GREETINGS FROM THE EDITOR-IN-CHIEF

We are pleased to present this new issue of the International Antitrust Bulletin, 2016 Vol. 1. The issue features articles from expert counsel on recent developments in competition law in Argentina, Brazil, the European Union, France, Russia and Spain. As always, the Bulletin includes What In The World Did I Miss? updates on global developments from our able regional reporters. We welcome your comments and suggestions and invite your proposals for future articles.

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Editor-in-Chief

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Africa

The Comoros

Mar. 2016 — The Comoros, a COMESA member state, recently adopted its own competition legislation [Loi No.13 -014 /AU – Relative à la concurrence en Union des Comores (the “Competition Act”)] which will apply to all economic sectors and all entities (public and private) that conduct business which has an “effect” in the Comoros. The Act prohibits restrictive practices and abuse of dominance, although recognizing a rule of reason defense. In particular, restrictive practices may be justified if they contribute to economic benefits through production or distribution gains alternatively through the creation or maintenance of employment. In addition, the defense requires such practices to provide the “users” with an equitable share of the resulting profit. Parties may also apply for exemptions from either the Government or the Commission Nationale de la Concurrence (“CNC”). The CNC, under the tutelage of the Ministry for Trade, is responsible for enforcing the provisions of the Act. The CNC has not, however, yet been established. Firms conducting business within the Comoros should take considerable notice of the potential penalties for engaging in restrictive practices in contravention of the Competition Act. The potential penalties can result in firms being fined a maximum of 5% of global turnover and 20% local turnover. In the case of a repeated offence, these maximum penalties are doubled. These potential maximum penalties are significantly higher than the commonly prescribed maximum administrative penalty of 10% of domestic turnover only. Interestingly, the Competition Act does not provide for merger notification but does provide for the imposition of a penalty if the CNC finds that parties do not cooperate fully, by providing incomplete or incorrect information or documents to the CNC. http://africanantitrust.com/2016/03/17/comoros-gets-competition-law ; www.comores-commerce.org/politique-commerciale/loi-de-la-concurrence

Kenya

Mar. 2016 — The Competition Authority of Kenya (“CAK”) conducted its first dawn raid. The search and seizure operations were carried out in respect of two fertilizer firms, Mea Limited and the Yara East Africa, based on the CAK’s suspicion of price fixing occurring between these two firms, which together control approximately 60% of the fertilizer market. The CAK conducted the raid in accordance with Section 32 of the Competition Act, which provides for the Authority to enter any premises in which persons are believed to be in possession of relevant information and documents and inspect the premises and any goods, documents and records situated thereon. The CAK is said to be have been seeking board reports, presentations, pricing data and circulars to detect contraventions of the Competition Act. This follows an inquiry which was launched last year by Kenyan competition authorities into what the CAK termed “powerful trade associations exhibiting cartel-like behavior specifically targeting banks, microfinance institutions, forex bureaus, capital markets as well as the agricultural and insurance lobbies.” The fact that the CAK has carried out its first dawn raid demonstrates its growing stature and confidence as an agency dedicated to combat anticompetitive practices. http://africanantitrust.com/2016/03/23/dawn-raids-on-the-increase-across-africa

Namibia

Dec. 21, 2015 — The Namibian Competition Commission (“NCC”) published revised merger notification thresholds in Government Gazette No. 5905 of 2015. The publication was as a result of the NCC’s review of previous thresholds which took into account a wide range of factors including the International Competition Network’s (“ICN”) Recommended Practices for Merger Notification Procedures, the thresholds of similarly situated jurisdictions and past experience. The 2015 thresholds are meant to address the shortcomings of the 2012 thresholds by establishing two thresholds which must both be met for the transaction to be deemed mandatorily notifiable. The two thresholds are: (1) a N$30 million threshold for the combined values of the undertakings involved; and (2) a N$15 million threshold for the value of the transferred undertaking. According to the notice and the NCC’s explaining note, a transaction having combined values (i.e., any combination of assets and turnovers of the undertakings involved) of more than N$30 million and, in addition, either assets or the turnover of the transferred undertaking of more than N$15 million will be deemed notifiable to the NCC (assuming all other elements of the merger definition, i.e., “change of control” have also been satisfied).

South Africa

Dec. 2015 — The South African Competition Commission (“SACC”) published revised draft guidelines for the assessment of public interest provisions in mergers (the “guidelines”) for public comment. This publication is the second draft of the guidelines published by the Commission, following the first round of comments received by the Commission. The Commission received comments from law firms, companies, international associations and policy research centers. The objective of the guidelines, as stated in the preface, is to provide guidance on the Commission’s approach to analyzing mergers by indicating the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest grounds in terms of section 12A(3) of the Act. There has been no indication, as of yet, that the draft guidelines will be amended substantially by the SACC, nor when the guidelines will be implemented. www.compcom.co.za/wp-content/uploads/2015/01/Public-Interest-Guidelines-December-2015.pdf
Mar. 23, 2016 — The SACC carried out a search and seizure (dawn raid) operation in the automotive glass fittings market as part of an ongoing investigation into allegations of price fixing and division of markets by PG Glass and Glasfit in the provision of automotive glass fitting and repair services. The dawn raid was conducted at the Gauteng offices of the Gauteng premises of PG Glass, Glasfit, Shatterprufe and Digicall. According to the SACC website, the Commission had “reasonable grounds to believe that information relevant to this investigation is on the premises of the four firms.” The SACC obtained from the High Court in Pretoria a warrant authorizing it to search the offices of the firms. The SACC has announced that it seized documents and electronic data, which will be analyzed together with other information gathered to determine whether a contravention of the Competition Act has taken place.

Dawn raid activity within South Africa has been on the rise, particularly in the years 2014 and 2015, and it is likely that 2016 will follow suit. This is the SACC’s first search and seizure operation in 2016, following four dawn raids which took place during 2015.

South Sudan

South Sudan was officially admitted to the East African Community (EAC), a regional intergovernmental organization, as its sixth member in Arusha (Tanzania). South Sudan applied for EAC membership soon after gaining independence from neighboring Sudan in 2011. South Sudan now joins Kenya, Uganda, Tanzania, Rwanda and Burundi in a free-trade zone that will allow it to benefit from more open labor movement, fewer restrictions on capital flows and other increased economic integration. Chapter 2 Article 6 (d) of the EAC Treaty states that the principles of the community are: “good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.” The timing of the integration of South Sudan by the EAC has initiated academic debate. The EAC has faced difficulties in implementing its competition law, namely the East African Community Competition Act, 2006 and Competition Regulations, 2010, due to the unique economic and market make-up of its member states.

Swaziland

Jan. 2016 — The Swaziland Competition Commission (“SCC”) announced that a market inquiry has been initiated into the retail banking sector. Swaziland’s retail banks include First National Bank (FNB), Nedbank, Standard Bank, SwaziBank and Swaziland Building Society (SBS). The central retail product, the “current account,” is said to be used as the starting point of the inquiry, extending to other important retail banking services which include credit products, savings products and payment services. The SCC has reiterated that it is not trying to set the prices for banks but rather that the inquiry would identify the distribution modes of all retail banking products and factors that influence the structure of the retail banking market. The launching of the inquiry is said to be as a result of the findings of a prioritization of sectors by the SCC in 2014, which looked into the markets or industries with the largest impact on consumers and of significant importance to the Swaziland economy.

Zambia

Feb. 2016 — The Zambian Competition and Consumer Protection Commission (“CCPC”) announced that it will be conducting a market inquiry into the vehicle towing sector. This sub-sector piqued the interest of the CCPC after an influx of complaints received from consumers who were not satisfied with conditions of the services and did not realize value for their money. The CCPC is mandated to review the operations of the market in Zambia and the conditions of competition in those markets. The CCPC, in March this year, made a call for information, inviting members of the public around the country to submit their experiences with towing services in an effort to understand the sector better and protect consumers. As identified in African Antitrust (www.africanantitrust.com), it remains to be seen whether this inquiry is focused predominantly on competition-law issues or rather consumer-protection issues.
What In The World Did I Miss?

Australasia

Australia

Mar. 21, 2016 — The Full Federal Court upheld an appeal by the Australian Competition and Consumer Commission (“ACCC”) in relation to air cargo cartel allegations. These proceedings are significant for the ACCC in its proceedings against fifteen international airlines, including PT Garuda Indonesia Ltd (Garuda) and Air New Zealand Ltd (Air New Zealand) alleging the airlines had engaged in price fixing in relation to surcharges for the carriage of air cargo from origin ports outside Australia to destination ports within Australia. The Federal Court in October 2014 found against the ACCC and held that the conduct did not occur in a market in Australia. The ACCC appealed that decision. On March 21, 2016, the Full Court found that price fixing conduct engaged in by Garuda and Air NZ could be characterized as taking place in a “market in Australia” and consequently breached Australia’s price fixing laws. This decision confirms the ACCC’s view that the conduct by the airlines in fixing air cargo surcharges to be paid by Australian importers, and ultimately passed on to Australian consumers, were caught by Australian competition laws. The matters against both Air NZ and Garuda have been remitted to the Federal Court to determine the relief to be granted, including declarations, injunctions and penalties. www.accc.gov.au/media-release/accc-appeal-upheld-in-air-cargo-case

Indonesia

Feb. 29, 2016 — The Supreme Court of Indonesia upheld the Business Competition Advisory Commission’s decision to fine six mobile communications operators for fixing prices of short messaging services (“SMS”) which caused a Rp 2.87 trillion loss to customers. The Court found that a clause of the Agreement of Cooperation between the operators included an SMS tariff which resulted in a price cartel in relation to messages sent off-net (i.e., using different networks) in the period of 2004 to April 2008. The Court ordered the operators to pay a total fine of Rp 77 billion. In calculating the financial loss suffered by consumers, the Court considered the opportunity loss to customers in not having access to lower SMS prices, the opportunity loss to customers in being unable to use more SMS services at the same price of one and consumers’ limited choice for other alternatives due to the cartel arrangements. http://en.tempo.co/read/news/2016/03/07/080751299/Sanction-for-SMS-Cartel; www.thejakartapost.com/news/2008/06/19/six-mobile-operators-guilty-price-fixing.html

Malaysia

Feb. 4, 2016 — The Competition Appeal Tribunal reversed a competition infringement finding against Malaysia Airlines and AirAsia, ordering a refund of the RM10 million fine imposed on each of the airlines by the Malaysian Competition Commission (“MyCC”) for breaching the Competition Act 2010. On April 11, 2014, the MyCC had found both airlines guilty of anticompetitive behavior in breach of market-sharing prohibitions under the Competition Act 2010, by entering into an agreement to share the market in air transport services within Malaysia. http://mltic.my/competition/news/mas-airasia-berhad-succeed-in-setting-aside-10-million-fine-MY15004.html

Feb. 26, 2016 — The MyCC announced that it had successfully resolved 202 out of the 232 complaints received from the public since the Competition Act 2010 was enforced on January 1, 2012. The Chief Executive Officer of MyCC stated that the industries that were found to most commonly breach the Act included construction, transportation, food, services, pharmaceutical, insurance, shipping, agriculture and banking. http://mltic.my/competition/news/mycc-resolves-202-complaints-on-offences-against-competition-act-MY15227.html; http://mltic.my/corporate/news/malaysia-eu-to-resume-fta-talks-mustapa-MY15277.html

New Zealand

Mar. 1, 2016 — The New Zealand Commerce Commission (“NZCC”) released its final report on competition in New Zealand’s dairy industry. The NZCC’s review of competition in the dairy industry commenced in June 2015, at the request of the Minister for Primary Industries. The NZCC’s view is that there is not sufficient competition in the market for the acquisition of raw milk from farmers (the “farm gate”) and the market in which processors supply raw milk to each other to justify the NZCC considering full deregulation of the dairy industry at this time. The NZCC noted that, if the market were deregulated now, Fonterra Co-Operative Group Limited (a major supplier of raw milk) would be able to increase the price of raw milk it sells to other domestic processors, which would likely lead to higher retail prices for dairy products. www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2016/commission-releases-final-report-on-dairy-sector-competition-in-nz
What In The World Did I Miss?

Australasia

Philippines
Jan. 31, 2016 — National Economic and Development Authority Director-General, Arsenio Balisacan, resigned to become the first chairperson of the newly-formed Philippine Competition Commission ("PCC"). The PCC was created under the Philippine Competition Act 2015. As the Commission was only organized on February 1, 2016, it is still in the process of preparing rules, regulations and procedures for implementation of the Act. www.gov.ph/2016/02/12/pcc-mc-16-001; http://asia.nikkei.com/Politics-Economy/Economy/Aquino-appoints-new-antitrust-enforcer

Singapore
Mar. 8, 2016 — The Competition Commission of Singapore ("CCS") issued a Proposed Infringement Decision ("PID") against 13 fresh chicken distributors for anticompetitive agreements to coordinate the amount and timing of price increases and for agreeing not to compete for each other’s customers in the market for the supply of fresh chicken products. The CCS found that the distributors were engaged in discussions between at least 2007 and 2014 whereby they agreed to coordinate price increases and not to compete for each other’s customers. These agreements were found by the CCS to be aimed at distorting the prices of fresh chicken products and restricting the choices available to customers. The distributors have 6 weeks from their receipt of the PID to make submissions to the CCS, following which the CCS will make a final decision on whether the conduct has breached the Competition Act. www.ccs.gov.sg/media-and-publications/media-releases/ccs-issues-pid-against-13-fresh-chicken-distributors-for-price-fixing-and-market-sharing

Thailand
Feb. 2, 2016 — The Cabinet approved draft amendments to the Trade Competition Act, submitted by the Commerce Ministry. The changes are aimed at enhancing competition and reducing business monopolies and political interference. The Government has indicated that a focus for enforcement authorities will be on state enterprises that run businesses in competition with the private sector. The amendments would also address establishing an independent regulatory body to supervise trade competition. www.bangkokpost.com/business/news/849488/competition-law-changes-win-backing; www.nationmultimedia.com/business/Much-needed-changes-to-competition-law-set-for-Cab-30277649.html

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Europe

Belgium

Mar. 1, 2016, Belgium Introduces New Leniency Rules — The Belgian Competition Authority issued new leniency guidelines in relation to its procedures around cartel enforcement. The new guidelines, which entered into force on March 22, include clarifications on the criteria that need to be met by individuals in order to receive immunity from prosecution in respect of cartel offenses, and they also aim to shift Belgium’s leniency rules closer to the EU standard — the European Model Leniency Program. www.belgiancompetition.be/sites/default/files/content/download/files/20160304_press_release_05_bca.pdf

European Union

Mar. 18, 2016, EU Makes Progress on E-Commerce Sector Inquiry — The European Commission published initial findings on certain aspects of its ongoing e-commerce sector inquiry. The findings concern in particular the practice of “geo-blocking,” whereby online retailers and distributors purposefully restrict sales of their products to customers in certain Member States. The Commission, in its initial findings, notes that this can be for any number of reasons, but it observes that the practice is widespread, and it seems probable that geo-blocking may feature heavily in any final report on the e-commerce sector. The Commission’s full preliminary findings are due by mid-2016, with the final report to follow in the first quarter of 2017. http://europa.eu/rapid/press-release_MEMO-16-882_en.htm

Mar. 17, 2016, EU publishes report on Insurance Block Exemption — The European Commission published a report assessing the feedback that it has received so far in respect of its consultation on the operation of the Insurance Block Exemption Regulation. The Regulation, which provides limited antitrust exemptions to the insurance industry for activities such as joint compilation of tables and co-insurance pools, is set to expire in 2017, and the Commission must decide whether or not to renew it. The Commission’s preliminary findings support, in its view, the ending of the Regulation in 2017, without renewal. This would fit with the Commission’s broader drive in recent years to pull back from support of sector-specific antitrust block exemptions. http://europa.eu/rapid/press-release_IP-16-861_en.htm

Hungary

Jan. 4, 2016, Hungarian Merger Review Shortened For Simple Cases — On January 1, a new procedural provision came into force in Hungary, meaning that the waiting period for a decision on straightforward merger cases has been shortened from 30 days to only 8 days. The waiting period had already been cut down from 45 days to 30 days as a result of legislative changes introduced in July 2014. The Office of Economic Competition points out that clearances can only be given within 8 days where a “complete” merger notification is received, flagging up the possibility that the notifying parties may continue to face delays beyond 8 days where information that the Office deems to be significant is not provided in the formal merger notification. www.gvh.hu/en/press_room/press_releases/press_releases_2016/administrative_time_limit_governing_simplified_mer.html

United Kingdom

Feb. 12, 2016, UK Authority Submits Input on National Competition Authority Consultation — The UK antitrust enforcer, the Competition and Markets Authority (“CMA”), published its response to the European Commission’s call for input on proposals to strengthen antitrust enforcement powers of national competition authorities (“NCAs”). The CMA is broadly supportive of the EU proposals, though it is of the view that the Commission’s proposals could go further in terms of providing for support to NCAs to enforce competition rules more effectively on a cross-border basis. www.gov.uk/government/publications/cma-response-to-ec-consultation-on-ensuring-effective-nca-enforcement

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What In The World Did I Miss?

North America

Canada

Feb. 1, 2016 — The Canadian Competition Bureau and the National Development and Reform Commission of China signed a MOU to enhance collaboration between the two nations. Canada and China will share their experiences and keep one another informed of policy and enforcement developments. This represents the third such agreement between the Competition Bureau and China antitrust authorities since May 2015, indicating increased cooperation between the two nations with regard to the enforcement competition laws. www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04023.html

Feb. 8, 2016 — Chalifoux Sani Laurentides Inc. (“Chalifoux Sani Laurentides”) pled guilty in a bid-rigging scheme to obtain municipal contracts for specialized sewer services in Quebec. Chalifoux Sani Laurentides was fined $118,000 for its participation in the bid-rigging scheme. Five companies and one individual have pled guilty for their participation in this scheme. The companies have been fined a total of $268,000. www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04013.html

Mar. 14, 2016 — The Canadian Competition Bureau obtained its second guilty plea in a bid-rigging scheme in Montreal residential construction market. Les Entreprises de ventilation Cimaso Inc. and its President, Roch Raby, were fined a total of $140,000 for their role in an agreement to rig bids for a private sector ventilation contract in Fauborg St-Laurent Phase II project. One other company, Les Entreprises Promécanic Ltée, has pled guilty for its participation in the bid-rigging scheme. That company (with a related individual) was fined a total of $565,000. www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04042.html

Mexico

Feb. 29, 2016 — Mexico’s Federal Economic Competition Commission (“FECC”) issued a preliminary ruling establishing that slots (landing and takeoff) in the Mexico City International Airport constitute an essential input and recommending corrective measures to foster competition. This investigation was the first procedure of its type initiated by the FECC. Once the file is integrated, the FECC will 60 days to issue its final resolution and recommendations. www.cofece.mx/cofece/images/AI/Dictamen_preliminar_29022016_.pdf

United States

Feb. 25, 2016 — The Federal Trade Commission (“FTC”) made its annual adjustments to pre-merger filing notification thresholds, as required by the Hart-Scott-Rodino Act of 1976 (“HSR Act”). The “size of the transaction” threshold has been raised from $76.3 million to $78.2 million. The “size of parties” thresholds of $15.3 million and $152.5 million in either annual sales or total assets will increase to $15.6 million and $156.3 million, respectively. For transactions valued at more than $78.2 million but not more than $312.6 million, no HSR Act notification will be required if the ultimate parent entities of one or both parties to the transaction do not satisfy the applicable “size of parties” thresholds. Transactions valued at more than $312.6 million (previously $305.1 million) will be reportable regardless of the size of the parties, unless an HSR Act exemption applies. www.ftc.gov/news-events/blogs/competition-matters/2016/01/hsr-threshold-adjustments-reportability-2016

Feb. 26, 2016 — The FTC cleared drug manufacturer Hikma Pharmaceuticals PLC’s (“Hikma”) proposed $2 billion acquisition of Roxane Laboratories Inc. (“Roxanne”) and Boehringer Ingelheim Roxane, Inc. from Boehringer Ingelheim Corporation on condition that the companies divest three strengths of anti-inflammatory and immunosuppressant prednisone tablets and all strengths of lithium carbonate capsules, used to treat bipolar disorder, to Renaissance Pharma, Inc.. The order also requires Hikma to relinquish to its drug development partner, India-based Unimark Remedies Ltd., the rights to market flecainide acetate tablets in the United States. Flecainide is used to prevent and treat abnormally fast heart rhythms. www.ftc.gov/news-events/press-releases/2016/02/ftc-puts-conditions-drug-manufacturer-hikma-pharmaceuticals-plcs


Mar. 17, 2016 — The Department of Justice (“DOJ”) filed an antitrust suit to block the acquisition by Tribune Publishing, publisher of the Los Angeles Times, of Freedom Communications Inc., publisher of the Register in Orange County, California, and the Press-Enterprise in Riverside County, California. The DOJ sought a temporary restraining order to prevent the sale from proceeding. The DOJ argued that the Los Angeles Times and the register account for 98% of sales in Orange County and 81% of English language newspaper sold in Riverside County. www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-la-times-publisher-acquiring-competing

Mar. 17, 2016 — Omron Automotive Electronics Co. Ltd. (“Omron Automotive”) pled guilty to bid rigging power windows installed on Honda Civics. Omron will pay a $4.55 million criminal fine. Omron Automotive, based in Komaki, Japan, and another manufacturer conspired from 2003 to 2013 to rig bids on power windows sold to Honda Motor Co., Ltd., according to the felony charge filed in the U.S District Court for the Eastern District of Michigan. Including Omron Automotive, 39 companies and 58 executives have been charged in the DOJ’s ongoing investigation and have agreed to pay a total of more than $2.6 billion in criminal fines. www.justice.gov/opa/pr/omron-automotive-electronics-co-ltd-pay-455-million-bid-rigging-power-window-switches

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What In The World Did I Miss?

South America

Argentina
Feb. 10, 2016 — The Argentine Agrarian Federation (“FAA”) accused Monsanto of abusing its dominant position. FAA claims that the producers are not against paying royalties for the technology, but against the abusive clauses imposed by the company. A complaint was filed by FAA and other trade associations before the National Commission for the Defense of Competition. According to the complaint, Monsanto monopolizes the market for seeds, imposing arbitrary and compulsory clauses in connection with the payment of royalties for the technology. www.conclusion.com.ar/2016/02/faa-denuncio-a-monsanto-por-abuso-de-posicion-dominante

Brazil
Jan. 20, 2016 — The Conselho Administrativo de Defesa Econômica (“CADE”) released draft guidelines for settlement agreements (the “Settlement Guidelines”) for public consultation and the final version of the guidelines for competition compliance programs (“Competition Compliance Guidelines”). The Settlement Guidelines encompass best practices and criteria adopted by CADE in negotiations of settlement agreements related to cartel infringements. According to CADE, the main purpose of the Settlement Guidelines is to allow for greater transparency, predictability, effectiveness and speed in negotiation of settlement agreements in the context of cartel cases. Notwithstanding this, the Settlement Guidelines are not binding, which means that CADE may deem appropriate not to take the guidelines into account in certain particular cases. Settlement agreements are set forth in Article 85 of the Brazilian Antitrust Law and may be executed by individuals and legal entities. In order to reach a settlement agreement with CADE, a proponent must acknowledge its involvement in the investigated conduct, cooperate with CADE throughout the investigation, and pay a fine. On March 17, 2016, CADE released the English version of the draft Settlement Guidelines. Comments and contributions on the Settlement Guidelines from interested parties may be sent to CADE by March 31. The Competition Compliance Guidelines provide guidance on how to implement an effective competition compliance program in order to prevent entities and individuals from engaging in competitive infringements. In accordance with the Competition Compliance Guidelines, having a robust competition compliance program in place may also serve as a mitigating factor in the establishment of the amount of the financial contribution in settlement agreements. The final version of the Competition Compliance Guidelines was released after a public consultation process through which interested parties submitted comments for CADE’s review. The Competition Compliance Guidelines are available in both Portuguese and English versions at CADE’s website. www.cade.gov.br/Default.aspx?cb7f8f9a6abf54df2a17280759fa

Jan. 6, 2016 — The General Superintendence (“GS”) of CADE launched a formal probe against Empresa Brasileira de Correios e Telégrafos (“Correios”), the Brazilian postal service operator. The investigation was based on a complaint filed by SETCESP, the trade association of cargo transportation companies of São Paulo. The GS claims that Correios may have been involved in three anticompetitive infringements: (i) sham litigation; (ii) naked restraints against competition; and (iii) refusal to provide services to competitors. The GS has reviewed over 200 lawsuits involving Correios in which the extension of its legal monopoly is discussed. According to the GS, Brazilian courts would have ruled against Correios in most lawsuits related to Correios’s alleged monopoly over the delivery of certain documents. In GS’s view, this could be considered evidence that Correios is adopting sham litigation tactics to artificially maintain its market position. The GS has also reviewed a number of lawsuits related to Correios’s alleged monopoly over the delivery of credit cards and checks and the deliveries made by motorcycle courier companies. According to the GS, although the Brazilian courts have ruled in favor of Correios in most lawsuits related to this subject, there is evidence that Correios is unable to provide some of the services demanded by its customers. In GS’s view, Correios is unduly preventing competitors from their right to provide services that Correios is unable to offer, which, according to the GS, represents a “naked restraint against competition.” According to the GS, there is evidence that Correios has been refusing to provide services to competitors. In markets such as e-commerce and financial services, the GS found that Correios often refuses to provide services to competitors, while at the same time providing the same services to customers that do not compete with Correios. Correios was required to submit its defense and, at the end of the discovery stage, the GS will issue an opinion on the case and forward it for final ruling by CADE’s Tribunal. www.cade.gov.br/Default.aspx?71c455a47c9166ad78c596a9b898

Jan. 20, 2016 — CADE’s Tribunal fined Cisco Systems Inc. (“Cisco”) and Technicolor S/A (“Technicolor”) BRL 30 million for gun jumping. This is the highest fine for gun jumping imposed by CADE so far. According to CADE’s Tribunal, the closing of the acquisition by Technicolor of Cisco’s connected-devices business outside Brazil could not have been implemented before CADE’s final approval, despite the carve-out agreement that Technicolor and Cisco had in place. In the decision, the Reporting Commissioner made it clear that carve-out agreements will not be accepted in Brazil to exclude or mitigate gun jumping penalties for at least three reasons. First, carve-out agreements are usually not an effective tool to prevent gun jumping (especially when it comes to avoiding the exchange of sensitive information among competitors) and are burdensome to competition authorities. Second, given that CADE’s merger review is one of the fastest in the world and CADE’s decision is usually issued in a timely fashion, execution of a carve-out agreement would be pointless. Third, a carve-out agreement does not necessarily meet the criteria set forth CADE’s Internal Rules for the closing of a transaction prior to CADE’s clearance. Arti-
What In The World Did I Miss?

South America

115 to 117 of CADE’s Internal Rules provide a mechanism through which CADE may give a green light to the parties to close a transaction while the deal is still under review. To that end, the following criteria must be met: (a) there would be no irreparable harm to competition resulting from the closing of the transaction; (b) the situation would be easily reversible in the future if the authority were to conclude that the notified transaction harms competition; and (c) the target company will face serious financial losses if the closing occurs after CADE’s clearance. Apart from the fact that carve-out agreements are not admissible in Brazil, the Reporting Commissioner pointed out that the carve-out agreement executed between Cisco and Technicolor does not prevent gun jumping for at least two reasons. First, the mechanisms put in place by the parties under the carve-out agreement would not be sufficient to isolate the Brazilian market from the effects deriving from the closing of the notified transaction outside Brazil. Second, given that the affected market is global in scope and Brazilian customers are served through imports into Brazil, the closing of the notified transaction in other jurisdictions would have effects in Brazil. www.cade.gov.br/Default.aspx?d66ab840d1473d25f15f04ee66b

Jan. 20, 2016 — CADE’s Tribunal fined Aurobindo Pharma Indústria Farmacêutica Ltda., Bravist Indústria e Comércio Ltda., and four individuals for operating a cartel that rigged bids to purchase inputs for the manufacturing of antiretroviral drugs. The investigation was launched based on information gathered through wiretappings made by the Federal Police in the so-called “Dirty Laundry Operation.” CADE’s investigation revealed that the defendants rig the bid results by fixing prices, suppressing bids and proposals, and subcontracting competitors. CADE dismissed the investigation against Xiamen Mcham Laboratories Ltd. due to lack of evidence of its involvement in the cartel infringement. It dismissed the case against Pharma Nostra and three individuals since they reached a settlement agreement with CADE in 2014. www.cade.gov.br/Default.aspx?66d928f03318ec36c08ddec70e189

Feb. 3, 2016 — CADE fined the port operators Tecon Salvador S.A., Intermaritima Terminais Ltda. and Tecon Rio Grande S.A. for abuse of a dominant position in the market for customs warehousing in the ports of Salvador (Bahia) and Rio Grande (Rio Grande do Sul). The companies are going to pay a fine of approximately BRL 10.6 million. The companies were investigated for unduly charging the Terminal Handling Charge 2 (“THC2”), a fee for the transportation of containers to customs warehouses. According to CADE, the charging of THC2 reinforces the bargaining power of port operators, unduly raises competitors’ costs, and may ultimately exclude competitors from the market. www.cade.gov.br/Default.aspx?2a1ded3bca40d45ea895a6b994bb

Feb. 23, 2016 — The GS launched an investigation against Companhia Sud Americana de Vapores S/A (“Companhia Sud Americana”), Eukor Car Carriers Inc. (“Eukor”), Grimaldi Group SpA (“Grimaldi”), Hoegh Autoliners Holdings SA (“Hoegh”), Kawasaki Kisen Kaisha (“Kawasaki”), Mitsui O.S.K. Lines (“Mitsui”), Nippon Yusen Kaisha (“Nippon”), Nissan Motor Car Carriers Co, Ltd (“Nissan”), and Wallenius Wilhelmsen Logistics (“Wallenius Wilhelmsen”) for an alleged international cartel in the market for ocean shipping services for roll-on/roll-off cargo. According to the GS, the alleged conduct involved customer allocation, agreements to increase prices or not to grant price reductions requested by customers. At least 80 individuals would have been engaged in the conduct through meetings, phone calls and e-mail exchanges. In November 2015, before the launching of the formal probe, Companhia Sud Americana, Kawasaki and Nippon entered into settlement agreements with CADE and committed to pay fines amounting to BRL 29 million. In February 2016, 13 individuals joined the settlement agreement executed by Nippon. The defendants will be required to submit their defenses and, at the end of the discovery phase, the GS will issue an opinion on the case and forward it for final ruling by CADE’s Tribunal. The alleged cartel is currently under investigation by US Department of Justice and the European Commission. www.cade.gov.br/Default.aspx?f145d523f228fc06103d0e203717

Feb. 24, 2016 — CADE imposed a fine of BRL 17.4 million on Solvay S/A (“Solvay”) due to its involvement in a cartel in the market for sodium perborate. The investigation was launched in 2006 after the execution of a leniency agreement between CADE and Evonik Degussa GmbH, Evonik Degussa Brasil Ltda. and one individual. According to CADE, between 1999 and 2001, Solvay and Degussa Aktiengesellschaft (“Degussa”) entered into agreements to share the market for sodium perborate. By means of such agreements, the companies established that Degussa would supply sodium perborate to Brazil, while Solvay would supply the product to the United Kingdom. The case was dismissed against two individuals due to the lack of evidence. This cartel infringement was also investigated by the US Department of Justice and the European Commission. www.cade.gov.br/Default.aspx?f145d523f228fc06103d0e203717

Mar. 3, 2016 — The GS opposed the incorporation of joint venture between Saint Gobain do Brasil (“Saint Gobain”) and SiCBRAS Carbeto de Silício do Brasil Ltda. (“SiCBRAS”) before CADE’s Tribunal. The joint venture will operate in the market for silicon carbide in Paraguay. The GS’s market investigation revealed that the transaction generates incentives for the companies to engage in coordinated practices, which could potentially bring downside effects to the sector, such as price increases. According to the GS, the transaction raises competitive concerns since: (i) Saint Gobain and SiCBRAS hold high market shares and compete in Brazil with each other; (ii) this is a 3 to 2 transaction; (iii) there is no close substitute for silicon carbide; and (iv) imports of silicon carbide do not exert significant competition constraints in Brazil. Furthermore, the transaction would allow the parties to exchange sensitive information and strategic data and to determine pricing...
strategies, production volume and customers to be served. The GS has submitted the transaction for CADE’s Tribunal review, which will issue a final decision on this matter.  

Mar. 16, 2016 — CADE’s Tribunal imposed fines amounting to BRL 21.3 million on Household Compressors Holding S.p.A, Danfoss A/S, Panasonic Electric Works Co. Ltd. and three individuals for operating a cartel in the international market for refrigeration compressors. The defendants exchanged commercial sensitive information, discussed price increases and the worldwide supply of compressors. The conduct took place between 1996 and 2008. The investigation was launched in July 2009 after the execution of a leniency agreement between CADE, the Tecumseh Group and a few individuals. This was the first case in which there was international cooperation for carrying out simultaneous dawn raids in Brazil, the US and Europe. The case was dismissed against the Tecumseh Group and its employees given that they complied with the terms and conditions set forth in the leniency agreement. CADE also dismissed the case against Whirlpool S/A, Whirlpool Unidade Embraco Compressores e Soluções de Refrigeração, and other nine individuals, which executed settlement agreements with CADE in 2009.  

Mar. 16, 2016 — CADE released for public consultation proposed Horizontal Merger Guidelines (the “Guidelines”). The main purpose of the Guidelines is to provide guidance on the best practices, stages of merger review, analytical methods and criteria adopted by CADE in the context of its merger control system. CADE’s current Horizontal Merger Guidelines were issued in 2001 and have been reviewed by CADE since at least 2007. Among the changes introduced by the Guidelines is the adoption of new framework of analysis for rivalry, market entry, purchasing power, potential competition, two-sided markets, diagonal integrations, and partial acquisitions, among others. Notwithstanding this, the Guidelines are not binding, which means that CADE may deem appropriate not to take it into account in certain particular cases. Comments and contributions on the Guidelines from interested parties may be sent to CADE by May 2.  

Chile
Jan. 6, 2016 — The Fiscalía Nacional Económica (“FNE”) recommended the Chilean Competition Tribunal (“TLDC”) to impose the maximum fine set forth in the law, i.e., USD 22.9 million on Cencosud, SMU and Walmart (jointly referred to as “supermarket chains”) for collusion in the market for fresh poultry meat. According to the FNE, the supermarket chains have been involved, through their suppliers, in an agreement to fix the minimum retail price of fresh poultry meat from 2008 to 2011. On December 14, 2011, a dawn raid was carried out at the premises of the supermarket chains. The seized documents revealed that the supermarket chains had been monitoring the retail price of the other members involved in the collusion. According to FNE, if a price deviation was noted by a supply chain, that supply chain would contact a supplier so that the latter would warn the wrongdoer to comply with the agreed price. In addition to fixing minimum selling prices, FNE stated that the mentioned supermarket chains’ conduct restricted competition by reducing the strategic behavior of competitors. At the end of 2011, the combined market share of the supermarket chains was 92.5%.  

Peru
Feb. 26, 2016 — Peru’s National Institute for the Defense of Competition and Protection of Intellectual Property (“Indecopi”) launched an investigation against 17 companies allegedly involved in a price-fixing agreement in the international market for ocean freight services. The investigated conduct dates back to at least 2009 and would have lasted until 2013. Indecopi was able to find evidence related to the alleged cartel after inspecting some of the companies’ premises. Minutes of meetings, e-mail communications and electronic documents were collected during the inspection. Those documents show that the involved companies had coordinated in order to fix rates for ocean freight services in connection with Peru-Asia route. The companies under investigation include American President Lines, CMA CGM, Compañía Marítima Chilena, Compañía Sudamericana de Vapores, Hamburg Südamerikanische Dampfschifffahrts Gesellschaft, Hapag Lloyd, Kawasaki Kisen Kaisha, Maersk Line Agency Holding, Mediterranean Shipping Company, Mitsui OSK Lines, Nippon Yusen Kabushiki Kaisha, APM Terminals Inland Services and certain local subsidiary agents.  

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Yandex vs. Google

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On September 18, 2015, the Federal Antimonopoly Service of Russia (“FAS”) ruled that Google had abused its dominant position in the market for pre-installed applications on mobile devices with an Android operating system in the Russian Federation.¹ The ruling was affirmed on March 14, 2016 by the Moscow Arbitration Court.²

Russia’s largest search engine provider, Yandex, had brought this matter to the attention of the FAS after several major manufacturers of mobile devices and tablets (in particular, Fly, Prestigio, Huawei, Samsung, and HTC) refused to cooperate with Yandex in relation to installation of the Yandex search engine and browser as the default settings. In unofficial comments, each of the manufacturers explained that it refused due to prohibitions and restrictions imposed by Google.

During the investigation, FAS looked at the pre-installed application market on Android devices (Android OS) localized for distribution in the Russian Federation. FAS distinguished pre-installation as a means to distribute mobile applications (which include app stores) from other means, such as independent download of applications and services by mobile device users from websites of developers and third parties. Pre-installed services and applications (installed on mobile devices at the time of purchase) are most commonly used by consumers and, as a rule, are not replaced by other services with similar functions. The FAS found that pre-installation is, therefore, the most efficient distribution channel. In this market, Google, as the developer and owner of the most sought-after app store, Google Play, and having ten times more users than its nearest rival, was found to be occupying a dominant position.

After analyzing the company’s practices, the FAS found that Google was endorsing Google Play. The manufacturers saw Google Play as a consumer’s first and basic need among Google applications and services comprising so-called Google Mobile Services (“GMS”). The GMS package comes with Google search pre-installed as the main (default) search engine. The FAS found that Google Play was tied to the GMS package and that individual components of the GMS package could not be purchased separately. As a result, most Android-based mobile devices sold in the Russian Federation had pre-installed Google applications from the GMS package (including those less popular with consumers) and Google search as the default search engine.

Mandatory pre-installation of Google Play as part of the GMS package was in some cases reinforced by additional prohibitions and limitations. Google prohibited manufacturers seeking to obtain Google Play from pre-installation of any applications competing with GMS applications on Android mobile devices. It expressly prohibited installation of Yandex as the default search engine and the Yandex Browser, and, in some cases, paid a fee from mobile advertising proceeds in return for the prohibition.

Additionally, Google required that any mobile device display on its home screen, in the manner specified by Google, all pre-installed Google applications, including Google Play.

Such practices ensured that the company’s products had maximum reach to raise revenues from mobile advertising, thereby creating preferential conditions for its business activities in the market. The practices raised barriers for Google’s competitors (in particular, Yandex) to access a number of markets, and it primarily blocked Yandex from the search market. The barriers could potentially result in restriction of competition due to a reduction in the number of business entities operating in the product market. The FAS concluded that these facts provided a ground to treat Google’s conduct as an abuse of dominance under Article 10 Part 1 of the Federal Law on Protection of Competition.

As a result of the investigation, a compliance order was issued to Google containing a number of behavioral conditions, including a prohibition against making availability of Google Play conditional upon pre-installation of other Google applications, products and services. The FAS ordered Google to notify users of Android mobile devices sold in Russia (by displaying a notice on the device’s screen) that (1) pre-installed Google applications can be deactivated, (2) the search engine in Google Chrome can be changed, (3) search engines and other applications similar to those in the GMS package can be installed from other providers and (4) an icon’s location on the device’s screen can be changed.

Application of antitrust requirements to the conduct of a dominant firm related to the use of intellectual property was a key issue in the investigation. Google claimed that all of the practices specified in the FAS’s charges amounted to lawful exercise of its exclusive rights to intellectual property, which excluded them from challenge as an abuse of dominance.

Rejecting Google’s argument, the FAS ruled that the applications included in the GMS package could not be treated as a single item of intellectual property, and it considered that each of the mobile applications taken separately, including Google Play, could be an item of intellectual property. The fact that Google may have exclusive rights in each of them did not justify
Google requiring pre-installation by manufacturers of mobile devices, much less prohibition of the use of other parties’ applications on those devices, if doing so leads to restriction of competition.

The FAS investigation has been closely watched by both the Russian public and the regulatory authorities of the European Union. Currently, several complaints are pending in the European Commission concerning Google’s alleged anticompetitive behavior in relation to Android OS, namely, the functioning of mobile applications specifically developed for that system. It is expected that the FAS decision may serve as a precedent for the European Union’s regulators.


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Recent Cartel Enforcement Activity in France

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The French Competition Authority (“FCA”) is one of the most active authorities in Europe, in particular as concerns cartel enforcement. Decisions issued in recent years have led to fines amounting to a total of more than € 2 billion. This makes France a candidate for thorough risk management, compliance programs and internal audits within international groups. A focus on decisions rendered by the FCA in 2015 provides a good insight into its recent cartel enforcement activity.

In March 2015, the FCA imposed a total fine of € 192.7 million on several competing manufacturers of dairy products for cartel behavior during the period 2006-2012. The case was initiated by a leniency application by General Mills-Yoplait, which benefited from a full exemption from fines. After the FCA conducted an onsite investigation at the premises of the companies concerned, a second leniency applicant provided further information, which was rewarded by a 35% fine reduction. The anticompetitive behavior consisted in price fixing and volume allocation in the context of tender offers organized by the main retailers that purchased the dairy products. The investigation found evidence of secret meetings, the use of dedicated mobile phones and meetings at the private home of one of the cartel participants. As all but one of the participants accepted not to challenge the facts, the debates before the FCA concerned mainly the calculation of fines. Interestingly, the fine of one of the participants was raised by 25% because it belonged to an important group of companies, while the fine of another participant was reduced because it had adopted competitive behavior during the cartel period, thus disrupting its operations.

In May 2015, the FCA imposed relatively moderate fines for a total of € 15 million to a long list of companies in the poultry sector, which were accused of having exchanged information on prices for several years. This amount is relatively low as compared to recent decisions by the FCA in horizontal/cartel-type cases. The FCA exceptionally accepted to depart from its usual method for calculating fines, which is based on the value of sales during the infringement period and would probably have led to much higher fines. It found that the sector had been hit by important crisis periods and that structural aspects of this industry made it difficult for the poultry sector to survive. Interestingly the FCA accepted and valued a collective commitment submitted by almost all participants aiming at the creation of an inter-branch organization in accordance with EU agricultural law, which could create a legally acceptable framework for cooperation. While this is not an explicit admission of an “agricultural exception” in competition law matters, it certainly creates a precedent and opens opportunities for companies in the agricultural sector to explore the possibilities of inter-branch organizations as an acceptable way of cooperating on certain market factors.

The FCA closed the year 2015 with a decision rendered in December concerning the delivery service industry, with a total amount of fines of € 672.3 million. The case had been brought to its attention, again, through a leniency application. Twenty delivery service companies were fined for coordinating on annual price increases. According to the FCA, this information sharing process occurred between September 2004 and September 2010 and mainly took place during meetings held within the framework of a professional trade union body, which has also been fined. The FCA has considered that round table discussions were regularly organized after and before the price increases, enabling the companies to harmonize their pricing demands and secure their business negotiations. Approximately half of the participants challenged the findings of the FCA and the decision is likely to be debated vigorously in appeal.

As shown by these three decisions, the FCA is relying heavily on its leniency program to detect cartel activities and, since fines are very high, leniency applications can be a winning strategy. When evidence has been provided by leniency applicants, fine reductions granted by the FCA to other cartel participants for not challenging the facts become a serious option. This trend has deeply impacted FCA proceedings, in a similar way to proceedings before the European Commission, by generating a shift of lawyers’ arguments from challenging the infringement itself to challenging the methodology for calculating fines.

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2 Décision n° 15-D-08 du 5 mai 2015 relative à des pratiques mises en œuvre dans le secteur de la commercialisation de la viande de volaille, available in French at www.autoritedelaconcurrence.fr/pdf/avis/15d08.pdf.


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In 2015, the Spanish competition authority (the National Commission for Competition and Markets, or “CNMC”) not only had a record year in terms of the amount of antitrust fines imposed but adapted to a Supreme Court ruling requiring them to change the way fines were calculated. Now, there are signs that under the new methods the fines for non-compliance may be even greater, and, in February 2016, the CNMC set out an ambitious action plan including the introduction of additional consequences.

2015 was a Record Year for Antitrust Enforcement

Between January and December of last year, the CNMC imposed a record of €549 million in antitrust fines on over 270 companies in 25 cases (although the CNMC’s predecessor used to publish data using slightly different periods, the amount would be comfortably above the previous record on any basis). Those fines reflect a huge amount of activity. The authority tackled a large number of major cartel and information exchange cases — 14 cases in total accounting for nearly €507 million in fines, including fines on over 250 companies (including several fines on trade associations (13) and third-party facilitators (9)).

The automotive sector in particular was a focus of activity. The investigation of a cartel between certain Volkswagen group dealers in several Spanish provinces, following a leniency application by the group itself, led to the discovery of five further cartels, between the dealers of the main car manufacturers and between the car manufacturers themselves. The brands involved in the conducts investigated had a joint market share amounting to approximately 91% of the motor vehicle distribution in Spain, and, in total, the six cases led to fines of €184 million.

Other affected sectors included waste management and urban sanitation (fines of €98 million were imposed on 3 trade associations and 39 companies for agreements) and the dairy sector (9 dairy companies and 2 trade associations were fined with €88.2 million for exchanges of information relating to purchases of raw milk).

The Supreme Court Annuls the Method Used to Calculate Antitrust Fines

In a judgment on January 29, 2015, the Spanish Supreme Court clarified the legal limits relating to fines for antitrust infractions under Spanish law and the basis on which such fines should be set in the future.¹

Under Spanish law, as in EU law, the maximum fine that may be imposed for antitrust infractions is 10% of the total annual turnover of the undertaking concerned. However, the Supreme Court expressly found that Spain was not bound to follow EU law as to the amount of the penalty and that, indeed, the method of calculating fines applied by the EU (and many other jurisdictions around Europe) would be incompatible with the Spanish constitution.

Specifically, the Spanish Constitution requires the LDC to establish a maximum possible penalty for any given infringement. Since there are no other relevant provisions in this respect, the 10% turnover limit must be interpreted as the maximum possible penalty, which can be therefore be applied only for the most serious possible infringement. This interpretation was inconsistent with the approach previously applied by the CNC (and that of the European Commission and many other authorities around Europe) under which the amount of the fine is calculated by reference to affected sales and duration, and the 10% is only applied as a “cap” or “levelling threshold.”

Accordingly, the Supreme Court instructed the CNMC to instead calculate the level of the fines as a point on the so called “arc of punishment” between 0% and 10% of turnover.

The CNMC’s New Approach

Although it has not published any new notice or guidelines, the CNMC has used a new approach in its decisions since the Supreme Court judgment based at determining a percentage of overall turnover. Specifically, the CNMC appears to first fix a percentage on the 0-10% scale for the “gravity” of the conduct in general and then adjust that general percentage for each company depending on their relative participation.

There is some debate as to whether the new calculation method implies higher antitrust fines. According to some studies, fines under the old method were higher as a percentage of turnover in most cases. However, throughout 2015 the percentages of turnover applied as fines have increased (from 3-4% early in the year to between 5% and 7% more recently). Moreover, while the fines for smaller companies may have decreased, it seems to be clear that the risk of fines for large companies and groups has significantly increased, since even a small percentage of their total turnover can represent a large amount.

The Action Plan

In February, the CNMC set out an ambitious Action Plan for competition enforcement in future in it which includes a number of specific initiatives:
• Intensification of the fight against cartels affecting public contracts by creating a working group to gather information on bid rigging, analyze cases investigated in recent years, train contracting authorities on how to detect cartels and create screening systems;

• Promotion of the Leniency Program, making adjustments to improve its efficiency and taking steps to make it more visible and better known to businesses;

• Recognizing personal responsibility for infringements by imposing fines of up to €60,000 on individual executives of firms involved;

• Promoting the use of alternative forms of punishment for companies and, specifically, the possibility of banning companies from contracting with public authorities;

• Specific monitoring of certain sectors, and in particular the marketing of rights to televise football matches, the telecommunications and pay-TV markets, the agricultural sector, the digital economy and the professions; and

• Close collaboration with international and regional competition authorities so as to coordinate their activities and share best practices.

Taken together, the proposals and, in particular the possibility of personal fines and bans on contracting with public authorities, appear significant.

Conclusions

In 2015, the CNMC not only brought a record number of cases and imposed a record amount of fines but also introduced a new methodology for calculating fines that arguably increase the risks for major groups. Now, in February 2016, the CNMC has proposed an action plan aimed at strengthening enforcement even further. As a result, antitrust compliance in Spain has never been more important and the risks of non-compliance have never been so high.


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Recent European Developments in Online Resale Price Maintenance

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In recent years in the United States, there has been debate over whether and, if so, how antitrust laws should govern minimum resale price maintenance (“RPM”). Historically, the United States treated minimum RPM agreements as per se unlawful under federal antitrust laws. However, in a 2007 case, Leegin Creative Leather Products, Inc. v. PSKS, Inc., the U.S. Supreme Court reversed this long-standing precedent and held that courts should analyze these agreements instead under the rule of reason analysis. The Court stated that, “[n]otwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output. Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.” Since then, U.S. federal courts must make a determination of the legality of any minimum RPM agreement on a case-by-case basis.

This article turns to the other side of the Atlantic and examines European treatment of minimum RPM in e-commerce. On one hand, the European Union (“EU”) views minimum RPM, on its face, as violative of competition law, unless certain conditions are satisfied. The reasoning is that minimum RPM limits consumers’ ability to compare prices and get value from their purchases. Minimum RPM can lessen intrabrands price competition among retailers seeking to attract customers using the internet. On the other hand, as increasing numbers of retailers take their products to the online marketplace, the threat of price erosion has become a matter of increasing concern for manufacturers. Moving forward, we can anticipate increased prosecution of RPM by the EU and its member states.

What is RPM?

RPM refers to a vertical price arrangement in which an upstream firm imposes a floor or ceiling on the pricing of products by downstream firms. Under such arrangements, the manufacturer of a product requires distributors, dealers, or retailers (collectively, “retailers”) to sell its product at or above a specified minimum price (“minimum RPM”), or at or below a certain maximum price (“maximum RPM”).

Internet Minimum Advertised Prices (“IMAPs”)

IMAPs are restrictions on the prices retailers may advertise on the internet. IMAPs have been viewed as a form of RPM. IMAPs may violate competition law since they reduce price transparency and increase transactional costs for consumers. The Competition and Markets Authority (“CMA”), the primary UK competition authority, has especially targeted IMAPs (as discussed in greater detail below).

Applicable EU Law

While EU law generally allows manufacturers to impose maximum or recommended resale prices, it strictly prohibits minimum RPM. Most European RPM cases are brought under Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) as well as the relevant statute(s) of the member state. Article 101 of the TFEU prohibits anticompetitive agreements, concerted practices and decisions by firms which may affect trade between EU member states. It provides, in full, “[a]ll agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”

As reflected in European Commission Guidelines on Vertical Restraints (2010/C 130/01) (“Guidelines on Vertical Restraints”) and Article 4 of EU Commission Regulation no. 330/2010, minimum RPM clauses are deemed to be, on their face, hardcore restrictions in vertical agreements. As a result, they are presumed to be unlawful anticompetitive behavior unless it is demonstrated that “likely efficiencies result from including the hardcore restriction in the agreement” and “that in general all the conditions of Article 101(3) are fulfilled.” In connection with e-commerce, the Guidelines on Vertical Restraints observe that “[t]he internet is a powerful tool to reach a greater number and variety of customers than by more traditional sales methods.” It can be expected that the European Commission will continue to focus on minimum RPM in e-commerce, and its current sector inquiry into e-commerce evidences close attention to internet selling.

United Kingdom (“UK”)

The UK has a history of targeting RPM, particularly, as mentioned above, where it relates to IMAPs. Under the Competition Act 1998, the UK’s competition law, Chapter I, in relevant part, prohibits anticompetitive agreements, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the UK and which may affect trade within the UK. The CMA is charged with enforcing the Competition Act 1998. Competition Act 1998 charges are generally brought together with charges under Article 101 of the TFEU. The CMA typically issues a Statements of Objection (“SO”), a provisional finding that there has been anticompetitive behavior, and after the parties have had an opportunity to respond to the findings, the CMA will make a final determination as to whether competition law has been violated. If it is determined that the Competition Act 1998 has been violated, a company could be fined up to 10% of its annual worldwide group turnover.
In late September 2013, the Office of Fair Trading (“OFT”), a predecessor to the CMA, issued two SOs with respect to minimum RPM and IMAP. One case, Pride Mobility Products Limited (“Pride”), concerned price restrictions on the sale of mobility scooters for use by disabled people. The OFT found that a manufacturer of mobility scooters and some of its retailers had entered into agreements that prevented eight UK retailers from either selling the scooters online or from advertising their prices online. The OFT ruled that the manufacturer’s IMAP policy was a restriction on competition. In that case, no fines were imposed because OFT determined that the size of the parties was too small.

More recently, on January 28, 2016, the CMA issued SOs to Ultra Finishing Limited, a bathroom fitting manufacturer, and retailer Foster Refrigerator, alleging that the two companies had, between 2012 and 2014, engaged in IMAPs for internet sales in violation of the Competition Act 1998 and TFEU. Consistent with Pride, the CMA alleged that IMAP is a form of minimum RPM that infringes competition law.

Italy

The Italian Competition Authority launched a minimum RPM investigation in November 2013 of Enervit, an Italian sport nutrition company, for minimum RPM agreements with retailers and wholesalers. The Authority alleged that Enervit: 1) encouraged retailers to keep the level of discounts applied on Enervit products between 20-25%; and 2) prohibited Italian retailers from selling or promoting the sale of products outside Italian territory. The Authority found that if the manufacturer had encouraged online distributors to significantly limit discounting, and it found, as well, that the territorial restrictions impeded online sales. To encourage compliance with minimum RPM, Enervit had created a reward policy, where it provided discounts to retailers that loyally engaged in RPM. The Authority only addressed its objections to the manufacturer and did not include resellers in its enforcement action.

Germany

Germany’s Federal Cartel Office (“FCO”) has made vertical price restraints a priority and has a record of strictly prosecuting minimum RPM. In two separate investigations in 2014 and 2015, the FCO investigated Adidas and ASICS, two sporting goods manufacturer, respectively, alleging they engaged in minimum RPM in the online market place. In October 2013, the FCO prohibited Sennheiser, a headphone and audio manufacturer, from restricting its distributors from reselling products on Amazon.com. Most recently, FCO fined a manufacturer of portable navigation devices €300,000 for imposing minimum RPM on retailers between the period of July 2009 to May 2014.

Moving Forward

Practitioners can expect continued enforcement attention to vertical restraints, especially RPM, throughout the EU. They can also anticipate increasing cooperation among national competition authorities within the EU in prosecuting RPM. In light of these expectations, companies should carefully examine their commercial policies and exercise caution when recommending resale prices in the future. Specifically, they should not incentivize compliance, or otherwise require compliance, with any such recommended prices.

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1 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Shortly after that decision, the Supreme Court further clarified that a manufacturer may, without incurring antitrust liability, unilaterally refuse to deal with a reseller that fails to honor a minimum price specified by the manufacturer. United States v. Colgate & Co., 250 U.S. 300 (1919).
3 Id. at 894 (internal marks and citations omitted).
4 Notwithstanding U.S. federal law’s stance, some state attorneys general continue to treat agreements on minimum RPM as per se illegal under state antitrust law, including, for example, California’s Cartwright Act.
5 EUR. COMM’N, GUIDELINES ON VERTICAL RESTRAINTS (2010), 2010 O.J. (130) 1.
7 EUR. COMM’N, GUIDELINES ON VERTICAL RESTRAINTS ¶ 47.
8 Id. ¶ 52.
10 See United Kingdom, Office of Fair Trading, Mobility scooters supplied by Pride Mobility Products Limited: prohibition on online advertising of prices below Pride’s RRP, CE/9578-12 (Mar. 27, 2014), available at https://assets.digital.cabinet-office.gov.uk/media/54522051ecd915d1380000007/Pride_Decision_Confidential_Version.pdf.
16 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

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Major Overhaul of Antitrust Enforcement in Argentina Announced by New Administration

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As a result of the Presidential elections in Argentina in 2015, in which Mauricio Macri was elected over the candidate of the party that had been in place for over the last 12 years, there have been new appointments of the heads of both bodies in the double-tier system currently in charge of antitrust enforcement, namely the Secretary of Trade and the Comisión Nacional de Defensa de la Competencia (the “Commission”).

As regards the new President of the Commission, renowned economist Esteban Greco was appointed by means of Decree No. 366/2016. A new roster of Commissioners is expected to be appointed soon, with an aim toward creating a more technically-oriented regulatory agency.

Review on 2015

Over the course of 2015, antitrust prosecution continued to be used as a tool against inflation. This entailed continuation of the Precios Cuidados price freezing agreements, where quarterly price negotiations were carried out with the Secretary of Trade and the intervention of all participants in the commercialization of certain products. Parallel market investigations were conducted for the purpose of controlling specific industries.

There has been a major focus over the last years on abuse of dominant position cases for the purpose of containing inflation, and this has had a detrimental effect on the prosecution of cartel cases, currently at an all-time low. A bill was drafted by the previous Administration to establish a leniency program, but it was never passed. The lack of a leniency program has contributed to the reduced attention to collusion cases. Additionally, the lack of concrete evidence that a leniency applicant could disclose has severely impacted investigations pursued by the Commission. A good example is the Tierra del Fuego car manufacturers’ case, in which an Argentine Pesos 1,060 million fine (approximately USD 130 million, the highest fine ever imposed in Argentina) was overturned by a Court of Appeals for lack of evidence.

The new Administration is also facing long-protracted cases, with certain investigations exceeding a decade of review. As regards cartel enforcement, there were no major cases. According to public comments made by President Greco, there are 255 anticompetitive conduct investigations currently being analyzed at the Commission (with an average review timeframe of 4.9 years) and 30 market investigation dockets (with an even longer review timeframe of over 7 years).

The situation is even more dire as regards merger control review, in which President Greco has acknowledged that there is a lack of progress and that review procedures are creating a "bottleneck effect." Over the course of 2015, 81 new merger control notifications were filed with the Commission, and only 59 were approved (all of which had been initiated in previous years). Pursuant to publicly released information by the new Administration, there are 305 merger control proceedings currently underway, with approximately 35% of those having no overlaps.

The delay in processing merger notifications can be attributed to the increased number of filings, which, in turn, has been caused by Argentina’s inflation rate. The current merger control threshold is set at Argentine Pesos 200 million, which was originally equivalent to USD 200 million but is now averaging USD 13.3 million due to inflation. As a result, the current average review timeframe is 2.5 years, even for non-material transactions.

The Antitrust Law sets a 45 working-day review period for a merger notification, but the Commission has historically used an interpretation by which it considers that its first request for information effectively suspends such term until a resolution can be issued. As a result, since Argentina is a non-suspensory jurisdiction, review of most transactions is not complete until after they have closed, and the review period is considerably longer than that for its international counterparts in most multi-jurisdictional transactions.

2016 Outlook

Upon the taking over of the new Administration, the new President of the Commission announced that amendment of the Antitrust Law is being weighed in order to meet the most pressing issues facing antitrust enforcement in Argentina.

The first issue under consideration is whether to maintain the non-suspensory nature of the merger control threshold, which would be automatically recalculated based on certain specific criteria or by means of a Presidential Decree. This would avoid a notification threshold that would remain static and fall behind, such as the current threshold. This would also have an impact on timing for completion of review, since it could alleviate the workload with which the case teams at the Commission are currently dealing.

A second issue under consideration is whether to maintain the non-suspensory nature of the merger control system. If there is a possibility of speeding up the review timeframe to achieve completion of review prior to closing, this would facilitate swift approval of non-problematic competition cases. Additionally, a fast-track system is being considered for accelerated review of cases, as opposed to use of the tacit approval system currently set out in the Antitrust Law (which, however, has nev-
Suggestions have been made that non-overlapping transactions subject to review due to the merger control thresholds would be dealt with in the manner prescribed by the Guidelines on Notification, namely, by means of a quick study in order to determine that there would not be an impact on any market. This expedited procedure would be a much needed reform, permitting the case teams to focus on important cases.

In respect to anticompetitive conduct, current investigation priorities would point toward detection of collusion which may have generated pricing increases. For this purpose, implementation of a leniency program is being considered, which would be a great leap forward for the procurement of evidence. There have also been comments on the need to recommence the use of dawn raids in order to uncover cartels.

Regarding the imposition of sanctions for anticompetitive conduct, it is likely that an increase in the current cap will take place, since it is now set at Argentine Pesos 150 million (approximately USD 10 million). The new Administration has made comments as regards setting clearer rules for the imposition of fines, so as to avoid the type of challenge that the previous Administration endured before the courts in regard to fines. What is still not clear is whether the Commission will push for incorporation of criminal sanctions under the Antitrust Law. In Argentina, there is a prison penalty of six months to two years for price fixing as set out in the Criminal Code, but there are no major precedents in that regard.

On the matter of anticompetitive sanctions, the new Administration has also stated that it is analyzing whether to keep the much-discussed solve et repete system set out by the previous Administration. Under this system, in order to appeal a fine, the accused parties would have to pay the total amount of the fine. Devaluation of the Argentine Peso, as well as the current inflationary scenario, would have a great impact on the deposit made by appellants, since it could greatly diminish the value of the deposit should a reversal of the fines be obtained in Courts after lengthy litigation. The new Administration has announced that it is analyzing the matter but has expressed concerns as regards returning to the previous system, in which the Commission would have to collect a fine after long-protracted appeal processes.

On a final note, there have been statements made by the new President of the Commission indicating an interest in procuring the help of internationally renowned authorities in order to ease the transition into a more technically-oriented regulator with peer reviews and following international enforcement standards.

**Conclusion**

It remains to be seen whether this new Administration will be able to carry out the necessary changes in order to bring antitrust enforcement up to international standards, but its public acknowledgement of the current shortcomings would indicate that steps will be taken in order to commence a correction of the course.

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1 Secretary of Trade Resolution No. 2 (Jan. 3, 2014).
4 Public address made by Esteban Greco on Mar. 17, 2015 at IDEA Forum (www.idealred.org).
5 Public address made by Esteban Greco on Mar. 17, 2015 at IDEA Forum (www.idealred.org).
6 Public address made by Esteban Greco on Mar. 17, 2015 at IDEA Forum (www.idealred.org).
7 Public address made by Esteban Greco on Mar. 17, 2015 at IDEA Forum (www.idealred.org).

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Mergers have the potential to generate efficiencies and, thus, boost the merged entity’s ability and incentive to compete, which may result in lower prices, better quality, and/or new products.

The new Brazilian Competition Law, Law No. 12,529/11 (“BCL”), which entered into force on May 29, 2012, introduced a premerger control regime allowing the Administrative Council for Economic Defense (“CADE”) to assess competitive effects of reportable mergers, including possible resulting efficiencies, before they are consummated.

This article describes the approach that has been adopted by CADE when assessing possible merger efficiencies and concludes that revisions to the Horizontal Merger Guidelines would be welcome to address open issues, for which clarification is needed, and increase transparency.

Efficiencies in the Brazilian Horizontal Merger Guidelines

Although CADE has not issued revised merger guidelines since the BCL entered into force, it has been taking into account the Horizontal Merger Guidelines issued in 2001 (“Guidelines”) to assess horizontal mergers.

In its premerger control analysis, CADE usually follows the five-step review process specified in the Guidelines: 1) definition of the relevant market; 2) determination of the parties’ market share; 3) assessment of the probability of the parties exercising market power following the transaction; 4) efficiencies assessment; and 5) evaluation of the net effect of the transaction on welfare, considering the cognizable efficiencies.

According to the Guidelines, CADE will credit efficiencies that are 1) “merger-specific” or unlikely to be accomplished in less than two years by other means that involve fewer anticompetitive effects; and 2) verifiable or substantiated.

The Guidelines provide the following six examples of the types of efficiencies that are likely to be considered by CADE: 1) economies of scale (e.g., reduction of average costs because fixed costs are a substantial part of total costs); 2) economies of scope; 3) dynamic efficiencies (e.g., introduction of a new technology that enhances production or one that allows the launch of a new product); 4) the substitution of a more effective team of administrators that may increase productivity; 5) generation of positive and elimination of negative externalities, and appropriation of externalities (e.g., appropriation of technological spill-overs or providing more and better information to consumers); and 6) compensatory market power (e.g., reducing the capacity of the input providers to exercise market power).

Additionally, the Guidelines provide examples of what is not to be considered as efficiencies, including “[p]ecuniary gains that are the consequence of an increase in market share” or that represent “solely a transfer of revenues between economic agents.”

Finally, the Guidelines clarify that CADE will base its efficiency assessment on quantitative evidence, or qualitative where the former is not available or feasible, and that efficiencies must be passed on to consumers in a reasonable amount of time.

In sum, the Guidelines provide that CADE shall credit only efficiencies that are merger-specific, verifiable and will be passed on to consumers in a reasonable amount of time, as substantiated on quantitative evidence or, where quantitative evidence is not available or feasible, on qualitative evidence.

Recent Case Law and Efficiencies Credit

The cases reviewed under the new Brazilian premerger control regime (through December 2015) indicate that CADE has generally considered the standards in the Guidelines to give credit to merger efficiencies.

CADE ratified the three main standards in a recent decision finding that efficiencies must be merger-specific, verifiable and passed on to consumers to receive credit. To assess if efficiencies claims were verifiable, CADE recently considered both historical data and qualitative evidence for investments. With respect to efficiencies being passed on to consumers, CADE has found that they must be substantiated to be considered cognizable.

Recent case law has also provided clarification to the Guidelines’ standards. CADE has clarified that efficiencies must be separately estimated for each relevant market and also clarified that an average price reduction for all products of the merging firms would not support an efficiency claim. Furthermore, CADE considered a mere investment plan to expand capacity not cognizable, because by nature it is prospective and uncertain, especially investments on infrastructure, which tend to present delayed results.

Recent decisions have also left open some issues for which clarification is needed, including treatment of economies of scale. CADE considered that economies of scale allowed the parties to compete more effectively, although in a general manner and not assessing pass-on to consumers. However, CADE has also raised doubts as to whether economies of scale should be credited, because 1) economies of scale can be achieved, in
principle, through organic growth; and 2) there can be doubt as to whether the efficiencies will be passed on to consumers.\(^{18}\)

CADE’s position with respect to obstacles to substantiating efficiencies is also left open. On the one hand, CADE allowed the merging firms to demonstrate pass-on after closing, concluding that a precise quantification would demand access to confidential data from the target by the acquiring party.\(^{19}\) On the other hand, CADE did not give full credit to the merging firms’ difficulty to estimate efficiencies as that would require access to confidential data.\(^{20}\) This meant that the acquiring firm must do more than present qualitative evidence of claimed efficiencies, despite the fact that presenting quantitative evidence would require access to competitively sensitive information of the other party to the transaction.\(^{21}\)

In light of the 2010 Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission,\(^{22}\) CADE has pushed for more stringent standards in cases of high concentration. Efficiencies are most likely to make a difference in merger analysis when the projected adverse anti-competitive effects, absent efficiencies, are not great. CADE has also recognized that efficiencies almost never justify a merger to monopoly or near-monopoly, given that they would not be able to produce a net beneficial effect on consumer welfare.\(^{23}\)

**Conclusion**

The cases reviewed under the new Brazilian premerger control regime show that CADE generally takes into account three standards, as provided by the Guidelines, to consider whether efficiencies are cognizable. They must be merger-specific, verifiable and passed on to consumers.

As a general rule, CADE considers whether projected merger efficiencies are substantiated via quantitative or qualitative evidence, so that it can verify by reasonable means their likelihood and magnitude; how and when they would be achieved; how they would enhance the merged entity’s ability and incentive to compete; why they would be merger-specific; and whether they would be passed on to consumers.

After over three and one-half years of the new premerger control regime, revised horizontal merger guidelines would be welcomed to increase transparency and clarity of CADE’s view on efficiencies and to assist in developing a consistent framework for analysis of efficiencies.

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1. CADE comprises two divisions: (i) the General Superintendence (“GS”); and (ii) the Tribunal. There is also an Economic Department, led by a Chief Economist, responsible for carrying out economic market tests upon request by the GS and/or the Tribunal.


3. Just before the publication of this article, CADE released for public comment a proposed draft revising the Guidelines (“Proposed Guidelines”). The suggested changes are mentioned in the corresponding footnotes. They are not addressed directly in the article, because they may be modified as per public input in the next months.

4. The Proposed Guidelines also suggest an assessment on the buying power.


7. Id., ¶¶ 75-84. Paragraph 89 of the Proposed Guidelines mention the same examples, except for “the substitution to a more effective team of administrators that may increase productivity.”

8. Id., ¶ 73.

9. The Proposed Guidelines at ¶ 187 do not mention whether the efficiencies may be based on qualitative evidence, where quantitative evidence is not available or feasible.


