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Greetings from the Editor-in-Chief
We are pleased to bring you Vol. 1-2018 of the International Antitrust Bulletin. This jam-packed issue features articles on a range of current topics, spanning recent (and controversial?) proposed changes to the immunity and leniency programs in Canada, the new draft competition bill in Argentina, and fresh clarification on the application of Vietnam’s competition law. Additionally, our authors tackle treatment of “Big Data” in Canada, procedural fairness and economics in competition enforcement, and the latest developments in Hong Kong. As always, the Bulletin includes What In The World Did I Miss, courtesy of our regional experts reporting from around the globe.

We hope you enjoy this issue and welcome your comments and suggestions. We look forward to your proposals for future articles!

Cindy Richman
Editor-in-Chief

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Africa

Ghana

December 5, 2017, New Competition Bill — Speaking at the World Competition Day celebrations, Ghana’s Director of Legal Affairs at the Minister for Trade and Industry, Mr. Kofi Amenyah, informed attendees that a Draft Competition Bill would be enacted in 2018. The process of enacting a competition policy in Ghana has been unsuccessful for more than a decade. However, with recent developments in setting up projects such as the: Competition and Advocacy Project (COMPAD Project); and the Competition Reforms in Key Markets for Enhancing Social and Economic Welfare in Developing Countries (CREW Project), it appears likely that the enactment of the Competition Bill will follow soon.

Kenya

September 4, 2017, Carrefour Seeks Exclusivity — French retailer, Carrefour, has brought another application under section 25(1) of the Competition Act 12 of 2010 (the Act) seeking an exemption from section 21 of the Act, which in essence would permit Carrefour to enter into certain exclusive lease agreements. The relevant clauses in question would preclude any competitor opening a retail store within a 5 km radius from the Carrefour shopping center for a period of at least 7 years. Furthermore, the exclusivity clauses require Carrefour’s consent before permitting any other food retail operation in the same shopping center for a period of roughly 19 years. Since Carrefour entered the Kenyan market in May 2016, it has submitted several exemption applications to the Competition Authority of Kenya (CAK). These applications have been criticized by local retailers (who would be precluded from entering the shopping centers as a consequence) as well as local suppliers who are of the view that international retailers “shy away” from local products. The CAK's decision in this regard will be particularly interesting as a number of other jurisdictions, including Australia, the UK and, more recently, South Africa have taken a conservative approach to long term exclusivity leases.

October 11, 2017, Another Professional Body Applies for Exemption — The Institute of Certified Public Secretaries of Kenya (ICPSK) has requested the CAK’s permission to set minimum prices for governance audit services of their members, despite prohibition by Section 21 of the Kenyan Competition Act 12 of 2010. The outcome will provide insight into the CAK's approach to such applications. Under sections 25 and 26 (read jointly) of the Act, firms or associations may apply to the CAK to be exempted from the provisions contained in, inter alia, section 21. ICPSK’s application follows that of the Institute of Surveyors of Kenya (ISK) and Institute of Certified Public Accountants of Kenya (ICPAK). The CAK rejected the application by ICPAK on the basis that the benefits of minimum fees put forward by ICPAK such as ensuring fair remuneration and preventing widespread undercutting were outweighed by potential harm they would cause in the marketplace. It was not satisfied that the ICPAK had sufficiently demonstrated how minimum fees would improve professionalism in the sector or protect consumers from high prices. The CAK stated that the “introduction of fee guidelines will decrease competition, increase costs, reduce innovation and efficiencies and limit choices to customers and is in fact likely to raise the cost of accountancy services beyond the reach of some consumers.” Further, the CAK had stated it did not want to risk setting a precedent for other professionals to follow the same path.

Namibia

October 29, 2017, N$51 Million Penalty Sought Against Namib Mills — The Namibian Competition Commission (NaCC) recently referred Namib Mills to the Windhoek High Court for abuse of dominance. The NaCC argues that Namib Mills abused its dominant position by requiring bakeries to exclusively purchase flour from the company. The NaCC requested that an administrative penalty of N$51 million (approximately US $3.5 million), which equals 2.6% of the firm’s turnover for the previous financial year, be levied on Namib Mills to the Windhoek High Court for abuse of dominance. The NaCC argues that Namib Mills abused its dominant position requiring bakeries to exclusively purchase flour from the company. The NaCC requested that an administrative penalty of N$51 million (approximately US $3.5 million), which equals 2.6% of the firm’s turnover for the previous financial year, be levied on Namib Mills to the Windhoek High Court for abuse of dominance. The NaCC requested that an administrative penalty of N$51 million (approximately US $3.5 million), which equals 2.6% of the firm’s turnover for the previous financial year, be levied on Namib Mills to the Windhoek High Court for abuse of dominance. The NaCC requested that an administrative penalty of N$51 million (approximately US $3.5 million), which equals 2.6% of the firm’s turnover for the previous financial year, be levied on Namib Mills to the Windhoek High Court for abuse of dominance. The NaCC requested that an administrative penalty of N$51 million (approximately US $3.5 million), which equals 2.6% of the firm’s turnover for the previous financial year, be levied on Namib Mills to the Windhoek High Court for abuse of dominance.

Nigeria

December 1, 2017, Federal Competition and Consumer Bill Awaiting Assent — After years of deliberation, the Nigerian Federal Competition and Consumer Protection Bill (as amended) has recently been adopted by the National Assembly and will be passed into law once it is assented to by the President—this is expected to be a mere formality which should take place soon. The Bill will replace the Consumer Protection Act and create a new Federal Competition and Consumer Protection Commission and Tribunal. The Bill has largely followed the model of other African countries which have successfully implemented antitrust and consumer protection legislation and seeks to address all areas of competition such as price fixing, market allocation, collusive tendering and abuse of dominance practices. In addition, the Bill will also seek to ensure and enhance product safety and consumer protection within Nigeria. Notably, the Bill provides for criminal liability for individuals engaging in anticompetitive practices.
What In The World Did I Miss?

Africa

South Africa

October 4, 2017, U-Turn on Abuse of Dominance Complaints — The South African Competition Commission (SACC) had initiated complaints in June 2017 for allegations of abuse of dominance by four international pharmaceutical companies: Roche and Genentech, Pfizer, Equity and Aspen, in relation to the sale of licensed cancer medication in South Africa. Four months after initiating the complaints, the SACC abandoned its investigation into Aspen and Equity. The SACC noted, in its media statement, that its investigation revealed that the revenue generated by these companies in South Africa was too remote to sustain a case of abuse of dominance under the current legal framework. In relation to Equity, the SACC’s investigation found that the relevant product is not registered in South Africa which means that the high prices are due to their importation form Germany. The complaints against the two other respondents, however, have not been withdrawn.

December 1, 2018, Amendments to the Competition Act — Draft amendments to the South African Competition Act, 89 of 1998 were published for comment on December 1, 2017. The Amendments are principally aimed at addressing certain concentrated markets and, in particular, have a robust public-interest element. Notably, the Amendments confer onto the competition authorities the mandate to conduct market inquiries into any sector and order any remedy, including structural remedies to the extent that there is any feature of the market which has an adverse effect on competition. The competition authorities are to consider the ownership levels and whether the relevant industry is sufficiently affected. In relation to the abuse of dominance provisions, the Amendments envisage shifting the evidentiary onus of proof to the respondent in prima facie cases of excessive pricing and removing the requirement that the excessive pricing be to the “detriment of consumers.” Guidelines from the SACC on what constitutes excessive pricing must also be published. The scope of general exclusionary conduct is expanded as well to prohibit price discrimination by a dominant firm against its suppliers. In relation to merger control, additional mandatory disclosures must be made by the merging parties in relation to all cross-shareholding or directorships. Furthermore, a series of small transactions (which take place within three years) and which fall below the notification thresholds may now be subject to merger control by the competition authorities and may be treated as constituting a “single merger.” Finally, the Amendments envisage additional public-interest grounds to be considered in assessing the effects of a proposed merger. These include the merging parties’ contribution to promoting and supporting ownership and control by historically disadvantaged persons.

COMESA

November 14, 2017, Progress on CAF / Lagardère Sport Investigation Announced — Further to investigations launched last February in relation to allegations of anti-competitive agreements between the Confédération Africaine de Football (CAF) and various stakeholders, the COMESA Competition Commission (CCC) published a press release on the “advanced” progress of the investigations and its assessments so far. The CCC held it had “identified a number of concerns arising from clauses contained in those agreements”, notably in relation to:

• The duration of exclusive agreements entered into between CAF and Lagardère Sports S.A.S. (some covering up to potentially 28 years) and the inclusion of “Right of First Refusal” clauses preventing CAF from seeking out other offers before having held renewal discussions with the relevant stakeholder. The CCC is concerned that these clauses may have led to foreclosure of competitors in the market and made it more difficult for new players to enter the market or for existing operators to expand their activities.
• The “Right of First Refusal” clauses contained in agreements awarding media and marketing rights and the duration of these agreements, as well as the manner in which these rights were attributed, namely as one package.

As a general remark, the CCC noted it is concerned by the “general lack of tender procedures within the CAF organization” in attributing various rights to the different stakeholders. The CCC further announced it had held a meeting with Mr. Ahmad, President of CAD, to discuss these matters as it has traditionally favored consultative approached in remedying competition harm, reminding that the Board of Commissioners is empowered to make orders to remedy the situation.

John Oxenham is a Co-Founder and Director of Nortons Inc. in Sandton.
What In The World Did I Miss?

Asia

China

October 31, 2017, China to Embrace New and Unified National Security Review for Global M&A Deals — Move over CFIUS, Investment Canada Act, and other jurisdictions’ national security review of foreign investment and make way for China’s upcoming newly unified national security review system for foreign investment. Like other jurisdictions’ national security review systems, it will cover more than just M&As. And just like other national security review systems, it could create a hurdle for completing an M&A deal involving a Chinese target. Not that we are complaining too vocally as the U.S.’s own CFIUS system itself is viewed by some, shall we say, as rather mysterious.

December 27, 2017, Return of “Behavioral Remedies” in China’s Merger Control Regime — Conventional wisdom holds that a structural remedy (a good-old divestiture order) is far superior and cleaner than a behavioral remedy, apparently MOFCOM begs to differ. It set a record, conditioning six merger clearances with behavioral remedies in 2017. In contrast, in 2016, MOFCOM attached approval conditions only two times, both of which contained structural remedies. And in 2015, of the two conditional approvals it granted, one had behavioral remedies. Observers see this as a return to behavioral remedies as the main tool for conditional merger clearance. It turns out that from 2008 (the year China’s Anti-Monopoly Law became effective) to 2014, seven in ten conditional approvals included behavioral remedies. Observers attribute this “return of behavioral remedies” to MOFCOM’s increased experience in handling many complicated global deals and increasing stature in the global merger control bar, which in turn boosted MOFCOM’s confidence in once again relying on behavioral remedies that tend to be more invasive and regulatory in nature.

India

November 25, 2017, Tips to Enforcement Agency for Surviving Judicial Review — There are usually several factors to point to when an antitrust enforcement agency is repeatedly overturned by the judiciary. In India, where the Competition Commission of India’s enforcement orders have been quashed or nullified by the Competition Appellate Tribunal, the Vidhi Centre for Legal Policy offers an explanation. It asserts in its report that CCI is mainly to blame for courtroom losses, including its failure to recognize the accused’s defense arguments and evidence, and having one panel hear the accused’s defense arguments while having an entirely different panel render enforcement decisions, among others.

December 14, 2017, Charging A Lot, Really A Lot, Will Garner Regulator’s Attention — Apparently, some private hospitals in Delhi charged so much for drugs that they were reaping 500% to 1,000% profit margins. Not a smart move as it will surely dare the regulator to come down with some sort of price or profit margin caps. And that’s precisely what will happen in Delhi.

Japan

December 22, 2017, There is an unhappy banker over JFTC’s bank merger review system — The Bank of Saga’s president is clearly not happy with how the JFTC reviews proposed bank mergers, saying Japan’s declining population should be recognized as a legitimate factor. He apparently went so far as to argue that the JFTC should use different criteria than those in the U.S. and Europe.

December 26, 2017, Private antitrust compliance commitment to participate in Japan Railway tenders — new antitrust compliance frontier? — Participants in tender offers are of course subject to the antitrust rules of the relevant jurisdiction(s). Could this “private commitment” not to run afoul of antitrust laws constitute a separate or additional duty to abide by “no bid-rigging” rules or even trigger a separate cause of action (in contract law, for example)? A long time ago, a FRAND pledge might not have been taken as seriously as it is today. Not that anyone would take a “no antitrust foul” commitment condition lightly when participating in tenders, it could possibly have its own life and consequences far beyond what the unwary might think.

Korea

October 26, 2017, We are all like registered lobbyists here at Sejong City, Korea — In a somewhat controversial move that would effectively turn every antitrust practitioner in Korea into something akin to registered lobbyists in the U.S., the KFTC announced a new system where those who wish to contact or visit the KFTC (from case handlers to middle managers to all the way to the top to KFTC commissioners) must preregister to be on the master list and then make separate, formal, public appointments before actually jumping on one of Korea’s bullet trains to personally visit the KFTC in Sejong City. On the flip side, KFTC officials who were contacted by antitrust practitioners at law firms or government affairs professionals at large conglomerates must submit a detailed report to the KFTC’s internal audit office within a few days. The KFTC explains that all these steps are designed to make the process more trans-
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parent and free from even an appearance of undue influence from former high-ranking KFTC officials now occupying the private sector side of the fence. Details of the plan will continue to be tweaked as everybody gains more experience and learns to live with the new normal.

December 14, 2017, Yes, it’s all about ET phone home, with ET being “extra-territorial” jurisdiction and reach of antitrust — First, there was China and then Korea and more recently Taiwan, finding Qualcomm’s licensing practice illegal. According to some critics, while China chose a set of remedies that were limited to within China, Korea chose a different solution, with potentially far-reaching effects. The KFTC counters that it simply ain’t so, because it needs a global remedy to be effective at all. It further asserts that a remedy stopping at the Korean border or in essence requiring a country-by-country licensing model will unwittingly cause discriminatory treatment in violation of the FRAND principle! The debate rages on.

Cecil Chung is Senior Foreign Counsel and Vice Chair of the Antitrust Group & Head of International Antitrust in the Seoul office of Yulchon LLC.
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Australasia

Australia

October 31, 2017 — The Australian Competition and Consumer Commission (ACCC) released its updated Media Merger Guidelines which now reflect the recent reforms in media ownership laws. The updated guidelines set out the ACCC’s approach to media merger reviews and outline areas of potential focus, including the role of premium content, diversity in the Australian media landscape, and the impact technological change and innovation is having on the media industry more broadly. The revision of the previous 2006 guidelines is expected to adapt to the media landscape in Australia which has “completely and irrevocably changed.”

November 6, 2017 — Amendments to the Competition and Consumer Act 2010 (Act) were introduced by the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 and the Consumer Amendment (Misuse of Market Power) Bill 2017. The Competition Policy Review amendments contain a broad range of changes to the Act in areas such as cartels, price signaling and concerted practices, exclusionary provisions, third line forcing, resale price maintenance, merger authorizations and non-merger authorizations, notifications and class exemptions, access and evidentiary provisions. The Misuse of Market Power legislation is intended to strengthen the prohibition on the misuse of market power by corporations. The current “purpose” test will be replaced with a “purpose or effects test,” prohibiting a corporation with a substantial degree of market power from engaging in conduct with the “purpose, effect or likely effect” of substantially lessening competition. The Australian competition regulator, the ACCC, has established a Substantial Lessening of Competition Unit (SLC Unit) to facilitate the enforcement of the new legislation. Specifically, the SLC Unit will be responsible for misuse of market power and concerted practices investigations and litigation within the ACCC.

December 14, 2017 — The ACCC announced that it intends to oppose BP’s $1.8 billion acquisition of Woolworths’ service stations. The ACCC believes the proposed acquisition is likely to substantially lessen competition in the retail supply of fuel, and that fuel prices at the Woolworths sites will likely increase after the acquisition. The ACCC has said its underlying concerns about the proposed acquisition would not be addressed by the divestments proposed by BP. BP intends to challenge this decision.

Indonesia

The Business Competition Supervisory Commission (KPPU) alleged that state-owned telecommunication company PT Telekomunikasi Indonesia (Telkom) forced prospective customers to subscribe to the Triple Play IndiHome service, which comprised of phone, cable television and internet services. The KPPU identified two issues with this practice: (i) an alleged tying practice by Telkom through IndiHome Triple Play; and (ii) an alleged misuse of Telkom’s dominant position in fixed-line services market. According to the KPPU, the services were not made available separately and consequently, consumers wanting to stop one subscription would be blocked from all services. On September 29, 2017, the Commission Assembly held that the evidence presented was insufficient to establish the existence of an effort to force consumers to subscribe to IndiHome Triple Play and that consumers were still able to purchase the services separately or independently.

New Zealand

October 17, 2017 — The New Zealand Commerce Commission (NZCC) published a statement of preliminary issues regarding the proposed acquisition by Daiken New Zealand Limited (Daiken) of Dongwha New Zealand Limited (Dongwha). Daiken and Dongwha are two of the three NZ manufacturers of raw medium density fiberboard (MDF). The statement outlines the main issues the NZCC will consider before making their final decision whether or not to grant clearance on March 29, 2018. These issues include unilateral effects (that is whether the merged entity can raise prices or reduce quality having regard to the closeness of competition between Daiken, Dongwha and the third manufacturer/supplier of raw MDF in NZ) and coordinated effects (i.e., whether the merged entity can coordinate with competitors to raise prices if the merger leads to few competitors in the market or the elimination of a vigorous competitor).

November 23, 2017 — The NZCC released its draft determination which would allow members of the Waikato-Bay of Plenty Chicken Growers Association Incorporated (Association) to collectively bargain with Inghams Enterprises (NZ) Pty Limited. Members of the Association sought to collectively negotiate the terms and conditions under which they supply chicken growing services to Inghams. NZCC’s preliminary view was that collective bargaining would lessen competition by hindering the normal competitive process of individual growers negotiating supply terms with Inghams. In making the drafting determination, it acknowledged that the public benefits of this arrangement appeared to outweigh the detriments arising from reduced competition. These benefits include
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decreasing transaction costs of several individual growers entering into supply contracts with Inghams and growers having the choice to opt in to collective arrangements or independently contracting with Inghams if they desired. The NZCC has invited interested parties to lodge submissions on the draft determination by December 8, 2017.

Philippines

October 18, 2017 — The Philippine Court of Appeals (CA) upheld the legality of the PHP$70 billion buyout of telco assets of San Miguel Corporation by the Philippine Long Distance Telephone Company (PLDT) and Globe Telecommunications. The CA’s resolution made permanent the writ of preliminary injunction it issued in August last year “enjoining and directing Philippine Competition Commission (PCC), its officials and agents, or persons acting for and on its behalf to cease and desist from conducting further proceedings for the pre-acquisition review and/or investigation of the subject acquisition.” The CA held that the PCC committed a grave abuse of discretion when it did not follow its own transitory rules and regulations when Globe and PLDT announced the deal and it follows that the PCC is now duty-bound to recognize and give effect to the merger. However, the CA has stated that the approval of the deal does not remove the power of the PCC to conduct a post-acquisition review to ensure that PLDT and Globe would not engage in any anti-competitive conduct.

Singapore

November 28, 2017 — The Competition Commission Singapore (CCS) issued an Infringement Decision against a number of entities for their involvement in bid-rigging in the tenders for the provision of electrical services for the Formula 1 Singapore Grand Prix 2015-2017 and provision of asset tagging services for the GEMS World Academy (Singapore). As a result, the CCS imposed fines totaling S$626,118 on Cyclect Group, Peak Top Engineering, and HPH Engineering. The Cyclect Group was awarded with a discount under CCS’s leniency program which accords lenient treatment to companies that come forward to CCS with information on their cartel activities.

December 11, 2017 — The CCS concluded its inquiry into the supply of car parts in Singapore. The inquiry aimed to better understand how the car parts market in Singapore works and the effects of market features on competition. One of the concerns raised by the CCS related to car dealers requiring customers to service or repair their cars exclusively at the respective dealers’ authorized workshops in order to ensure that the car warranty remained valid. As a result, all the major car dealers in Singapore have agreed to change their warranty restrictions as identified by the CCS to facilitate a more competitive market. Implementation is expected to be completed by December 31, 2017.

Thailand

October 5, 2017 — Thailand’s new Trade Competition Act B.E. 2560 (2017) (the Act) introduced significant reforms in the area. The Act repeals the Trade Competition Act B.E. 2542 of 1999, with the most dramatic change being the introduction of a dual merger control regime so that mergers resulting in a monopoly or creating dominance now require pre-merger approval, and any consolidation that will materially reduce competition will require post-merger notification. Other reforms include higher penalties of up to 10% of turnover; criminal sanctions for cartel conduct and abuse of dominance; and the power for the Office of Trade Competition Commission (OTCC) to issue orders for a business operator to suspend, cease or change any contravening conduct. The OTCC is also required to, among other things, make publicly available the outcome of the OTCC’s decisions on all claims, and hold public hearings for all secondary legislation to be published under the new Act.

Vietnam

September 15, 2017 — The fifth draft (the Draft) of the new Competition Law was published on Vietnam’s National Assembly Office portal for public review and commentary. The Draft is currently being reviewed and is expected to be passed in May 2018. The Draft retains notable clauses presented in the second draft of April 2017 but also includes substantial changes from the previous draft as set out below:

- Article 12 now draws a distinction between horizontal and vertical anti-competitive agreements. In particular, businesses in a vertical relationship are prohibited from entering into certain anti-competitive agreements, if “such agreement creates, or can possibly create, a substantial anti-competitive effect to the market.”
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- The draft has slightly altered merger control thresholds in regard to economic concentration. The draft further adds to the second draft, stating that “economic concentration shall be prohibited if it creates, or may possibly create, a substantial anti-competitive effect to the Vietnam market, and there is no possible remedy to cure such effect.”
- The threshold to notify an economic concentration is more flexible than the second draft. The draft now asks the Government to provide and adjust thresholds, having regard to the: (i) total assets in Vietnam of either of the enterprises participating in the transaction; (ii) total revenues in Vietnam of either of the enterprises participating in the transaction; and (iii) total value of the transaction. A transaction will be notifiable if any of these thresholds is met.

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What In The World Did I Miss?

Europe

European Union

November 16, 2017, European Commission and China Start Dialogue on State Aid Control — The European Commission and China’s National Development and Reform Commission held an inaugural meeting under a joint framework for state aid-related discussions on November 16. This is the first time that the EU and China have held joint discussions specifically on issues related to the enforcement of state aid rules and related policy issues, and is intended as an extension of the already extensive cooperation between the EU and Chinese authorities in other areas of competition policy and enforcement.

November 29, 2017, European Commission Publishes a Paper on a New EU Patent Policy — The European Commission has published a long-awaited policy paper on standard essential patents (SEPs), aimed at clarifying the EU antitrust framework for antitrust patent litigation. The SEP policy paper aims to increase transparency and predictability in the antitrust enforcement of intellectual property rights (IPRs), with the ultimate goal of tackling potential abuses of market power by either licensees or licensors of IPRs.

France

December 21, 2017, French Authority Slaps a 30 million Fine On a Company Hindering a Competition Law Investigation — The French competition authority, the Autorité de la concurrence, imposed a €30 million fine on Brenntag AG on December 21 for hindering the investigation of several allegations of the firm’s predatory pricing and unlawful distribution practices. This is the first time that the French authority has issued such a fine, and may indicate an increased willingness to crack down on such alleged conduct. The authority found that Brenntag had provided misleading and late information, and had also withheld some information which prevented the authority from being able to take a fully-informed, timely decision.

Lithuania

December 29, 2017, New Merger Notification Thresholds and Examination Procedure In Lithuania — Amendments to Lithuanian merger control procedures entered into force on January 1. Noteworthy changes include an increase in the notification thresholds, as well as the creation of a “stop the clock” procedure allowing the Competition Council to address failures to submit information in a timely manner.

United Kingdom

December 15, 2017, UK Competition Watchdog Releases a Bid-Rigging Detection Tool — The Competition and Markets Authority (CMA) launched a bid-rigging detection software designed to spot unusual bidder behavior and pricing patterns. The CMA intends the tool to be used by public authorities in the UK in order to tackle potential cartel abuses in the field of public procurement. The tool works by analyzing the number and pattern of bidders, pricing patterns, document origins and other factors in order to identify potential bid-rigging; suspected bid rigging abuses can then be shared with the CMA.

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What In The World Did I Miss?

North America

Canada

October 27, 2017 — Cardinal Ventilation Inc. was fined $375,000 after pleading guilty to one count of bid-rigging. Cardinal admitted that it conspired to rig bids on three condominium construction projects in Montréal. As part of the conspiracy, Cardinal admitted it agreed with competing firms to offer the lowest bid so it could obtain a ventilation contract. To date, four companies and two individuals have pleaded guilty for their participation in the bid-rigging scheme and fines totaling over $1 million have been imposed by Canadian courts.

December 13, 2017 — A Japanese car parts manufacturer (NGK Spark Plug Co. Ltd.) pleaded guilty to one count of bid-rigging for participating in an international conspiracy and was fined CAD 550,000 by the Ontario Superior Court of Justice. Following an investigation, the Canadian Competition Bureau had determined that NGK had unlawfully conspired with a competing supplier to determine who would win bids issued by the General Motors Company in 2005.

Mexico

November 12, 2017 — COFECE, the Mexican Competition Authority, ruled that three individuals unlawfully engaged in absolute monopolistic practices in the corn tortilla market in the state of Jalisco. COFECE concluded that the Jalisco Rural Development Secretary acted outside the bounds of his official duties and played a supporting role in a price-fixing agreement between a tortilla businessman who was the president of the Tortilla and Pastry Industry United Groups’ Board of Directors and the chairwoman of the Industry Association Board of Directors. According to COFECE, the agreement resulted in tortilla price increases in the Guadalajara Metropolitan Region and caused annual damages to customers of more than MXN 52.6m (US $2.7 million). The COFECE Plenum has imposed fines totaling MXN 394,508 (US $20,645).

December 11, 2017 — COFECE levied fines against five latex glove suppliers (Dentilab, Ambiderm, Degasa, Productos Galeno and Holiday de México) totaling MXN 257.6m (US $13.6 million) and sanctioned 11 related individuals for rigging public tenders related to the sale of latex gloves for surgery and exploration. COFECE determined that the suppliers divided latex gloves purchases among themselves by coordinating prices and discounts or refraining from bidding between March 2009 and April 2014. According to COFECE, the conduct resulted in the overpricing of latex gloves and resulted in damages of about MXN 174m (US $9.2 million) to affected customers.

December 12, 2017 — COFECE rejected a merger involving U.S.-based Rea Magnet Wire Company and a Mexican company (Xignux) after determining that the merged firm would obtain market power and negatively impact competition in the magnet wire production and distribution market. COFECE concluded that North American competitors and imports from Asia would not generate sufficient competitive pressure to block or counter possible price increases by the merged firm. The merging parties may appeal COFECE’s decision.

December 14, 2017 — COFECE fined beer maker Cerveceria Cuauhtémoc Moctezuma (CCM) MXN 11.7m (US $618,000) for failing to comply with the terms of a prior settlement agreement. CCM and Grupo Modelo had previously been accused of engaging in relative monopolistic practices in the market for on premises and off premises beer distribution, including giving cash incentives to various retail points on the condition that they refrain from selling rival products. Under a prior settlement agreement, CCM had committed to take several measures to correct the alleged anticompetitive practices and monitor its commitments, including the establishment and monitoring of a 1-800 phone line. COFECE concluded that CCM missed the deadline to set up and monitor the 1-800 phone line, and missed the deadline to submit reports on the 1-800 line.

United States

November 20, 2017 — The United States Department of Justice (DOJ) filed a civil antitrust lawsuit to block AT&T/DirecTV’s proposed acquisition of Time Warner Inc. According to DOJ’s complaint, the combined company would use its control over Time Warner’s popular networks to hinder its rivals by forcing them to pay higher fees for the right to distribute those networks. The allegations of the complaint further claim the combined company would use its increased power to slow the industry’s transition to new and exciting video distribution models that provide greater choice for consumers, resulting in fewer innovative offerings and higher bills for American families.
What In The World Did I Miss?

North America

December 5, 2017 — The Federal Trade Commission (FTC) issued an administrative complaint challenging the merger of Tronox and Cristal, two top suppliers of chloride process titanium dioxide (TiO2), a white pigment used in a wide variety of products including paint, industrial coatings, plastic, and paper. The FTC contends that the acquisition increases the likelihood of successful coordination among the remaining four suppliers, as it would allow the newly merged firm and the other top supplier, Chemours Company, to control the vast majority of chloride titanium dioxide sales in the North American market and more than 80 percent of North American manufacturing capacity. Prior to the issuance of the complaint, Tronox issued a press release announcing that the waiting period in the United States under the Hart-Scott-Rodino Act expired on Dec. 1, 2017. However, the FTC noted in its press release that statutory waiting period had expired on or about Oct. 7, 2017, and there was a timing agreement between the merging firms and Commission staff requiring 10 business days of advance notice before consummating the transaction. At the time of Tronox’s press release, the FTC claimed that Tronox was aware that the matter was pending before the FTC for imminent further action, and the parties could not close the proposed acquisition because of pending reviews in other jurisdictions.

December 18 and 20, 2017 — DOJ and the FTC each recently challenged consummated mergers. DOJ filed an antitrust lawsuit in September 2017 against a consummated merger between Parker-Hannifin and CLARCOR that had previously received HSR clearance in January 2017. According to DOJ’s complaint, the transaction created a monopoly in the markets for EI-qualified aviation fuel filtration systems and elements sold to U.S. customers and would therefore result in increased prices, decreased services and product innovation, and slower delivery of these critical safety products. On December 18, DOJ announced that Parker-Hannifin had agreed to settle the litigation by divesting the aviation fuel filtration business and assets that it acquired from CLARCOR. Similarly, on December 20, the FTC challenged the consummated merger between Otto Bock and FIH Group Holdings (owner of Freedom Innovations), two prosthetics manufacturers that are top sellers of prosthetic knees equipped with microprocessors. According to the FTC’s complaint, Otto Bock is a dominant supplier in this market and its acquisition of Freedom Innovations would remove a significant and disruptive competitor.

December 29, 2017 – A U.S. District Court in Massachusetts dismissed state and federal predatory pricing antitrust claims against Uber Technologies Inc. in suits brought by more than 700 licensed Boston taxicab medallion holders. The court found that the taxicabs failed to allege that Uber’s services were priced below Uber’s costs and therefore did not provide sufficient detail or support for their predatory pricing claims. The court also dismissed (i) claims alleging Uber interfered with the taxicabs’ business relationships and (ii) claims against the individual defendants, Uber’s former CEO Travis Kalanick and its co-founder Garrett Camp. The court concluded that the purported business relationships with Boston individuals were too hypothetical, and the plaintiffs failed to show the court has personal jurisdiction over either individual defendant. The court, however, denied Uber’s motion to dismiss the taxicabs’ state unfair competition claims.

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What In The World Did I Miss?

South America

Argentina

September 27, 2017 — The National Commission for the Defense of Competition (CNDC) accepted the divestment plan submitted by Prisma in the context of an antitrust investigation. This is the first time that an antitrust investigation has resulted in disinvestment in Argentina. Prisma is the local operator for the Visa brand and was owned by Visa International and 14 banks. The divestment plan includes the sale of 100% shares of the company, whose shares cannot be acquired by more than one bank operating in Argentina in order to prevent vertical links similar to the current ones. As per the divestment plan, Prisma cannot market another brand of credit card until there is a new player marketing the Visa brand in the Argentinian market. Finally, Prisma also must provide services (card processing services and others) on a non-discriminatory basis to any entrants.

Brazil

September 20, 2017 — CADE’s Tribunal approved two settlement agreements entered into by Chunghwa Picture Tubes, Ltd. (Chungwha). The first settlement relates to an investigation into an alleged international cartel in the market for color display tubes (CDT). Chunghwa has agreed to pay a fine amounting to BRL 652,000. The second settlement agreement concerns an investigation into an alleged cartel in the Brazilian market for LCD displays. Chunghwa has agreed to pay a fine of around BRL 12,000,000. Both cases involved the acquisition of components used to manufacture final products, as well as imports of final products.

October 2, 2017 — CADE’s Department of Economic Studies (DEE) released a study on the market for port services. The study provides a national overview, as well as an analysis of CADE’s own activities in the review of merger cases and antitrust infringements investigations in the sector. The study indicates that port services are responsible for the flow of more than 95% of exports and 90% of imports in the country. It also highlights the importance of port services in Brazil as part of a full logistics chain encompassing roadway, railway and waterway transportation, transshipment stations and storage terminals. The study also addresses topics such as environment, customs and safety. It is available on CADE’s website.

October 4, 2017 — CADE’s Tribunal approved two settlement agreements entered into by Chunghwa and Technicolor S/A (Technicolor) in the context of an investigation into an alleged international cartel in the market for color picture tubes (“CPT”). The cartel would have lasted from 1995 to 2007. Chunghwa has agreed to pay a fine amounting to BRL 13,000,000 and Technicolor has agreed to a fine of BRL 2,600,000. These are the third and fourth settlement agreements in the probe.

October 11, 2017 — CADE launched an administrative inquiry in order to investigate an alleged cartel in public bids promoted by the Municipal Secretary of Works of the Rio de Janeiro, for the contracting of engineering and constructions services for large road projects. The investigation is a result of a leniency agreement entered into by Carioca Christiani-Nielsen Engenharia S/A (Carioca) and some of its executives with CADE and the Federal Public Prosecutor’s Office, in the “Car Wash Operation.” The alleged conduct is claimed to have started between November-December 2009 and continued up to 2014. The following companies were allegedly involved in the reported conduct: Carioca, Construtora Andrade Gutierrez S/A, Construtora Norberto Odebrecht Brasil S/A, Construtora OAS S/A, Construtora Queiroz Galvão S/A, Construções e Comércio Camargo Corrêa S/A, Contern Construção e Comércio S/A and Delta Construções S/A. So far, the evidence shows that the “Transcarioca,” “Transbrasil,” and “Transoeste” projects have been affected by the alleged cartel. Other city hall projects might have also been affected. Carioca stated that the technical specifications of the public bids were drafted to favor the alleged cartel participants, through contacts with public agents and politicians. Additionally, the companies are believed to have fixed prices and conditions, and allocated bids by presenting coverage proposals and/or abstaining from submitting proposals. The investigation relates to a leniency applicant which acknowledged its participation in the alleged cartel, and committed to cooperate with CADE’s investigation by providing documents and further information. This is the tenth leniency agreement executed by CADE in the context of the Car Wash Operation. At the end of the preliminary investigation, the GS may decide to launch a formal probe. Then 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. Companies are subject to fines of up to 20% of their turnover. Individuals may pay fines ranging from BRL 50,000 to BRL 2,000,000,000. CADE’s Tribunal may also impose other penalties in addition to the fines.

October 24, 2017 — CADE’s Tribunal blocked the proposed acquisition of Mataboi Participações Ltda. and its subsidiary Mataboi Alimentos Ltda. (jointly Mataboi) by JB Agropecuária Ltda. (JB). According to the Reporting Commissioner, the transaction would result in vertical relationships in the markets for livestock breeding, cattle slaughtering in the States of Goiás, Minas Gerais and Mato
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Grosso, and wholesale sales of natural boneless beef, and retail of beef in the city of Goiania. The transaction would also give rise to horizontal overlaps in the markets for cattle slaughtering in the State of Goiás, Minas Gerais and Mato Grosso and wholesale sales of natural boneless beef in the entire country. CADE’s Tribunal’s view was that there were no structural or behavioral remedies that could address the competition concerns arising from the transaction, as rivalry is limited and barriers to entry into the relevant markets are high. JBJ acquired Mataboi in December 2014, but only submitted the transaction for CADE’s approval in November 2016. In a judgment session held in December 2016, CADE’s Tribunal decided that the parties engaged in gun jumping and fined them in BRL 664,000. The Tribunal approved a merger control agreement by means of which JBJ shareholders agreed neither to hold any positions in JBS S.A., nor to exchange sensitive information until the transaction was reviewed and cleared by CADE. Although JBJ and JBS are not part of the same corporate group, CADE imposed such restrictions given that JBJ’s owner is José Batista Júnior, who is a relative of JBS’ shareholders and was appointed to be a CEO at JBS. The companies will now have 30 days to undo the transaction.

October 24, 2017 — CADE’s Tribunal cleared with remedies the acquisition of Time Warner by AT&T. The transaction would result in a vertical integration of Time Warner’s channel licensing for pay-TV operators and satellite pay-TV services (packaging and distribution) provided by operator Sky Brasil, which is a company belonging to the AT&T Group. According to the Reporting Commissioner, this integration could ultimately result in an exchange of information and negotiation of better commercial terms and conditions between the parties. The transaction was approved under the execution of a merger control agreement, which sets forth the following commitments, among others: (i) Sky Brasil and Time Warner’s channel programmers must remain as separate entities, with their own governance and management structures, and must not share commercially sensitive information or information that could allow discrimination against companies outside any of the groups; (ii) AT&T must ensure that Time Warner’s channel programmers offer all channels licensed to Sky to packaging and pay-TV operators under non-discriminatory conditions; and (iii) Sky Brasil may not refuse to transmit or impose restrictions in transmitting channels to channel programmers outside the AT&T Group. The merger control agreement also provides for the use of arbitration to solve any disputes arising from commercial negotiations with third parties. An independent consultant will monitor compliance with the terms and conditions of the merger control agreement, which will remain in force for five years.

October 31, 2017 — CADE’s DED released a preliminary report on the organization of the individual passenger transportation services sector. According to such report, the entry of new players such as Uber reinforces the expansion of the “sharing economy” in the market for individual passenger transportation services, which benefits both consumers and drivers and reduces market failures. Passengers are benefited because they know beforehand the price, route, drivers’ score and vehicle, in addition to being able to reach consumers more easily and efficiently, among other things. In addition, the preliminary report also stresses that the rise of the so-called sharing economy in the market for individual passenger transportation services can also generate increased competition, as they are able to create new demand (i.e., reaching users that do not use taxi services) and to provide a more efficient service with rates that are generally lower than regular taxis.

November 1, 2017 — CADE’s Tribunal approved 10 settlement agreements with several companies. Two settlement agreements were entered into by Siemens Ltda. and VA Tech Transmissão e Distribuição Ltda., as well as with 12 individuals, in the context of a formal probe involving the market for energy transmission products. The companies have agreed to pay fines that together amount to BRL 137,000,000. Other six settlement agreements were entered into by Nakata Automotiva S/A, Tenneco Automotive Brazil Ltda., Mahle Metal Leve S/A Robert Bosch Ltda., Delphi Automotive Systems do Brasil Ltda. and Dayco Power Trasmission Ltda., as well as with 21 individuals, in connection with an investigation concerning exchange of sensitive information between competitors in the independent aftermarket of auto-parts. The companies have agreed to pay fines that amounted to BRL 46,350,000. One settlement agreement was executed by Lao Indústria Ltda. in an investigation into the market for household water meters. The company has agreed to pay a fine of BRL 6,700,000. The remaining settlement agreement was entered into by Seabut Artigos Esportivos – Eireli and involved the market for diving equipment. It did not provide for the payment of a fine. According to the Brazilian competition law, settlement agreements involving unilateral conducts do not require the payment of fines. All settling companies and individuals have acknowledged their participation in the investigated conducts, ceased their involvement in the antitrust infringement and agreed to cooperate with CADE’s investigations.
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South America

December 7, 2017 — CADE’s General Superintendence (GS) launched a formal probe against Federal Mogul Sistemas Automotivos Ltda., Mahle Metal Leve S/A and KSPG Automotive Brazil for allegedly operating a cartel in the independent automotive aftermarket and OEM segment involving engine pistons, bearings, liners, pins, connecting rods, ring carriers, rings, sealing rings, and engine piston rings. According to the GS, the investigated companies would have fixed prices and commercial conditions and exchanged commercially sensitive information in the aftermarket. In the OEM segment, the companies would have allocated customers, fixed prices and commercial conditions and exchanged commercially sensitive information. The conduct would have lasted from 2004 up to 2012, and was arguably implemented by means of e-mail exchanges, phone calls, and meetings. 26 individuals would have been involved in the conduct. 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.

December 13, 2017 — For the first time, CADE’s Tribunal gave the green light to close a transaction before the 15-day waiting period has elapsed. In Brazil, the parties are not allowed to close or implement the transaction immediately after the publication of the clearance decision issued by the GS. The waiting period intends to give third parties the chance to appeal the case to CADE’s Tribunal or to the Tribunal itself to request the case for a complementary review. This unprecedented decision was issued in the context of the proposed acquisition of a 60% stake in Rio de Janeiro Airport by Excelence. The GS had approved the transaction on December 11, 2017, but the parties would have to wait for 15 days for the clearance decision to become final. CADE’s Internal Rules provide a derogation mechanism by means of which CADE may give green light to the parties to close a transaction while the deal is still under review or within the waiting period if the following criteria are 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 concludes that the notified transaction harms competition; and (c) the target company will face serious financial losses if the closing occurs after CADE’s clearance became final. The transaction was also subject to approval by the Brazilian National Civil Aviation Agency, which determined that the deadline for payment of the first installment should be made up to December 20, 2017. The 15-day waiting period would expire after such deadline. CADE’s Tribunal deemed that the request for derogation met all legal requirements, and allowed the parties to close the deal before the 15-day waiting period has elapsed.

December 18, 2017 — CADE’s GS launched a formal probe to investigate an alleged bid rigging in the States of Bahia, Ceará, Minas Gerais, Paraná, Rio de Janeiro, Rio Grande do Sul, Sao Paulo, and in Distrito Federal, relating to infrastructure projects of rail passenger transportation (subways and monorail). The investigation is a result of a leniency agreement entered into by Construções e Comércio Camargo Corrêa S/A ("Camargo Corrêa"), some of its current and former executives, CADE and the Federal Public Prosecutor’s Office in the context of the Car Wash Operation. In addition to Camargo Corrêa, the investigated companies are Andrade Gutierrez, Odebrecht, OAS, Queiroz Galvão, Carioca, Marquise, Serveng, Constran, Alstom, Carioca, Serveng, Construcap, CR Almeida, Galvão Engenharia, Iesa, Mendes Junior and Siemens. According to the GS, the investigated companies would have allocated at least 21 bids throughout the years of the conduct. Contacts among competitors would have lasted from 1998 to 2014. According to Camargo Corrêa, the conduct could be divided into three phases. The first phase would have taken place between at least 1998 and 2004, and involved Camargo Corrêa, Andrade Gutierrez and Odebrecht. The companies would have begun allocating large projects among themselves. The second phase took place between 2004 and 2008, when OAS and Queiroz Galvão joined the arrangement, and companies began using aliases to refer to projects and companies. The third phase would have lasted from 2008 up to 2014. Companies had contacts more frequently in this phase in view of large projects of the Federal Government’s PAC program, the World Cup of 2014 and the Olympics in 2016. Contacts would have lessened as companies did not reach agreement with regard to certain projects. This is the twelfth leniency agreement executed by CADE in the context of the Car Wash Operation. 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. Companies are subject to fines of up to 20% of their turnover. Individuals may pay fines ranging from BRL 50,000 to BRL 2,000,000,000. CADE’s Tribunal may also impose other penalties in addition to the fines.

Chile

December 11, 2017 — The Chilean Supreme Court decided that Chile consumer’s rights agency could maintain a damage class action against paper product maker SCA. The company was fined for operating a cartel in the markets for toilet paper, paper towels and facial tissues. Although SCA was granted a reduction on the applicable fine for cooperating with the investigation in the context of its
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leniency application, the company ultimately decided to appeal to the Tribunal of Defense of Free Competition, where the final ruling is pending. The damage action against SCA was filed in April 2016, and in July of the same year, the Court of Appeals of Santiago declared the action procedurally inadequate. This is because the Chilean competition law only allows damages claims for anticompetitive conduct be brought after the competition tribunal issues its final ruling and finds the defendants involved in an antitrust infringement. Regardless, based on procedural grounds, the Supreme Court decided that the Court of Appeals decision should be overturned, and remanded the case to the trial court for a decision on the merits.

Colombia

December 12, 2017 — The Superintendence of Industry and Commerce (SIC) imposed a fine on Argos, Cemex and Holcim and 6 individuals for their participation in a cartel involving the market for cement. According to the SIC, they account for 96% of sales in the Colombian market for cements. The conduct would have lasted from at least January 2010 to December 2012. SIC reached the conclusion that the companies had similar prices, and they were not able to provide any reasonable economic explanation to their parallel behavior. The three companies paid a fine of over $200 billion Colombian pesos. SIC dismissed the investigation against Tequendame and San Marcos.

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Hong Kong Competition Commission’s Legal Action against Residential Renovation Contractor Cartel

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On August 14, 2017, the Hong Kong Competition Commission (HKCC) filed a complaint against ten residential renovation service providers (hereafter Defendant Contractors) with the Hong Kong Competition Tribunal (Tribunal). This was the second legal action that the HKCC brought to the Tribunal since the Hong Kong Competition Ordinance became fully effective in December 2015. The Complaint alleges that the ten Defendant Contractors violated the First Conduct Rule by: (i) participating in a market sharing agreement involving the provision of renovation work for the tenants of three new buildings that were part of a public housing estate in Hong Kong, and (ii) fixing the prices they offered to the tenants for the renovation work.

This article first provides a summary of the background behind the Complaint, followed by a discussion of the alleged market sharing and price-fixing agreements detailed in the Complaint. A few observations regarding the alleged agreements are noteworthy from an economic perspective. First, as explained below, only about one-third of the public housing tenants appeared to have been directly affected by the alleged market sharing arrangement, suggesting that alternatives to the Defendant Contractors for the provision of renovation services might be available to the tenants. Second, the alleged price-fixing agreement appeared to have only applied to the published (or list) prices of different “packages” of renovation services offered by the Defendant Contractors, and there is no allegation of the defendants attempting to fix the actual prices that the tenants ultimately paid for the services. Further, Complaint also does not set out any direct evidence showing that the alleged agreements at issue have resulted in competitive harm to the tenants.

Nevertheless, under the Competition Ordinance, agreements to allocate customers or to fix prices constitute “Serious Anti-Competitive Conduct,” and are deemed to have the object of harming competition. A violation of the First Conduct Rule involving “Serious Anti-Competitive Conduct” is subject to the full range of enforcement options provided under the Competition Ordinance. Specifically, as in this matter, the HKCC is not required to show the alleged agreements have had anti-competitive effects before bringing legal proceedings against the infringing parties.

Background

To protect the interests of public rental housing tenants from the “infiltration of illegal elements,” the Hong Kong Housing Authority (HKHA) maintains a reference list of renovation and decoration contractors. A contractor must meet certain eligibility requirements in order to be included on the reference list. The HKHA appoints and grants licenses to a number of contractors from the reference list to undertake renovation projects for the tenants of each new housing estate.

The ten defendants in this Complaint were appointed by the HKHA to undertake renovation work in the residential units of three new buildings (hereafter the “Three Houses”) that were part of a public rental housing estate developed by the HKHA. Each house consists of 40 floors of residential units, with slightly over 20 units per floor. The Defendant Contractors were informed by the HKHA in August 2015 that they were included on the reference list to undertake renovation work for the tenants of the Three Houses. In a briefing session organized by the HKHA held shortly after the notification, the defendants were reminded that they “must not agree among themselves to allocate any Units to a particular contractor.”

After construction of the Three Houses was completed in June 2016, the tenants were notified that their respective units were ready for occupation. Prior to moving into their units, the tenants typically would engage the service of a contractor to undertake renovation work in their unit. Note that the tenants are not required to retain the service of any of the ten Defendant Contractors included on the HKHA reference list. Further, the scope and price of the renovation work to be performed is subject to negotiation by the tenant and the contractor.

Market Sharing Agreement

The HKCC alleges the ten Defendant Contractors engaged in a scheme by which each defendant was assigned specific floors within each of the Three Houses regarding the renovation work to be conducted for the tenants (Floor Allocation Arrangement). Under the arrangement, each defendant agreed not to actively seek or accept business from the tenants of a floor that was allocated to another defendant. Moreover, if approached by a tenant from a floor that was allocated to another defendant, a Defendant Contractor would direct the tenant to the contractor who was pre-determined to service that particular floor.

According to the Complaint, about one-third of the tenants across the Three Houses (868 out of a total of 2,582 units) retained one of the ten Defendant Contractors to undertake renovation work in their units, of which 96% (833 units) had engaged the Defendant Contractor who was pre-determined to service the specific floor as set out in the Floor Allocation Arrangement. It is unclear from the Complaint whether the remaining two-thirds of the tenants performed the renovation work themselves, or if they engaged a contractor that was not
on the HKHA reference list. Regardless, the evidence suggests that alternative sources to the Defendant Contractors for the provision of renovation services were available to the tenants.

**Price-Fixing Agreement**

In addition to the Floor Allocation Arrangement, the HKCC also alleges that the ten defendants engaged in an agreement to fix the “package prices” for certain renovation work items for projects undertaken in the Three Houses (Package Price Arrangement). According to the Complaint, the defendants prepared and distributed promotional flyers to the tenants of the Three Houses as the tenants began to take possession of the residential units. The flyers laid out ten specific renovation work items to be undertaken in the units, and bundled the items into two “Basic Packages.” Basic Package 1 consisted of the first four work items, while Basic Package 2 was comprised of all ten work items. Printed out on the flyers are the “Package Price” for each Basic Package of renovation work items, separately for each of the four different unit “models” located on each floor.\(^{12}\)

The Complaint alleges that the flyers were jointly produced by the ten Defendant Contractors, and were used by each defendant to advertise and promote its services to the tenants of the Three Houses. According to the Complaint, the Package Prices listed on the flyers were the prices offered by the Defendant Contractors “in the first instance” for the two Basic Packages of work items.\(^{13}\)

The HKCC claims that the “Package Price Arrangement” was a price-fixing agreement as it “fixed, maintained or controlled the price for the supply of decoration work” via the following means:\(^{14}\) (i) the Package Prices stated on the promotional flyers were jointly determined by the defendants; (ii) the Package Prices were adopted as the transaction prices “on various occasions” in which the tenants did not negotiate with the Defendant Contractor for a lower price; and (iii) on those occasions in which the tenants did negotiate with a Defendant Contractor, the Package Prices had an impact on the final transaction price as they served as a starting or anchoring reference point for the tenants’ negotiations with the Defendant Contractor.

Further, the Complaint alleges that the promotional flyers gave the tenants the impression that the Defendant Contractors were all similar and hence would offer similar prices, and that the Package Prices reflected the standard industry pricing for renovation work. As a result, the tenants would have likely been discouraged to approach a contractor that was not assigned to their floor, which in turn might have affected their negotiations with the specific Defendant Contractor who was allocated to the tenants’ floor. Hence, in addition to affecting the final prices the tenants paid for the defendants’ renovation services, the “Package Price Arrangement” also facilitated the defendants’ implementation of the Floor Allocation Arrangement.

**Conclusion**

That the HKCC brought a legal action against firms in the residential renovation sector should come as no surprise. As indicated in a May 2016 report published by the HKCC on the sector, the HKCC received “substantial anecdotal and other market intelligence” suggesting that collusive activities are widespread among residential renovation, decoration, and maintenance contractors in Hong Kong.\(^{15}\) In fact, the HKCC indicated that it might bring legal actions against additional firms suspected to have engaged in cartel activities in connection with the provision of renovation services in public housing estates.\(^{16}\) This Complaint also affirms the HKCC’s commitment and stated priority in fighting hard core anti-competitive conduct such as agreements to fix prices and to divide the markets.\(^{17}\)

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\(^{1}\) The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the author and do not reflect or represent the views of Charles River Associates or any of the organizations with which the author is affiliated.

\(^{2}\) In the Competition Tribunal of the Hong Kong Special Administrative Region, Competition Tribunal Enforcement Action No. 2 of 2017, between Competition Commission and W. Hing Construction Company Limited, Sun Spark Construction Limited, Lau Chung Yan and Lau Chun Kwok Adam (in partnership trading as Mau Hang Painting & Decoration Co), Cheung Yiu Fai Danny and Wong Tung Hoi (in partnership trading as Tai Dou Building Contractor), Kam Kee Machine Electrical Iron Works Company Limited, Hui Tak Cheong Kanly and Hui Tak On Bryan (in partnership trading as Hip Yick Construction Company), Suen Sik Kau (trading as Tai Wah Civil Engineering), Poon Wai Woon and Poon Kai Wo Julio (in partnership trading as Wai Sun Iron & Decoration Co), Yeung Kwok Yee (trading as Wide Project Engineering & Construction Co), and Luen Hop Decoration Engineering Co Limited (CTEA 2/2017) (hereafter Complaint).

\(^{3}\) Competition Ordinance, No. 14 (2012), available at [www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf](http://www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf). The Competition Ordinance provides for a judicial enforcement model through the establishment of the Competition Commission (the HKCC) and the Competition Tribunal (the Tribunal). The HKCC is the enforcement agency established under section 2 of the Competition Ordinance. The Tribunal is a judicial panel set up to hear and adjudicate on proceedings brought by the HKCC.


\(^{5}\) The First Conduct Rule prohibits firms from entering into an agreement or engaging in a concerted practice if the agreement or practice has the object or effect of harming competition in Hong Kong. *Competition Ordinance*, § 6(1).


\(^{7}\) Id., § 5.2.

9 The eligibility requirements include, among other criteria, a background check by the Hong Kong Police Force to confirm that the contractor has not been involved in triad activities.

10 The three residential buildings, Chun Tat House, Shing Tat House and Oi Tat House, comprised Phase 1 of On Tat Estate, which was located in Kwan Tong, a district in Kowloon. Complaint, ¶ 3.

11 Complaint, § 24(1).

12 The four models differ from one another in terms of their sizes and layouts.

13 Complaint, ¶ 42(2).

14 Id., ¶ 46(1).


17 Indeed, three months after it filed the Complaint, the HKCC announced on November 22, 2017 the launch of a “Combat Market Sharing Cartels” Campaign to raise public awareness of market sharing and its harm, to educate the public on how to detect the practice, and to encourage members of the public to report suspected market sharing behavior to the HKCC. Press Release, Hong Kong Competition Comm’n, Competition Commission Launches “Combat Market Sharing Cartels” Campaign (Nov. 22, 2017), available at www.compcomm.hk/en/media/press/files/20171122_Combat_Market_Sharing_Cartels_Campaign_e.pdf.

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New Clarification on the Application of Vietnam’s Competition Law to Foreign Enterprises

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Traditionally, Vietnam’s Law on Competition (No. 27/2004/QH11) (the “Law”) has been interpreted to not apply to extraterritorial (i.e., foreign) economic concentrations. However, despite a lack of legislative or regulatory certainty in this regard, it appears that transactions involving foreign companies are now more likely to fall within the Law’s jurisdiction where there is an impact in Vietnam.

Since the enactment of the Law and its associated decrees, several aspects of the Law have been difficult to interpret due to a lack of formal clarification and guidance in the Law, decrees or from the Vietnam Competition Authority (“VCA”). A fundamental and recurring question is the scope of the Law and how it applies to foreign businesses. The Law states that it applies to activities of “Enterprises” which are defined to include “overseas enterprises operating in Vietnam.” This article will focus on the latter part of this phrase which has proven difficult to define given the lack of clarity on what level of activity is required to determine whether the “operating in Vietnam” threshold has been met.

Based on disclosures in the VCA’s 2016 Annual Report and subsequent consultations with the VCA, this article will briefly discuss a recent clarification of this threshold that may significantly expand the extraterritorial scope of the Law including, in particular, how it relates to economic concentrations involving foreign companies.

Historically, based on the author’s experience and discussions with colleagues and VCA officials, the “operating in Vietnam” threshold has been interpreted as requiring some legal or physical presence in Vietnam by the relevant overseas entity in order for it to be deemed an “Enterprise” under the Law. However, despite the comfort provided by informal guidance from the VCA on specific transactions, in the absence of formal interpretation, there has always been a risk that the threshold could be interpreted more broadly in later review on a given transaction by the VCA or relevant adjudicative bodies or in other cases.

To fall within the scope of the Law’s merger regime, the relevant economic concentration must involve at least two “Enterprises” in one of the specified forms of transactions. Lack of certainty in determining whether a foreign entity will be deemed an “Enterprise” has made ascertaining whether a specific transaction is subject to Vietnam’s merger regime problematic. One observes this problem both in transactions where all parties are foreign entities (particularly where any Vietnamese subsidiaries are not directly involved in the transaction), but also where a foreign business acquires a Vietnamese company.

Fortunately, the VCA has traditionally welcomed both formal and informal consultations and, based on numerous consultations with VCA officials, there has been some comfort that the VCA was previously interpreting “operating in Vietnam” as requiring some form of physical or legal presence in Vietnam. Effectively, this meant that the merger regime would not apply where local subsidiaries were not participating directly in an economic concentration undertaken by their foreign parent companies or where one of the parties involved in the transaction was a foreign entity without a legal or physical presence in Vietnam.

In its 2016 Annual Report, the VCA discussed a notification received in regard to a proposed transaction between Sanoﬁ and Boehringer Ingelheim. For this purpose, we can ignore the specifics of the transaction and the VCA’s substantive determinations and focus on the VCA’s conclusion that, although the acquisition occurred outside of Vietnam, both relevant entities participating in the economic concentration satisfied the “operating in Vietnam” threshold. With respect to one of the entities, this conclusion was premised on ownership of a Vietnamese subsidiary. With respect to the other, it was founded on the basis of its distribution into Vietnam. Given this interpretation of the threshold, the relevant entities were determined to be “Enterprises” and the foreign transaction was subject to the Law’s merger regime.

This more expansive interpretation of the scope of the Law has been confirmed in subsequent consultations with VCA officials who stated that having products distributed into Vietnam was sufficient to fall within the scope of “operating in Vietnam.” Previous Annual Reports had already suggested that ownership of a local subsidiary might be sufficient to satisfy the “operating in Vietnam” threshold; although this was not explicitly stated nor was it expressly confirmed in subsequent discussions on this issue with VCA officials.

However, given the 2016 Annual Report, going forward, it seems prudent for foreign businesses participating in economic concentrations involving acquisition of Vietnamese businesses, and even with regard to a foreign economic concentration that may involve Vietnam markets, to consider the potential application of the Law. More broadly, given this guidance on the application of the “operating in Vietnam” threshold, foreign companies engaged in other activities with implications on Vietnamese markets—including potential abuses of dominance, anti-competitive agreements or unfair trade practices—should also
consider whether they may be deemed “Enterprises” subject to the Law.

Despite the above, it is important to note that this clarification is not formally set out in the Law or relevant decrees and therefore, the VCA’s history of welcoming informal and formal consultations on issues where the application of the Law is uncertain remains a valuable resource when considering potential application of the Law to foreign enterprises. It should also be noted that Vietnam is currently considering amendments to the Law and recently published drafts of the proposed amendments have addressed this uncertainty by expanding the definition of Enterprise to include “foreign enterprises” regardless of whether they are “operating in Vietnam.”

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Proposed Immunity and Leniency Changes Likely to Discourage Cooperation in Canada

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In February 2016, we wrote that increasing disclosure requirements for Canadian immunity and leniency applicants might discourage companies from cooperating with Canadian antitrust enforcers. Our comments followed a decision to require production to criminal accused of information proffered by immunity and leniency applicants to the Canadian Competition Bureau (“Bureau”) and judicial production orders issued against those same cooperating parties and their lawyers to produce interview notes and other “factual information” collected during their internal investigations.

Partly in response to that decision and partly because of the failure to convict the accused in the Durward and the Chocolate cases, the Bureau plans to revise its Immunity and Leniency Programs. Drafts have not been released, but senior officials have announced some key changes, some of which have been implemented in practice. We have some recent experience with the Bureau’s new approach and offer our observations on it and the proposed changes to the Programs. In summary, we believe these changes will further discourage cooperation in Canada. We caution that the Bureau has not released its revised Programs, and they will be subject to consultation, so these proposals may yet change.

Mandatory KGB Interviews before Immunity

Witness interviews are not new. The Bureau’s current Immunity Program and the PPSC Deskbook provide that the Bureau and PPSC (Public Prosecution Service of Canada) may need to interview relevant witnesses before granting immunity. However, the Bureau’s new Immunity Program will reflect its new practice: a corporate immunity applicant must make the relevant employees available for videotaped interviews by Bureau officers before the PPSC will consider an immunity recommendation.

KGB interviews, so-called after a case of that name, are intended to guard against a witness recanting at trial, something that the Crown complained of in Durward. If the testimony changes at trial, the prosecutor can use the recorded evidence to impeach the witness and potentially enter it into evidence for the truth of its contents under an exception to the hearsay rule.

We have no quarrel with the objective underlying this new policy. Competition Act enforcement will suffer if the Crown cannot rely on witness testimony. If individuals believe that they can tell one story to get immunity and another story later, the integrity of the immunity process will be compromised to the detriment of enforcement more generally. We understand that KGB interviews are typical in other criminal contexts. Why should Competition Act enforcement be different?

While the goal may be laudable, challenges apply in practice that may discourage some applicants from seeking immunity in Canada.

First, some companies and their counsel will fear a potentially discoverable record of an employee admitting criminal conduct. Although Bureau investigations are confidential, civil plaintiffs have recently obtained records collected by the Bureau during its criminal investigations. While disclosure may be many years after the interview in question, many companies and their counsel will weigh the risk of future disclosure—which might have global consequences—against the benefit of immunity in Canada.

Second, recording the interview for possible use at trial makes it critical that the witness’ evidence at the interview is as complete as possible. This increases the importance of counsel having completed the internal investigation before the interview occurs. In large global investigations, companies and their counsel may bristle at Canadian interview requirements driving the investigation agenda. The company will typically face much greater exposure in the U.S., Europe and Asia. Why should Canada drive the timelines of its investigation? Some companies will decide that it should not, and decline to seek immunity or leniency in Canada.

Finally, early KGB interviews can compromise enforcement in other jurisdictions putting the immunity applicant in an awkward position between two or more enforcers with competing priorities. For example, the DOJ’s then top enforcer recently described how recorded testimony before trial can compromise trial testimony, for example, if the DOJ’s investigation reveals information that would further refresh the witness’ recollection. This perspective is at odds with the Bureau’s new requirement of KGB interviews before recommending immunity (and possibly within 6 months of the proffer). How can an immunity applicant in Canada and the U.S. satisfy both the DOJ and the Bureau? Will the Bureau postpone KGB interviews on the DOJ’s request? If so, for how long? Until the DOJ secures a conviction? Alternatively, if the Bureau presses forward with interviews, the immunity applicant risks compromising the DOJ’s request. The easiest way to avoid these headaches is not to seek immunity in Canada.

Recording Proffers

Like the US, Canada advertises a paperless process through which an applicant’s counsel delivers an oral proffer to Bureau investigators. It appears that the paperless process is slipping away. The Bureau may record proffers under the new Programs.
Recording proffers will send shivers down the spines of non-Canadian counsel who are used to the American paperless process and fear the creation of disclosable records. It will also affect the presentation of the proffer, likely making it more awkward and stilted. More troubling, however, is the uncertainty about the process. When will the Bureau record proffers? Always? If not always, when? Will the Bureau record the whole proffer or only parts? If an applicant makes multiple proffers, will all be recorded? Will an applicant know upon seeking a marker whether it will need to submit to recorded proffers? Will transcripts be made of audio recordings? If so, in what circumstances? Why is the Bureau recording proffers at all? Have counsel later denied making certain statements?

Combined with the reluctance to have proffers recorded, we believe the uncertainty about the Bureau’s process will discourage immunity and leniency applicants. Certainty and predictability are critical elements of immunity and leniency programs globally. Participants do not want to guess at what the process will be. Too many questions produce an easy answer: to not cooperate in Canada.

Disclosure of Potentially Privileged Documents

We understand that the revised Programs will require disclosure of all non-privileged, relevant documents, with some suggestion that this may include documents created by counsel during the company’s internal investigation, such as counsel’s notes taken during employee interviews. Presumably, the rationale derives from the court’s decision in the Chocolate case,10 its comment that facts are not privileged once the party with knowledge of the facts comes under a legal duty to disclose, and its subsequent production orders, which required the production of counsel’s interview notes.

It is true that facts are not privileged. Telling facts to a lawyer does not protect the facts from disclosure. The state can compel disclosure from a person with knowledge of the facts using lawful process, subject to the constitutional protection against self-incrimination. But solicitor-client privilege exists to ensure that the lawyer does not have to disclose the facts provided by the client.

In our view, a lawyer’s notes of a client conversation are privileged unless privilege is waived (which it does not have to be to participate in the Programs). For example, the Crown could not compel a criminal defense lawyer to disclose notes of conversations with the accused client. Why should it be different if those notes record facts learned from a corporation’s directors, officers, and employees in their capacity as such? Those natural persons are the conduit through which the corporation as a legal entity provides facts to its lawyers so that the lawyers can provide legal advice to the corporation.

Our position, however, leads to a problem. How does the corporation disclose all the “factual information” it has without producing notes of what its employees said when interviewed by its lawyers? It seems to us that it does so by producing all of its relevant pre-existing business documents and making its employees available to be interviewed—both requirements of the current Programs.

Leaving aside what ought to be privileged, we have little doubt that there will be a steep decline in immunity and leniency applications if the Bureau and PPSC require applicants to disclose counsel’s notes made during an internal investigation, especially if the obligation extends to notes taken by non-Canadian lawyers.

Increased Fine Reduction for Timely and Valuable Cooperation

Currently, a 50% fine discount is only available to the second cooperating party, known as the first-in-leniency applicant. The Bureau proposes to open up the 50% discount to all cooperating parties based on the timeliness and value of their cooperation. The stated goal is to increase the timeliness and quality of cooperation. The unstated goal is to attract more guilty pleas from cartel participants who saw a modest fine discount as an insufficient reason to plead guilty.

We doubt that this change will achieve either goal. Perversely, it reduces incentives to seek leniency—at least for the first-in-leniency applicant because it reduces the certainty of the available benefits. First-in-leniency provides two significant benefits: immunity for current directors, officers, and employees and a 50% fine discount. While the revised program will maintain the former benefit, threatening the latter benefit will cause potential applicants to think twice. How far could that fine discount tumble if another company moves more swiftly, has more incriminating documents, or more compliant witnesses? No one knows. The Bureau is the arbiter of whether the cooperation is too slow or too modest.

Undoubtedly, some first-in-leniency applicants will work hard to preserve the 50% fine discount. How many? We suspect fewer than the Bureau hopes.

Will the possibility of a 50% fine reduction incent later applicants to cooperate? Rarely. Most potential leniency applicants save more money by not cooperating with the Bureau and not pleading guilty. Increasing a fine discount from 30% to 50% will not move the needle for very many companies. Most will rightly suspect that the full 50% discount will be rare for subsequent cooperators. The more typical case will likely involve a small reward—perhaps a 35-40% fine reduction—for timely and valuable cooperation. Remember, the Bureau will already have cooperation from at least two prior cooperating companies. How timely or valuable is cooperation from the third company likely to be?

Until the Bureau establishes a strong record of convictions in contested cases, tinkering around the edges of the leniency incentives will not attract more applicants. Creating more uncer-
tainty and burden for first-in-leniency applicants only erects further barriers to their applications.

**Conditional Immunity**

We understand that the new Immunity Program will provide for a grant of conditional immunity with full immunity granted only after the PPSC is certain that the applicant’s cooperation is no longer necessary. Realistically, this could take years. In *Chocolate*, Cadbury sought immunity in July 2007, the DPP agreed to grant immunity in November 2007 and the parties executed an Immunity Agreement in May 2008. The Crown stayed the final charges in November 2015. Under the new regime, Cadbury would have had only conditional immunity for more than seven years since its continued cooperation was necessary to convict the accused. Under the new regime, it is unclear staying charges against the accused would cause Cadbury to lose its conditional immunity or crystallize its full immunity.

The rationale for this change is not clear. Currently, an applicant receives immunity but that immunity can be lost if it fails to cooperate. Under the new proposal, an applicant will receive conditional immunity with full immunity contingent on cooperation. Thus, it will lose immunity if it does not cooperate—the same situation it faces now just with a less certain name and appearance.

If the change means only that full immunity is unavailable until the applicant makes its witnesses available for KGB interviews and produces its documents, then the change is in form not substance. Currently, the PPSC refuses to process immunity recommendations without KGB interviews.

**Conclusion**

We cannot hide our pessimism for the Bureau’s proposed changes to the Immunity and Leniency Programs. We hope that these changes will strengthen cartel enforcement in Canada, but we fear the opposite. The more potential immunity applicants who decide that the benefits of immunity are not worth the burdens and risks associated with cooperation, the fewer cartels the Programs will detect. This may not matter for global cartels since American, Asian and European enforcers detect and punish their participants. But it is critical for homegrown cartels.

Is reduced detection worth the increased odds of conviction? Maybe. But that presumes the current programs are to blame for the results in Durward and Chocolate. We are not so sure.

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4. After this paper was written, on October 26, 2017, the Competition Bureau released its revised Immunity Program for comment.
10. Id., ¶ 37.

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What’s So Big About Big Data: Canada’s Competition Bureau Issues Draft Discussion Paper for Consultation

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The evaluation and treatment of data and “big data” in antitrust has become an increasingly popular topic of debate and discussion in international antitrust circles. In a global economy that is increasingly driven by disruption and innovation, antitrust authorities have been contemplating when and how traditional antitrust paradigms might apply and whether the existing tools and legislation are sufficient to address any antitrust concerns that may arise.

On September 18th, Canada’s Competition Bureau put out a draft discussion paper for consultation titled “Big Data and Innovation: Implications for Competition Policy in Canada.” With a view to sparking further dialogue with stakeholders, the discussion paper provides the Bureau’s perspective on the role of data (including collection, use and access to such data) in the context of merger review, abuse of dominance cases, cartels and the application of the misleading representations provisions of the Competition Act. Key aspects of the Bureau’s position as outlined in the discussion paper as well as some practical implications are discussed in more detail below.

I. Role of Data in Merger Review and Monopolistic Practices

Since certain aspects of antitrust analysis (such as market definition and market power) are essential to both merger review and abuse of dominance cases, the role of big data in these two areas is discussed together by the Bureau. Before delving into a more detailed discussion, the discussion paper acknowledges at the outset that “competition policy in Canada does not, and should not, assume that ‘big is bad’.” The Bureau also acknowledges that “firms are increasingly harnessing big data in ways that drive innovation and quality improvements across a range of industries.” As a result, while the Bureau is mindful of the need to avoid “under-enforcement,” it is also mindful of “over-enforcement” which “risks slowing or even stopping such advances.” This need to approach enforcement and intervention in a balanced manner is a welcome acknowledgement and helps to set the overall tone of the discussion paper.

A. Data and Market Definition – Increased Reliance on Direct Effects

In applying existing tools to platforms or digital markets: The discussion paper outlines the complexity of applying traditional market definition tools to mergers and acquisitions where big data or multi-sided platforms are involved. In particular, the Bureau refers to the difficulties of applying the traditional hypothetical monopolist test (used to assess substitutability between products) where products are made available at no cost or where multi-sided platforms are involved. The Bureau posits that because of such difficulties, in certain cases involving big data or platforms in the digital economy, it “may be appropriate to rely on alternative methods to assess market definition or to forgo market definition as an initial step and focus on direct evidence of competitive effects.”

B. Data and Market Power – Big is Not Necessarily Bad

Data can be a barrier: Again, the Bureau acknowledges that “developing valuable data through competition on the merits does not run afoul of the [Competition] Act even if it results in significant market power.” However, the discussion paper also provides that in certain cases, “access to and control over critical data that serve as an essential input may confer market power” and may also represent a barrier to entry. In particular, the Bureau notes that access to data may act as a barrier as a result of network effects or if a firm has exclusive access to proprietary data.

Data may make market shares less important: The Bureau also notes in cases involving data, market shares, which are traditionally a key input into an assessment of market power, may either overestimate or underestimate a firm’s market power. In particular, the Bureau notes that when assessing the acquisition of a firm with low market share but “troves of valuable data,” agencies should assess post-acquisition incentives and the importance of the data being acquired.

Denying access to data may be exclusionary: With respect to access to data, the Bureau notes that antitrust “does not usually impose on firms an obligation to share data that they have collected and developed.” However, the Bureau also notes that incumbents can try to prevent their competitors from obtaining data that is necessary to compete. In evaluating whether such acts are truly competition on the merits or anti-competitive acts,
the Bureau will apply the “no economic sense” test as applied in the Tribunal’s TREB\(^*\) re-determination decision to the conduct in question. Here, it is interesting that the Bureau has singled out the “no economic sense” test particularly when other possible tests have been discussed and adopted by the Tribunal in the past.

C. Assessment of Competitive Effects

Impact on future competition: The Bureau acknowledges that the assessment of whether a merger or practice is likely to result in a substantial prevention of competition (rather than a lessening of competition) is challenging in cases involving data given the need to understand not just the current uses but also the future or potential uses for the data. As the Bureau also acknowledges, however, any theory of impact upon competition is required by Canadian jurisprudence to be grounded in existing evidence. As the Supreme Court of Canada noted in its decision in \textit{Tervita}, “factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company’s circumstances.” From a practical perspective, a company’s business plans and documents will undoubtedly continue to play an important role in the assessment of probable future competitive effects in cases involving data.

Likelihood of coordinated effects: The Bureau notes that where big data is involved, co-ordinated effects may be facilitated by a merger or practice in two ways: (i) by removing an additional constraint on co-ordination in a market that is already conducive to coordination (e.g., there is already transparent pricing data available) or (ii) where data is made more readily available or transparent as a result of the merger or practice. The Bureau cites the example of an acquisition of a maverick firm and notes that such an acquisition may be more problematic in a market where big data would facilitate co-ordination.

Non-price effects include impact on privacy: The discussion paper notes that in addition to assessing the impact of the practice or merger on dimensions such as innovation and quality, another important non-price effect to be evaluated is the impact on privacy. While consideration of such effects is again, not new, the Bureau also acknowledges that quantifying such non-price effects is challenging and “could have consequences for provisions of the Act that include an efficiencies defence.” While the Bureau is clearly signalling the difficulties associated with the assessment and quantification of anti-competitive effects (as required by the \textit{Tervita} decision) particularly where non-price effects are involved, the discipline imposed by quantification is a necessary hurdle to protect against over-enforcement.

II. Big Data and Cartels: Collusion in an Age of Algorithms

\textit{Algorithms and agreements}: A hot topic in antitrust circles has been whether the use of algorithms and big data might facilitate tacit co-ordination as well as collusion that perhaps may go undetected. While the Bureau acknowledges that big data “may introduce more efficient and powerful ways to implement and manage a cartel . . . it does not constitute a new kind of activity.” The Bureau notes (correctly in our view) that even with the increasing sophistication of the tools involved, the offence is still rooted in the agreement itself. That is, if companies agree to use algorithms to implement an agreement with respect to pricing (as occurred in the UK and U.S. cases involving the sale of posters via Amazon\(^*\)), then while such an agreement uses new tools to implement and monitor the agreement, the underlying offence is no different. With these statements, the Bureau appears to be denouncing suggestions made by certain commentators regarding the need to consider amending antitrust laws to encompass a broader concept of collusion.

\textit{Conscious parallelism is not criminal}: Certain antitrust academics have suggested that the increased ability to use big data to monitor and react to competitors’ pricing data may lead to increased acts of parallel pricing which in turn, dampen competition. However, the Bureau notes that “big data is likely to introduce a difference of degree rather than a difference of kind when it comes to conscious parallelism.” The Bureau also notes that there is “broad consensus that the unilateral monitoring and responding to data collected on one’s competitors is legal” and that altering the existing framework would be “unworkable.”

\textit{Big data and facilitating practices}: The discussion paper notes that to the extent that big data and algorithms are used to engage in facilitating practices, such activity may be an indicator of the existence of an illegal price-fixing agreement and thus, may be examined by the cartels provision or alternatively, may be captured by section 90.1 of the Act (a civil provision which prohibits agreements between competitors that result in or are likely to result in an anti-competitive effect). However, given that section 90.1 also requires an agreement or arrangement, it is not clear that this provision could apply to situations where the facilitating practice falls short of an agreement.

III. Application of Misleading Representations Provisions to Data Collection

While the Bureau has historically applied the misleading representations provision to “practices where consumers were misled into purchasing a product or service,” the discussion paper notes that the “era of big data may warrant devoting greater attention to representations that mislead consumers into giving away their information.” This statement is an important signal as to the direction the Bureau intends to take with respect to statements and disclosures involving the collection and use of data.

\textit{Misleading statements re: collection and use of data}: The discussion paper notes that when companies make misleading representations to consumers about how their data will be collected, maintained, shared or erased, such statements can be pursued under the misleading representation provisions. Here, the Bureau gives the example of the FTC’s proceedings against SnapChat for
representing that its snaps would disappear forever when recipients could use several simple methods to save snaps indefinitely.

Inadequate disclosure may also be misleading. Not only will the Bureau examine whether the disclosure provided in respect of data collection and use is truthful, it will also examine whether the disclosure provided is sufficient for consumers to make an informed choice to provide such data. More specifically, the Bureau states that “companies are putting themselves at risk when they collect information that consumers would not expect to be collected in the normal course of business and only disclose this material information in terms and conditions that are likely to be overlooked by consumers.” The Bureau also states that “the collection and use of data that go beyond what consumers would reasonably expect increases the likelihood of deception.” From a practical perspective, however, this approach raises questions about what consumers reasonably expect re: data collection in today’s digital era. In addition, whether non-disclosure or inadequate disclosure would be sufficient to be “material” (which has been defined by the courts to mean whether the representation influenced a purchasing decision) remains to be seen. Finally, as noted by Canada’s Office of the Privacy Commissioner or “OPC” in its comments on the Bureau’s discussion paper, the collection of personal information without consent is already within the scope of the OPC’s mandate under Canada’s federal privacy sector legislation, the Personal Information Protection and Electronic Documents Act (PIPEDA). The OPC’s comments regarding its desire to work with the Bureau in this area suggest that perhaps the Bureau had not made the OPC aware in advance of its intention to increase its enforcement efforts in the privacy area. Regardless, the potential for the Competition Bureau to use the significant penalties available under the misleading advertising provisions means that companies should carefully consider the adequacy and correctness of its disclosure regarding the collection or use of data.

IV. Conclusions and Implications

The discussion and debate regarding the role of big data in antitrust is likely to continue to evolve both in Canada and elsewhere. The Bureau’s discussion paper covers a number of areas and provides a useful first glance at the Bureau’s perspective on these evolving issues. While the paper does not, for the most part, represent a significant departure from the Bureau’s established policies or approaches, companies doing business in Canada may consider taking the following practical steps:

• Companies using algorithms to monitor competitors’ pricing or make dynamic pricing decisions should continue to make pricing decisions unilaterally and avoid communications with competitors regarding approaches to pricing whether through algorithms or other electronic tools.
• Reviewing existing privacy policies and disclosure with respect to the use, collection and disposal of consumer data to ensure that adequate and proper disclosure is provided up front (and not simply in terms and conditions that, according to the Bureau, could be overlooked).
• Avoid the use of data collection that would be unexpected (for example, the collection of a consumer’s location data where a consumer purchases an app that provides another purpose).
• When evaluating the antitrust implications of a possible merger or other practice where one of the parties has significant data, take into account the effects of the proposed conduct on non-price effects such as privacy as well as quality and innovation.


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International Developments in Promoting Procedural Fairness and Economics in Competition Enforcement

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A crucial component of competition enforcement is the procedure that governs such enforcement. A competition authority’s procedures can affect the quality and timeliness of enforcement decisions. The ability of parties to access significant investigative information, present evidence and obtain a fair hearing all contribute to the quality of an enforcement decision. By assessing the strengths and weaknesses of its case against the opposing party’s arguments and evidence, a competition authority can ensure that its enforcement decision is properly grounded in law and facts. Furthermore, transparent procedures contribute to the legitimacy of a competition authority’s enforcement decision. Parties will more readily abide by enforcement decisions if they understand the reasons for the decision and the process the competition authority took in arriving at its decision.

An ancillary topic closely connected to procedural fairness is the role of economics in competition enforcement. Economics is the lingua franca of competition authorities. It provides a common set of tools and principles that competition authorities from different jurisdictions can employ to ensure their enforcement decisions promote economic welfare, rather than undermine it. For businesses, particularly those that operate internationally, it provides a means for them to reasonably predict whether their practices or mergers will be perceived by competition authorities as pro- or anti-competitive, regardless of the jurisdiction in which the business operates. The greater certainty and predictability provided by economics complements the role played by procedural fairness in a competition enforcement system.

The importance of procedural fairness and economic analysis in competition enforcement has led to various international initiatives to promote their proliferation. The purpose of this article is to highlight some of these recent initiatives.

North America

In May 2016, the American Bar Association, Section of Antitrust Law, International Task Force released a report entitled Best Practices for Antitrust Procedure. The report promotes procedural fairness by providing a comprehensive list of best practices that ensure the accuracy, efficiency and impartiality of competition enforcement. The best practices cover the various stages of competition enforcement: Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision and Review. The best practices are intended to be broadly applicable regardless of the particular legal system (i.e., administrative or prosecutorial, civil law or common law, etc.).

Canada’s Competition Bureau is active in promoting procedural fairness and the use of economics in competition enforcement through its capacity building program. Through the program, the Bureau sends its officials to exchange technical expertise and participate in seminars and workshops with its foreign counterparts. For example, Jeanne Pratt, a Senior Deputy Commissioner of the Bureau, participated in the International Competition Network’s (ICN’s) workshop on due process in August 2017 that was hosted in Singapore. She facilitated a how-to session on integrating procedural fairness into agency decision-making and moderated a panel that gave the perspectives of senior officials and non-governmental advisors on procedural fairness. Furthermore, Alan Gunderson, the Bureau’s then acting Associate Deputy Commissioner of the Economic Analysis Directorate, participated in a Taiwan Fair Trade Commission seminar on incorporating economic analysis into competition enforcement in September 2017 that was also hosted in Singapore. He shared his experience on how the Bureau approaches economic analysis in abuse of dominance cases and facilitated a how-to session on merger control analysis.

International Organizations

International organizations continue to play an important role in promoting procedural fairness and economic analysis in competition enforcement. For instance, in 2015, the ICN released its Guidance on Investigative Process. The Guidance provides international best practices regarding investigative procedures and addresses topics such as transparency and the protection of confidential information. Notably, in May 2017, the U.S. Chamber of Commerce conducted a survey of 240 practitioners across 14 different jurisdictions to assess the level of adherence to the Guidance.

Furthermore, in September 2016, the Competition Bureau and the University of British Columbia’s Sauder School of Business hosted the ICN Chief/Senior Economists Workshop. Over 30 Chief and Senior Economists from ICN member agencies participated in two days of discussion on topics of importance to economists working in competition authorities, including unilateral effects analysis, vertical restraints in digital markets and screening for cartels. The ICN, in collaboration with the Organisation for Economic Co-operation and Development’s Korea Policy Centre, will also be organizing a Chief/Senior Economists Workshop in May 2018 to further promote normative economic principles and analysis.

Another international organization that has been engaging in capacity building work is Asia-Pacific Economic Cooperation (APEC). For example, under a proposal from Vietnam, APEC...
plans to conduct a policy dialogue and two seminars to promote the use of economic evidence in competition policy. Furthermore, APEC’s Competition Policy and Law Group regularly organizes training seminars. In February 2017, the Group held seminars on the investigative powers of competition authorities and the economics of competition policy.

Conclusion

As this article suggests, promoting procedural fairness and economics in competition enforcement remains a priority for jurisdictions around the world and for international organizations. This trend is beneficial for both competition authorities, who want to ensure their enforcement actions are legitimate, efficient and effective, and for businesses, who can more easily comply with competition laws and procedures when they are impartial, predictable and transparent.

1 The views expressed in this article are the personal views of the author and do not reflect the views of the Competition Bureau, the Commissioner of Competition or the Department of Justice Canada.


8 Vietnam’s proposal can be found at https://aimp2.apec.org/sites/PDB/Lists/Proposals/DispForm.aspx?ID=2028.

9 A list of seminars hosted by the Competition Policy and Law Group can be found on its website at www.apec.org/Groups/Economic-Committee/Competition-Policy-and-Law-Group.

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2018, Antitrust in Argentina: “Back to the Future”¹

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2017 will be remembered as a historic year for antitrust in Argentina. On November 22, 2017, the Congress gave preliminary approval to the new competition bill drafted jointly by Argentina’s Antitrust Authority and legislators of the official party, between January and September 2016 (hereinafter the “Draft Bill”).

The story goes back to February 2016, a few months after the end of Kirchner’s administration, when new rules were put in place to normalize the enforcement of competition law in Argentina. That same month, Mr. Esteban Greco was appointed President of Argentina’s Antitrust Agency. The oath taking ceremony took place at the main saloon of the Presidential Palace, before President Mauricio Macri, and was witnessed by the entire Cabinet of Ministers and the heads of the Senate and the Supreme Court of Justice. This was seen as a symbolic gesture of what was to come during the next few months, setting competition as one of the government’s enforcement priorities.

By mid-2016, the Government presented the National Productive Plan, which included competition as the eighth most important pillar. In December 2016, competition was included as number eight among the one hundred political priorities for 2017.

Since the appointment of its new President, Argentina’s Antitrust Agency, the National Commission for the Defense of Competition (CNDC for its Spanish acronym), assumed the main objective of establishing competition as the primary way of interaction between companies and consumers, so that companies have the chance to grow based on efficiency, innovation and quality of their products, increasing the alternatives to consumers in terms of quality, prices and commercial conditions.²

One of the main challenges assumed by the new authorities was proposing changes in the legal framework to improve the institutional design and to develop modern tools for competition enforcement.

Argentina’s Antitrust Draft Bill: The Beginning of a New Era

The Draft Bill was developed during the second half of 2016. In August 2016, for the first time in history, the CNDC opened a public national and international consultation to receive comments and proposals on the drafted text. Once finished, the CNDC started working jointly with legislators of the official party to issue a unified draft bill, which was introduced to the Congress on September 27, 2016.

The Draft Bill was written following both Argentine reality and experience as well as antitrust international best practices, aiming at increasing deterrence and pursuing independence, transparency and predictability of agency decisions.

The Creation of an Independent Authority

The Draft Bill creates the National Competition Authority (NCA) as an independent authority with sufficient powers to adopt its decisions, control its own budget and function without political interference.

As established in the Draft Bill, the NCA shall be composed of five members that will be designated by the Executive, with the approval of the Senate. Candidates shall be chosen from a shortlist that shall be the result of a public contest decided by an independent jury. Every candidate shall have a suitable technical record, sufficient experience in competition issues, as well as a well-known moral character.

The internal structure of the NCA also contemplates the creation of a Secretary of Anticompetitive Conduct, and a Secretary of Economic Concentration, which shall be in charge of the investigation phase of conducts and merger control proceedings, respectively.

Mergers & Acquisitions Control

The Draft Bill contemplates three major changes regarding the mergers and acquisitions control regime in Argentina:

- First, it includes the so-called ex ante control, in order to solve a current problem, as under Law 25,156 currently in force, mergers and acquisitions are submitted for the evaluation of the CNDC after deals are closed.
- Second, the Draft Bill regulates a “fast-track” procedure for those mergers and acquisitions which fall are deemed to have a low potential impact on competition. This is expected to speed up the procedures on said cases, as well as insuring more resources are reserved for more complex cases.
- Last but not least, the Draft Bill updates the thresholds for the notification of mergers and acquisitions. In Argentina, thresholds have been “frozen” in local currency (AR$) for the past fifteen years. As a result, in a country like Argentina, characterized by a high inflation economy, an increasingly high number of concentrations become notifiable. In order to avoid this same issue in the future, the Draft Bill also contemplates an adjustment system of the thresholds.
**Cartels & Leniency**

Regarding cartels, the Draft Bill also introduces three major changes to the current regime:

- **Section 2** provides that hard core cartels shall be regarded as absolute restrictive practices, with a presumption to cause harm to the general economic interest.³
- **Additionally**, for the first time in Argentina’s antitrust history, the Draft Bill includes the creation of a leniency program. The idea of this inclusion is to facilitate the proper detection, prosecution and sanction of cartels, and the investigation to enforce the law. The design of the leniency program incorporates some of the world’s best practices and current trends that have proved to be successful in dealing with cartels.
- **Finally**, the Draft Bill includes new guidelines for the application of fines by the Agency. These include up to double illicit gains; up to 30% of the relevant market turnover multiplied by the number of years (duration) of the practice;⁴ and a measurement in so-called “adjustable units” by means of which fines can reach up to US $205 million.

**Antitrust Damages**

Regarding this the issue of damages lawsuits, the Draft Bill provides the possibility of filing a claim for antitrust damages, stipulating that the resolution of the ANC in relation to a violation of the law shall have force of res judicata once it becomes final. The claim shall be filed through expedited summary proceedings as stipulated by Argentina’s Code of Civil and Commercial Procedure.

**The Creation of a Court of Appeals in Antitrust Matters**

The creation of a specialized court, “The Court of Appeals in Antitrust Matters,” is expected to give certainty and predictability; to lead to greater efficiency in the decision-making process; and to minimize the potential different interpretations of judges regarding the subject matter. All this redounds in the benefit of economic agents.⁵

**Conclusion**

Having obtained the preliminary approval from the Honorable Chamber of Deputies, turned 2017 in a historic year for antitrust in Argentina, as it marked the first step towards a better enforcement of competition law, which has been long needed for many years.

Antitrust enforcement in Argentina in 2018 also faces fresh challenges. The Draft Bill is expected to be passed next February-March, after the consideration by the Senate, and the regulation of the new law poses a major question: how to put it into action, i.e. from the creation of the new authority, and the effective implementation of the leniency program, to the updating of the M&A notification thresholds and the creation of a new appellate body. There is no doubt that a definitely new era in antitrust is starting in Argentina.

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1. 1985, American Science Fiction comedy film, directed by Robert Zemeckis.
3. As the legal right protected by Argentina’s Antitrust Law.
4. This amount shall not exceed 30% of the consolidated national turnover.

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