor for the supply of wire harnesses.\textsuperscript{28}

This year saw the ACCC bring its first two “gun jumping” cases. Proceedings were instituted against:
• Cryosite Limited for diverting customers from the target to itself before regulatory approval was obtained and the transaction completed;\textsuperscript{29} and
• Pacific National (“PN”) and Aurizon for reaching an understanding in the context of a sale to PN which led to Aurizon closing its intermodal business.\textsuperscript{30}

D. DOMINANCE

In May 2018, the Full Federal Court found that whilst Pfizer took advantage of its market power, it did not act for a prohibited

\textsuperscript{27} Id.
(anticompetitive) purpose. This case was brought under the old test for misuse of market power, which prohibited only taking advantage of market power for anticompetitive purposes but, unlike the current law, did not prohibit conduct that had an anticompetitive effect.

III. Brazil*

A. Legislative Developments

Resolution 21/2018, ruling on the disclosure of documents from leniency and settlement agreements to support damage claims, was published in 2018. In order to protect and promote the leniency program, which could be weakened by the growing (and legitimate) culture of damage claims, CADE decided that disclosure of documents should only be allowed if imposed by judicial court orders.

Continuing the recent improvement of its soft law via guidelines, CADE has now issued the “remedies guidelines”, aimed at providing transparency, predictability and legal certainty in remedies negotiations.

B. Mergers

While 2017 was marked by three blocking decisions, 2018 had one merger blocked: the acquisition of Liquigas by Ultragaz – the two largest gas producers in Brazil. CADE took the view that the merged entity would allow price control in a market with very few players and, allegedly, prone to collusion.

Gun jumping remains on the spotlight. Since the pre-merger regime came into force in 2012, CADE investigated seventeen cases, out of which fourteen had fines agreed or applied. 2018 was responsible for four of those.

33. Resolução No. 21, de 5 de Setembro de 2018, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA, de 11 de Setembro de 2018 (Braz.).
36. See Administrative procedure for Determination in the Concentration Act n° 08700.000631 / 2017-08, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 8, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWewYjcbu9ZEFhBt-n3BfPLh9w7akQAb8mpB9yOdnxUsfO6XMgIEvZPtH7Y0qK
C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The largest fines in 2018 were imposed in the so-called “salt cartel”\(^{37}\) (289 million BRL) and the “flexible packaging cartel”\(^{38}\) (306 million BRL). In relation to international investigations: two were brought to trial: the “gas-insulated switchgear cartel”\(^{39}\) and the “TV’s color pictured tubes cartel,”\(^{40}\) which resulted in the collection of approximately 5 million BRL in fines and over 80 million BRL in settlements jointly.

Settlements amounts accounted for 1.3 billion BRL, more than twice the value obtained from fines resulting from convictions.\(^{41}\)

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37. See Administrative procedure for Determination in the Concentration Act n° 08012.005882/2008-38, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (May 23, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFHbr-n3BPPLNu9u7aKQaH8mpB9yOhgKgD5Fur-RyPxmlu_cWwxtLqXBNMJia0_RrEEFHlyCw0PhVdZgOp9eAL_N8rdWqtnNeK0qylh5WRVL_5IW; see also Administrative procedure for Determination in the Concentration Act n° 08012.001376/2006-16, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 23, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFHbr-n3BPPLJu9u7akQAh8mpB9yMH3wF-mE0OEZuXiH9nQc97SybE65LyTdAWMK1iqfB5v6Va1CA4U6yKhKl2MGl7mp9Ku9q9hPoLT1srBe11N.

38. See Administrative procedure for Determination in the Concentration Act n° 08012.004674/2006-30, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (July 4, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFHbr-n3BPPLJu9u7akQAh8mpB9yMH3wF-mE0OEZuXiH9nQc97SybE65LyTdAWMK1iqfB5v6Va1CA4U6yKhKl2MGl7mp9Ku9q9hPoLT1srBe11N.


40. See Administrative procedure for Determination in the Concentration Act n° 08012.002414/2009-32, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Aug. 22, 2018), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFHbr-n3BPPLJu9u7aKQaH8mpB9yNgf2cz7k5Mw1JhbWRaBvs1mV4dIUs8hxoY85Yq7cCCGUJIMyg_SmiMSRaWrt1nSgq9T3w9y9c9AAow.

D. DOMINANCE

CADE indicated that it is closely and increasingly monitoring the financial sector in order to promote technological innovation and allow the entry and growth of competitors in vertically related markets, e.g. cryptocurrency, credit card issuance, payment arrangements, which already resulted in the payment of almost 55 million BRL by Banco do Brasil, Bradesco, Cielo, Itaú and Redecard in the investigation of payments arrangements.

E. COURT DECISIONS

Following the trend of civil damages arising from cartels, Whirlpool withdrew its appeal (to the Brazilian Supreme Court) that questioned the confidentiality of the documents related to the settlement reached with CADE in the so called “compressors cartel” due to an out-of-court settlement through which it committed to disclose part of the information and documents.

IV. CANADA*

A. LEGISLATIVE DEVELOPMENTS

In 2018, the Canadian Competition Act’s affiliation rules were amended to provide consistent treatment of corporate and non-corporate entities.

42. See Administrative procedure for Determination in the Concentration Act n° 08700.003599/2018-95, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Jan. 18, 2019), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0e62g277GvPsZDAxAO1tMiVcL9FcFMR5Uu6rEqPEJuTUu08mg6wxL0JzWxCOr9mNeMYP8UajTVP9dxRfPbcR-i6dE70KFJk91LEikHF095Gv2EaMU59eRqF7SgY7; see also Administrative procedure for Determination in the Concentration Act n° 08700.003187/2017-74, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Jan. 10, 2019), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0e62g277GvPsZDAxAO1tMiVcL9FcFMR5Uu6rEqPEJuTUu08mg6wxL0JzWxCOr9mNeMYP8UajTVP9dxRfPbcR-i6dE70KJk91LEikHF095Gv2EaMU59eRqF7SgY7; see also Administrative procedure for Determination in the Concentration Act n° 08700.003187/2017-74, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Jan. 22, 2019), https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_exibir.php?0e62g277GvPsZDAxAO1tMiVcL9FcFMR5Uu6rEqPEJuTUu08mg6wxL0JzWxCOr9mNeMYP8UajTVP9dxRfPbcR-i6dE70KFJk91LEikHF095Gv2EaMU59eRqF7SgY7; see also Administrative procedure for Determination in the Concentration Act n° 08700.003187/2017-74, CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA (Apr. 6, 2016), http://en.cade.gov.br/press-releases/cade-condemns-cartel-in-the-international-market-of-refrigerator-compressors.


* Adam S. Goodman and Simon Kupi of Dentons Canada LLP.

44. An Act to amend the Canada Business Corporations Act, the Canada Not-for-Profit Corporations Act and the Competition Act, S.C. 2018, c. 8 (Can.). These amendments are currently in force: see Competition Act, R.S.C. 1985, c. C-34, ss. 2(2)-2(4)(Can.).
Furthermore, Parliament introduced a public interest review process for airline joint ventures under the Canada Transportation Act.\(^45\)

**B. Mergers**

Canada's Competition Bureau (“Bureau”) obtained divestitures in five transactions including: Metro Inc./Jean Coutu Group;\(^46\) Linde AG/Praxair;\(^47\) La Coop fédérée/Cargill Limited;\(^48\) and Bayer AG's USD 66 billion acquisition of the Monsanto Company.

**C. Cartels**

The Bureau and the Public Prosecution Service made significant changes to the immunity and leniency framework applicable to cartel activity.\(^49\) Immunity is now provided later in the process, with cooperation expected under a “Grant of Interim Immunity”; immunity for directors, officers and employees will be considered based on an individual’s cooperation; and leniency discounts are now contingent on the value of cooperation provided.\(^50\)

In March 2018, the Bureau executed criminal search warrants against the corporate owners of two leading Canadian newspapers.\(^51\) The Bureau's

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45. *Transportation Modernization Act*, S.C. 2018, c. 10, ss. 14, 83-88 (Can.). These amendments were not yet in force as of writing.
investigation concerns the parties’ agreement to swap forty-one publications, and the subsequent closure of thirty-six of them.52

Additionally, a thirteenth defendant pled guilty in connection with the Bureau’s car parts investigation,53 and four engineering firm employees were charged in connection with allegations of bid rigging regarding infrastructure projects in Gatineau, Quebec.54

D. ABUSE OF DOMINANCE AND OTHER ANTICOMPETITIVE PRACTICES

In the Bureau’s Competition Tribunal proceeding challenging an “Agency Model” arrangement in the North American e-books market, the final publisher (HarperCollins) settled in January 2018, terminating the matter in Canada.55

The Bureau also concluded its litigation against the Toronto Real Estate Board over restrictions to real estate listing information.56

E. COURT DECISIONS

In early 2018, the Federal Court of Appeal held that the Bureau would have to balance confidentiality concerns against procedural fairness on a case-by-case basis.57

The Canadian Supreme Court granted defendants leave to appeal the British Columbia optical disk drive certification decision.58 The Court will consider whether “umbrella purchasers,” who purchased from non-cartelists, have a cause of action in Canada.

52. Id.
58. Id.
V. China*

A. LEGISLATIVE DEVELOPMENTS

China’s antitrust enforcement agencies underwent significant institutional reform in 2018. In April 2018, China established the State Administration for Market Regulation (“SAMR”), combining the antitrust enforcement responsibilities of the previous Price Supervision and Antimonopoly Bureau of the National Development and Reform Commission (“NDRC”), the Antimonopoly Bureau of the Ministry of Commerce (“MOFCOM”), and the Antimonopoly and Anti-unfair Competition Bureau of the State Administration of Industry and Commerce (“SAIC”). The reform will enable SAMR to combine enforcement resources, optimize the use of resources for SAMR’s enforcement priorities, resolve overlapping enforcement jurisdictions and harmonize inconsistent rules and practices of previous concurrent agencies.

B. MERGERS

During the first three quarters of 2018, SAMR cleared 319 merger cases, including 261 cases under the simple case procedure. In 2018 SAMR published eleven penalty decisions for transactions not properly notified, the highest number in the past ten years.

SAMR imposed conditions on four transactions in 2018. In Bayer / Monsanto, SAMR imposed global divestitures and behavioral remedies,

* Peter Wang and Yizhe Zhang of Jones Day. All resources are dated as of 26 November, 2018.


including giving open access to Bayer’s digital agriculture platform in China to Chinese developers on a fair, reasonable and non-discriminatory basis.\(^6^4\) In *Essilor / Luxottica*, SAMR prohibited the combined entity from engaging in exclusive behaviors such as bundling, exclusive dealing, discriminatory licensing or selling below cost.\(^6^5\) In *Linde / Praxair*, in addition to capacity divestiture, SAMR requested that Linde constantly supply Chinese customers with certain gas mixtures at reasonable prices and quantities and that Linde divest its shares in four joint ventures in China.\(^6^6\) In *UTC / Rockwell*, in addition to global divestitures, the combined entity was prohibited from tying or proactive bundling, among other restrictions.\(^6^7\)

C. **Administrative Enforcement**

During the first three quarters of 2018, SAMR started investigations of twelve alleged cartels/anticompetitive agreements and eleven alleged abuse of dominance cases.\(^6^8\) The published decisions of closed cases mainly involved local cartels.

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D. Court Decisions

From January through November 2018, Chinese courts handled 836 unfair competition and antitrust cases.69 One notable issue is the divergent approaches between Chinese antitrust agencies and Chinese courts toward resale price maintenance ("RPM"). In short, RPM is essentially treated as per se illegal by SAMR, while Chinese courts assess the effect of the alleged RPM on competition.70

In a civil antitrust lawsuit filed by a distributor against Hankook Tire in July 2018, the distributor alleged that Hankook forced the distributor to enter into a vertical agreement to restrict resale prices.71 Although the Shanghai court confirmed the existence of this agreement, it held that there was no evidence showing anticompetitive harm and, therefore, no RPM.72

Similarly, the Guangdong High Court dismissed an appeal of a private civil antitrust lawsuit filed by a distributor against Gree, a Chinese household appliances brand.73 The Court ultimately concluded that the market for household air conditioners from 2012 to 2013 was highly competitive and the alleged RPM did not have any anticompetitive effect. As a result, the conduct at issue did not constitute an RPM violation.74

VI. European Union*

A. Legislative Developments

The European Union ("EU") adopted legislation to prevent "geo-blocking" European consumers’ access to goods or digital content based on their location.75 The European Commission ("EC") also started reviewing the antitrust rules for distribution of goods and the antitrust exemption for liner shipping consortia, both of which are scheduled to expire in 2020.76
parallel, the EC continued to consider the implications of big data, a policy focus that will likely continue throughout Commissioner Margrethe Vestager’s remaining year in office.  

B. **Mergers**

Consolidation in the agrochemical space continued to attract EU scrutiny. Ultimately, the EC approved Bayer’s planned acquisition of Monsanto, subject to divestments. The EC also cleared Apple’s proposed acquisition of Shazam following a review that highlighted its growing focus on access to big datasets. In another high-profile deal, the EC cleared Disney’s plan to acquire parts of Fox, subject to divestments.

The EC continued to enforce suspected non-compliance with the merger review process, fining Altice €125 million (−$148 million) for “gun jumping”.

C. **Anti-Competitive Practices**

The EC continued vigorously prosecuting cartels. Through November 2018, the EC imposed fines totaling about €800 million (−$948 million) on companies found to be involved in cartels relating to capacitors, maritime car transports, spark plug and car braking systems. It also started or continued investigations of suspected cartel activities, including in metal packaging and styrene monomer purchasing, as well as alleged collusion.

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among car manufacturers to delay the development of clean emissions technology.84

The EC also fined four consumer electronics manufacturers a total of €111 million (~$132 million) for imposing minimum resale prices on their online retailers, the EC’s first sanction in a case involving resale price maintenance and the use of pricing algorithms and monitoring software.85

D. ABUSE OF A DOMINANT POSITION

The EC imposed a €4.3 billion (~$5 billion) fine on Google for imposing restrictions on Android device manufacturers and network operators.86 It accepted remedies offered by Gazprom to address potential concerns related to restrictions on trans-border gas supply.87 The EC also began investigating whether destination clauses in Qatar Petroleum’s liquefied natural gas (“LNG”) supply contracts may have impeded trans-border trade of LNG.88

E. COURT DECISIONS

At the end of 2017 (after publication of the 2017 version of the ABA’s Year in Review), the EU Court of Justice ruled that luxury good makers can prevent their distributors from using online marketplaces.89

89. See EU Court of Justice Press Release No. 132/17, A supplier of luxury goods can prohibit its authorised distributors from selling those goods on a third-party internet platform such as Amazon (Dec. 6, 2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170132en.pdf.
VII. India*

A. LEGISLATIVE AND INSTITUTIONAL DEVELOPMENTS

The Government reduced the size of the Competition Commission of India ("CCI") from seven commissioners to four.90 A new chairman, Ashok Kumar Gupta, was appointed in November 2018.91 The CCI also amended its merger regulations to provide greater clarity on review timelines and procedures.92 In addition, the Government initiated a review of the 2002 Competition Act;93 significant reforms are anticipated.

B. CARTELS AND OTHER ANTI-COMPETITIVE AGREEMENTS

Cartel enforcement continues to be one of CCI’s focuses.94 This year saw increased attention to pricing in the healthcare and airline industries.95 It also saw the continuation of enforcement activities in connection with the automotive parts industry and with alleged collusion in government tenders.96

The CCI continues to use leniency as an effective enforcement tool. While CCI is consistent in granting 100% leniency to first-in-line applicants disclosing the existence of a cartel, applicants who apply at a subsequent...
stage have received lower (but still generous) reductions.\textsuperscript{97} In the Flashlights case, despite the filing of two leniency applications, CCI found no violation, holding that pure information exchange in itself is insufficient evidence for finding price fixing.\textsuperscript{98}

\section*{C. Merger Control}

CCI has adopted an expansive definition of when one enterprise "controls" another for purposes of merger review.\textsuperscript{99} The standard applied to evaluate corporate control in this context includes not just \textit{de jure} control, but also the acquisition of special veto rights, material influence, or \textit{de facto} control of the target.\textsuperscript{100}

CCI has actively pursued cases involving allegations of gun-jumping, including partial-payments, advance consideration, and token payments.\textsuperscript{101} Penalties, however, have continued to be nominal, generally up to $14,000, whereas the maximum penalty that can be levied is 1 percent of the combined assets or turnover of the combination, whichever is higher.\textsuperscript{102}

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\textsuperscript{102} See Competition Commission of India [CCI] Aug. 8, 2018, Notice given under Section 6(2) of the Competition Act, 2002 given by Chhatwal Group Trust, Shrem Infraventure Private Limited and Shrem Roadways Private Limited, C-2018/01/544 (India), \textit{available at} https://www.
CCI generally continues to demand India-specific behavioural remedies in global transactions. Such remedies include undertakings to license agricultural technology on fair reasonable and non-discriminatory terms and requiring divestments (even of minority stakes) in competing businesses.\(^\text{103}\)

CCI cleared Walmart’s acquisition of e-tailer Flipkart despite criticisms of Flipkart’s business practices, which include Flipkart’s alleged use of deep discounts.\(^\text{104}\) CCI considered those criticisms as ancillary concerns and addressed them in separate enforcement proceedings.\(^\text{105}\)

**D. Dominance**

In 2018, CCI fined Google $21 million for abusing its dominance in the online web search and search advertising markets.\(^\text{106}\) In contrast, CCI dismissed, at the threshold stage, claims against Uber and Ola alleging that those companies improperly exercised collective dominance or formed part of the same dominant ‘group’ based on their alleged common shareholders.\(^\text{107}\)

**E. Notable Court Decisions**

The Supreme Court set aside a lower appeals court’s determination that a cartel had formed in the cylinder manufacturer market, finding that evidence

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of parallel pricing, contemporaneous trade association meetings, and an assessment of general market conditions was insufficient to return a finding of an anti-competitive agreement.\textsuperscript{108}

The High Courts of Delhi\textsuperscript{109} and Madras\textsuperscript{110} issued decisions allowing the Director General’s office (“DG”) to expand the scope of its investigations to include parties other than those specifically mentioned in the CCI’s order directing an investigation. Further, the High Court of Delhi held that the DG can proceed against directors and employees of a company parallel to its investigation of the company itself for violations of the Competition Act.\textsuperscript{111}

In addition, the National Company Law Appellate Tribunal (“NCLAT”) directed that at the time of final disposal of a case, CCI must rigorously and independently consider all evidence collected by the DG during the course of the investigation, rather than simply affirming the DG’s investigation report.\textsuperscript{112}

\section*{VIII. Japan*}

\subsection*{A. LEGISLATIVE DEVELOPMENTS}

In June, the legislature adopted new “Commitment Procedures” that allow the Japan Fair Trade Commission (“JFTC”) and an investigated company to resolve an alleged violation of the Antimonopoly Act (“AMA”) by mutual consent.\textsuperscript{113} Subsequently, the JFTC issued new Guidelines on the Commitment Procedures\textsuperscript{114} that provide detailed protocols and examples of


\textsuperscript{113.} Shigeyoshi Ezaki, Vassili Moussis, Kiyoko Yagami and Naoki Uemura of Anderson Mori & Tomotsune. All resources are dated as of 26 November, 2018.


possible remedies that may be proposed by investigated companies. The Commitment Procedures became enforceable in December 2018.115

B. Mergers and Acquisitions

In August, the JFTC gave clearance to Fukuoka Financial Group, Ltd. for the acquisition of shares in The Eighteenth Bank, Ltd. after an in-depth review that took into account remedies (including assignment of account receivables to competitors, periodical reporting to the JFTC, etc.) proposed by the parties.116 In total, for the fiscal year April 1, 2017 to March 31, 2018, the JFTC cleared 299 cases.117 Of these clearances, six — including the acquisition of shares in Santoku Corporation by Hitachi Metals, Ltd. and Broadcom’s integration with Brocade — were cleared contingent on the implementation of remedies proposed by the parties.118

C. Cartels and Other Anticompetitive Practices

In March, the JFTC filed a criminal accusation with the Public Prosecutor-General against the four largest construction companies in Japan: Taisei Corporation, Kajima Corporation, Obayashi Corporation, and Shimizu Corporation (the so-called “Super 4”), as well as two executives, for bid rigging in the maglev railway construction project.119 According to the JFTC, these companies exchanged information regarding price quotes for the bids and agreed upon the successful bidder on certain construction projects. In October, the Tokyo District Court ordered Obayashi Corporation and Shimizu Corporation to pay fines totaling ¥380 million.120 The court’s decisions regarding Taisei Corporation, Kajima Corporation and the two executives remain pending. Although done infrequently, the JFTC can file criminal accusations with the Public Prosecutor-General for “serious and vicious” violations following compulsory investigations.121

121. Shiteki-dokusen no Kinshi oyobi Koseitorihiki no Kakuho ni Kansuru Horitsu [Dokusen Kinshiho] [Antimonopoly Act] Law No. 54 of 1947, art. 74, para. 1; The Fair Trade Commission’s Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding...
is one of the rare cases where the JFTC has made use of such criminal referral powers.

With respect to cartels, the JFTC issued a series of cease-and-desist orders and surcharge payment orders to several distributors of uniforms for rigging bids for uniforms supplied to the transportation and service industries. According to JFTC press releases, leniency applications were used in all these cases.

In addition, in 2018 the JFTC closed three investigations — including investigations of Apple Inc. and Airbnb — without taking any legal action against the investigated companies because they voluntarily proposed remedies (including amendment or waiver of certain contract provisions which are alleged to be restrictive) to rectify the conduct that was suspected to be in violation of the AMA.

IX. Korea*

A. Legislative Developments

123. Id. at n.9.


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retaliatory conduct for filing a complaint with the Korea Fair Trade Commission ("KFTC").

On August 24, the KFTC proposed the first comprehensive overhaul of the FTL since the FTL was enacted some 38 years ago. Among other changes, the bill proposes to: (i) allow prosecutors to launch investigations and issue indictments against hard-core cartels (e.g., price fixing, bid rigging) without the KFTC’s referral; (ii) allow private individuals to seek injunctive relief from the courts without having to go through the KFTC; (iii) raise the ceiling amount of fines by 100% for all violation types; and (iv) introduce a “size of transaction” threshold for notifying mergers that would capture mergers with a high acquisition price.

In March 2018, the KFTC introduced amended Guidelines on Criminal Referrals for FTL Violations. Under the amended Guidelines, which are now in effect, the KFTC is expected to actively pursue criminal referrals of individual executives and employees, in addition to companies.

B. MERGERS

The KFTC approved two global mergers with conditions in 2018. The KFTC required both structural and behavioral remedies in respect of the proposed acquisition of NXP Semiconductors N.V. by global chipmaker Qualcomm. The KFTC also approved the proposed merger between Linde AG and Praxir Inc. on the condition that one party divest its assets in Korea and/or the U.S.

128. Id.
C. Cartels and Other Anti-Competitive Practices

The KFTC imposed corrective orders and fines in a number of cartel cases, including a combined fine of KRW 1.715 billion against two Japanese ball bearings manufacturers,\(^\text{132}\) a combined fine of KRW 119.4 billion against six steelmakers,\(^\text{133}\) and a combined fine of KRW 36 billion against nine Japanese condenser manufacturers.\(^\text{134}\) The KFTC referred respondent companies in each matter (and one foreign national individual in the latter case) for criminal prosecution.

D. Dominance

In January 2018, the KFTC imposed corrective orders and a combined fine of about KRW 6.2 billion against global CT and MRI equipment maker Siemens and two of its affiliates for excluding a group of CT/MRI maintenance/repair newcomers from the relevant market for Siemens products.\(^\text{135}\)

X. South Africa*\(^\text{136}\)

A. Legislative Developments

Parliament passed extensive amendments to the Competition Act\(^\text{137}\) designed to address high levels of concentration and support small, medium and black owned businesses. The amendments include new provisions to address buyer power, stronger abuse of dominance provisions and enhanced powers for the Competition Commission ("COMPCOM") in market inquiries and introduce a veto power for foreign acquisitions which may adversely affect national security.\(^\text{137}\)


\(^{134}\) See Press Release, KFTC, KFTC sanctions global electronic parts cartels (Sept. 14, 2018), http://www.ftc.go.kr/solution/skin/doc.html?fn=dd3ca0d53b137c9b61dd822a8453b10f1 7b3204a3a312a6e0c133af2453d7e&rs=/fileupload/data/result/BBSMSTR_0000000002402/.


* Lara Granville, Director, Cliffe Dekker Hofmeyr Inc. The author would like to thank Reece May for his help with this chapter.

\(^{136}\) Competition Act 89 of 1998 (S. Afr.).

B. MERGERS

In 2018, COMPCOM prohibited three mergers. Public interest remains a key consideration in merger review, as in Off the Shelf/Chevron, in which onerous public interest conditions were imposed.

C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

An increasing number of cartel referrals are proceeding to trial rather than being settled. In 2018, the Competition Tribunal ("Tribunal") considered six cartel cases in a variety of industries.

COMPCOM's long-running healthcare inquiry may be nearing completion. COMPCOM published a provisional report finding that over-servicing and over-supply underlies rising private healthcare costs.

D. ABUSES OF DOMINANCE

The Tribunal’s Media24 decision on predatory pricing was overturned by the Competition Appeal Court ("CAC"), which found no predatory pricing.

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had occurred.\footnote{142} COMPCOM referred another case alleging predatory pricing against regional airline SA Airlink to the Tribunal.\footnote{143}

E. Court Decisions

COMPCOM is appealing a CAC ruling that confirmed the Tribunal and CAC have jurisdiction to issue a declarator on whether a transaction is notifiable, even where COMPCOM has not first considered the transaction.\footnote{144} The Constitutional Court confirmed that COMPCOM can use investigatory powers including the issuing of summons, and dawn raids, in investigating whether a transaction is notifiable.\footnote{145}

XI. United Kingdom*

A. Legislative Developments

Uncertainty continues over the form of the UK’s post-Brexit competition regime, although some indication was given by the draft withdrawal agreement published in November 2018.\footnote{146} Whatever the fate of that agreement, the Competition & Markets Authority (“CMA”) has confirmed it is likely that the UK will introduce a state aid regime that is very similar to the current EU regime.\footnote{147}

If the deal is agreed (in identical or similar form), the EU Commission and Courts will continue to have jurisdiction over competition law issues during any “transition period.”\footnote{148} But there will be scope for UK and EU law to diverge in the future.

Corporations that are currently facing a Commission investigation should be aware that, if there is no Brexit deal, the CMA will be free to open a new investigation.\footnote{149}

\footnote{142. See Media 24 (Pty) Ltd. v. Competition Comm’n of So. Africa, Case No. 146/CAC/Sep16 (Mar. 19, 2018), available at https://www.comprise.co.za/assets/Uploads/146.CAC.Sep16-Judgment.pdf.}
\footnote{143. See Media release, COMPCOM, SA Airlink to be Prosecuted for Abuse of Dominance (Feb. 14, 2018), http://www.compcom.co.za/wp-content/uploads/2018/01/Airlink-Final.pdf.}
\footnote{* Jasvinder Nakhwal & Jonathan Tickner, Peters & Peters Solicitors LLP.}
\footnote{148. See TF50 (2018) 55, Draft Agreement at art. 92(4) – (5).}
investigation even though the Commission’s investigation has not concluded.\footnote{149}

UK competition lawyers have continued to seek qualification in Ireland, to ensure they retain access to EU legal privilege following Brexit.\footnote{150}

B. MERGERS

A proposed merger between major UK supermarket chains J Sainsbury Plc and Asda Group Ltd is currently under phase 2 investigation by the CMA.\footnote{151} Among other issues, the CMA has said it will weigh the merged company’s increased buying power against the growing competition it would face from discount supermarkets such as Aldi and Lidl.\footnote{152}

C. CARTELS & OTHER ANTICOMPETITIVE PRACTICES

The CMA has launched a confidential investigation into suspected anti-competitive arrangements in the financial services sector but has not yet determined there is sufficient evidence to issue a statement of objections.\footnote{153} The CMA also partially closed an investigation into anti-competitive agreements in the pharmaceutical sector to prioritize the use of its resources elsewhere.\footnote{154} The decision followed losses in appeals brought by Pfizer and Flynn Pharma in the Competition Appeal Tribunal (“CAT”), which did not accept the CMA’s finding that abuse had taken place.\footnote{155}

The infrequency of criminal cases (the UK’s most recent criminal cartel prosecution concluded in September 2017)\footnote{156} continues to raise questions about whether the CMA is making sufficient use of its substantial enforcement powers.

\footnotesize
\begin{itemize}
\item \footnote{149}{See Brexit: merger review implications and recommendations, NORTON ROSE FULBRIGHT (Jan. 2017), http://www.nortonrosefulbright.com/knowledge/publications/145758/brexit-merger-review-implications-and-recommendations.}
\item \footnote{150}{See No-deal Brexit guidance: Providing legal services in the EU, THE LAW SOCIETY (Nov. 8, 2018), https://www.lawsociety.org.uk/support-services/advice/articles/no-deal-brexit-providing-legal-services-in-eu/}
\item \footnote{151}{See J Sainsbury PLC / Asda Group Ltd merger inquiry, CMA (Dec. 13, 2018), https://www.gov.uk/cma-cases/j-sainsbury-plc-asda-group-ltd-merger-inquiry.}
\item \footnote{153}{See Press Release, CMA Financial services sector: suspected anti-competitive practices (Nov. 16, 2018), https://www.gov.uk/cma-cases/financial-services-sector-suspected-anti-competitive-practices.}
\item \footnote{154}{See Press Release, CMA, Pharmaceutical sector: suspected anti-competitive agreements (Nov. 15, 2018), https://www.gov.uk/cma-cases/pharmaceutical-sector-suspected-anti-competitive-agreements.}
\item \footnote{155}{Flynn Pharma Ltd v CMA [2018] CAT 11; Pfizer Inc. v CMA [2018] CAT 11.}
\end{itemize}
D. Cases

In what the CMA views as a landmark case, the CAT found that golf club manufacturer Ping Europe Limited had breached competition law by banning the sale of its golf clubs on the internet.\textsuperscript{157} But the judgment still allows for more limited regulation of online supply.

XII. United States*

A. Mergers

The U.S. federal antitrust agencies, the Federal Trade Commission ("FTC") and United States Department of Justice Antitrust Division ("DOJ") received 2,052 HSR filings in the 2017 fiscal year, a twelve percent increase over 2016. Of these, fifty-one (2.5\%) were investigated, and thirty-nine (1.9\%) resulted in enforcement action.\textsuperscript{158}

The most significant merger litigation of 2018 was the DOJ’s challenge to AT&T’s acquisition of Time Warner.\textsuperscript{159} The DOJ claimed that the merger would substantially lessen competition in the video programming and distribution market by enabling AT&T to hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner’s “must have” networks. After a six-week trial, the U.S. District Court denied the DOJ’s request for an injunction and permitted the transaction to close.\textsuperscript{160} The DOJ has appealed the decision.\textsuperscript{161}

The challenge demonstrates a policy shift away from “behavioural” remedies, which require ongoing monitoring and enforcement. Under prior administrations, such remedies had been used to resolve competitive concerns in vertical transactions, but DOJ refused to consider them in the AT&T case.\textsuperscript{162}

\textsuperscript{157} Ping Europe Ltd. v CMA [2018] CAT 13, Sec. G.
\textsuperscript{161} United States v. AT&T, INC., ET AL., 18-5214 (D.C. Cir., 2019).
\textsuperscript{162} Makan Delrahim, Assistant Attorney General, Dept. of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association’s Antitrust Fall Forum (Nov. 16, 2017).
B. Cartels and Other Anticompetitive Practices

The DOJ has continued to prosecute domestic and international cartels, although there has been a notable decrease in the total number of criminal cases filed and penalties imposed by the DOJ in the past two years.\(^{163}\)

The next frontier of aggressive antitrust enforcement is in the area of “no-poaching” agreements. Following the 2016 release of agency guidance on human-resources related antitrust violations,\(^ {164}\) there have been several actions brought by state attorneys general as well as civil class-action lawsuits.\(^ {165}\) In 2018, the DOJ announced a settlement with rail equipment suppliers Knorr-Bremse AG and a Westinghouse subsidiary in connection with alleged unlawful agreements not to compete for each other’s employees, the first such settlement since the agency guidance.\(^ {166}\)

C. Agency Guidance and Advocacy

The FTC has held a series of public hearings starting in September 2018 on Competition and Consumer Protection in the 21st Century.\(^ {167}\) The hearings examine whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy. To date, the hearings have addressed exclusionary conduct by digital and technology-based platform businesses; acquisitions of potential competitors in digital marketplaces; vertical mergers; and privacy, big data, algorithms, and artificial intelligence.

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165. See e.g., Compl., Deslandes v. McDonalds USA LLC et al., Case No. 1:17-cv-04857, N.D. Ill. (June 28, 2017).
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