Lex Mundi

Global Competition Law Report

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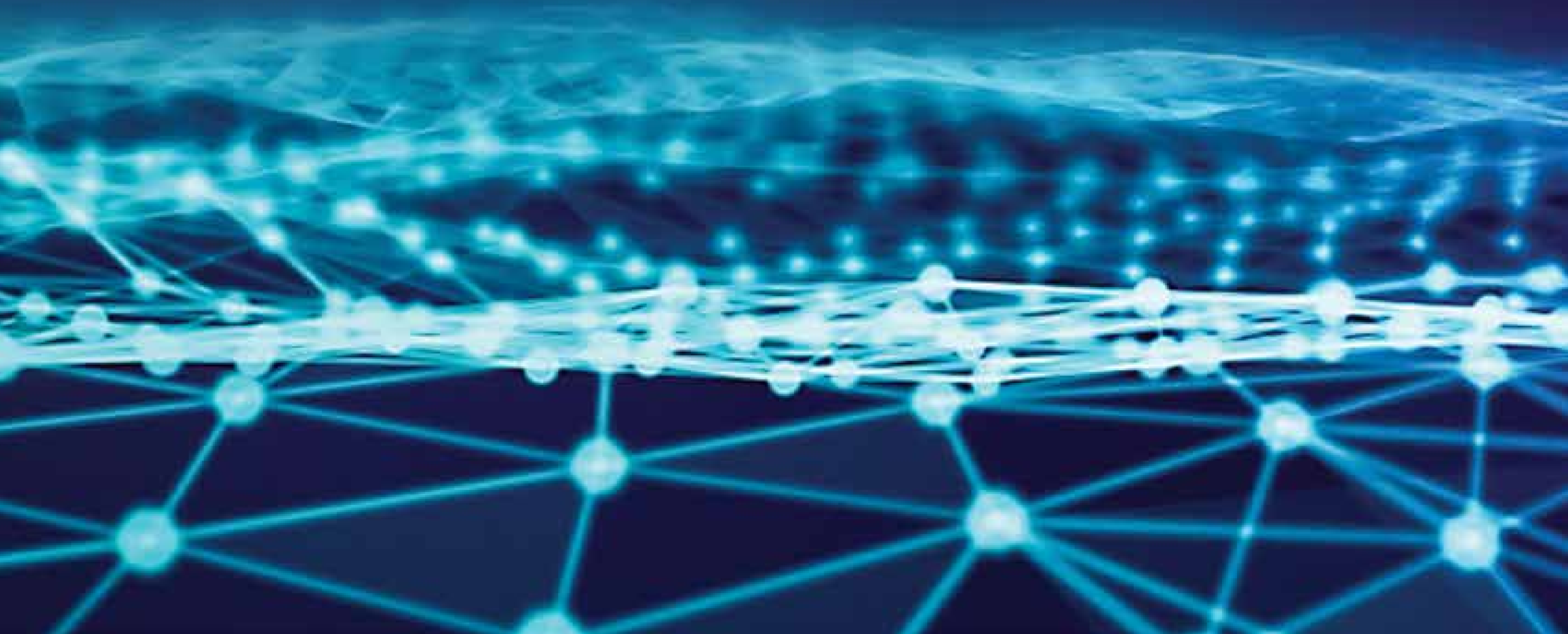

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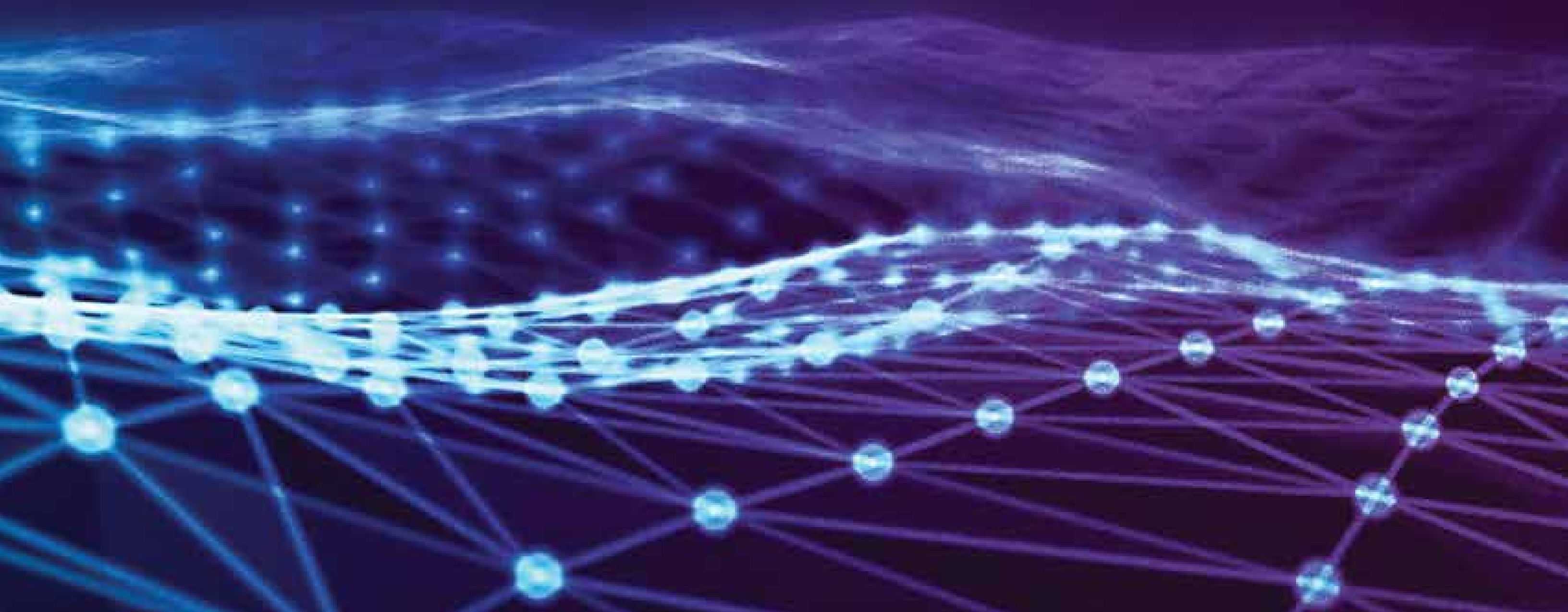

Executive Summary

Lex Mundi's global network of competition lawyers is a unique resource for the lawyers who are a part of the network and the clients who make use of it. Each law firm is considered premier in its jurisdiction, which provides access for counsel to global and local law and systems expertise. Members of Lex Mundi's Antitrust and Competition Practice Group meet and collaborate on a regular basis. From our local and regional expertise, we have formed this truly unique and efficient publication to provide real-time, thoughtful, and accurate global advice on competition law.

More than 20 Lex Mundi member law firms collaborated to publish the *Lex Mundi Global Competition Law Report*. The relevance of each development varied depending on the region, but consultation with each jurisdiction was important to understanding the global status of the legal issues addressed.

We hope that you find our inaugural edition of the publication useful to your practice, especially in this current time of the COVID-19 pandemic, as you navigate forward in uncertain times. We look forward to your questions or thoughts on the law or other ways the members of the Lex Mundi Antitrust and Competition Practice Group can assist you.

From our local and regional expertise, we have formed this truly unique and efficient publication to provide real-time, thoughtful, and accurate global advice on competition law.

Vertical Merger Trends

Vertical Merger Trends

Recent developments in antitrust law have reignited a longstanding debate regarding the proper approach to vertical mergers by antitrust regulators around the world. Vertical mergers have been traditionally considered neutral or pro-competitive and typically treated as such by antitrust regulators. However, this view is starting to shift and regulators have become more willing to carry out in-depth reviews of vertical mergers, push back against efficiency claims, and challenge those mergers that raise antitrust concerns. These shifts are even more pronounced in the growing digital economy space where collection and use of data have become more prevalent and increasingly necessary to gain an edge on the competition.

Antitrust enforcers are also reconsidering the types of remedies used to resolve potential antitrust harms for vertical mergers. While behavioral/conduct remedies have been favored over structural remedies in the past, economic commentators have recently noted that such behavioral/conduct remedies may be insufficient as they are inherently difficult to enforce and require antitrust regulators to foresee all the ways in which a vertically merged entity may behave to reduce competition. The current administration at the U.S. Department of Justice has also strongly noted a preference for structural remedies, even in the case of vertical mergers.

As the debate over vertical merger review continues, companies considering integrating with upstream or downstream firms may face longer investigations and uncertainty as to how the vertical merger will be treated in the current landscape.

I. Traditional Approach to Vertical Mergers

Vertical mergers involve the combination of companies operating at different points of the supply chain. They have traditionally been considered neutral to pro-competitive by antitrust regulators given the common view that they give rise to significant efficiencies without increasing horizontal market concentration in a relevant market.

In particular, traditional economic analysis points to the efficiency-enhancing nature of these mergers as well as to a host of other pro-competitive benefits including: increasing production process efficiencies; reducing production and design costs; saving transaction costs from contracting between firms; improving communication; and reducing production and design costs.[1] Dynamic efficiencies through increased innovation and investment are also often attributed to vertical mergers. Moreover, vertically merged firms may be incentivized to lower prices downstream through the elimination of double marginalization (*i.e.*, removing markups at multiple parts of the supply chain) which results in lower inputs costs.[2]

Despite these efficiencies, economic theory also points to the potential competitive concerns associated with vertical mergers, prompting many antitrust enforcement agencies to issue guidelines detailing their approach to reviewing such mergers. Antitrust agencies are often focused on the potential for unilateral and coordinated effects that may arise from a vertical merger and enhance market power for a firm:

- **Unilateral Effects:** Vertically integrated firms could foreclose on downstream competitors by limiting supply or by increasing prices of critical inputs or could foreclose on upstream competitors by no longer purchasing inputs from such competitors.
- **Coordinated Effects:** Sharing competitively sensitive information could allow a vertically integrated firm to more effectively monitor prices or output levels of downstream competitors to facilitate collusion or coordination among competitors.

As part of their review of vertical mergers, many antitrust regulators evaluate whether the integrated firm would have the ability and incentive to harm competition post-merger as well as the potential effect in the industries where the merging parties operate.

[1] Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings* (February 2019), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/atsource-february2019/feb19_wong_ervin_2_18f.pdf (hereinafter, *Wong-Ervin*).

[2] Wong-Ervin, *supra note* 1.

II. Shift in Approach to Treatment of Vertical Mergers

More recently, the approach to viewing vertical mergers as neutral or pro-competitive transactions that lead to significant efficiencies is being revaluated by economic commentators, antitrust regulators and other stakeholders. How to address potential concerns in vertical mergers is also undergoing a shift in approach, with antitrust enforcers signaling a move away from behavioral/conduct remedies toward structural remedies.

Recent economic commentary suggests that antitrust agencies should carefully consider the efficiencies claims made by integrating parties as these claims may be significantly overstated. In particular, commentators have advised that efficiency claims by merging parties should be properly tested to confirm that they are verifiable, merger-specific, and do not arise from an anticompetitive reduction in output or service.[3] Rather than presuming these claims are accurate, efficiency claims arising from vertical mergers should be scrutinized to the same extent as efficiency claims in horizontal mergers. As these efficiencies are often speculative or difficult to provide, adopting a standard upon which to substantiate these claims may be a complex undertaking. However, if a vertical merger is benign and efficiencies that have been claimed are likely to occur, particularly in a highly concentrated market, this can lead to adverse outcomes and under-enforcement.

Several high-profile vertical mergers have escalated the debate on how antitrust regulators should approach these types of transactions. Antitrust enforcers around the globe reviewed the Broadcom/Brocade, Qualcomm/NXP, and AT&T/Time Warner mergers, with AT&T/Time Warner being the first litigated vertical merger case to be brought by the U.S. Department of Justice in over 40 years.

More recently, the approach to viewing vertical mergers as neutral or pro-competitive transactions that lead to significant efficiencies is being revaluated by economic commentators, antitrust regulators and other stakeholders.

In January 2020, the U.S. Federal Trade Commission and Department of Justice's Antitrust Division released Draft Vertical Merger Guidelines for public comment. This is the first official guidance from these regulators since the Non-Horizontal Merger Guidelines were released in 1984, signaling a desire to reconsider and update the regulatory framework surrounding issues relating to vertical mergers.

Antitrust agencies have also been rethinking the types of remedies that should address potential vertical theories of harm. In the past, where there have been challenges or investigations into vertical mergers, antitrust regulators opted to resolve competition concerns with behavioral remedies such as:

- preventing sharing of competitively sensitive information through firewalls;
- requiring non-discrimination clauses and prohibiting exclusivity clauses in contractual arrangements with downstream competitors;
- maintaining a level of inoperability between the product of the merged firm and its competitors; and
- obligating the merged firm to supply or license competitors.[4]

Certain economic commentators have called into question the efficacy of behavioral/conduct remedies create instead of structural remedies, including divestitures of products at issue, to resolve foreclosure concerns raised by vertical mergers.[5]

[3] Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy* (2019), available at https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3166&context=facpub.

[4] Wong-Ervin, *supra note* 1; OECD, *Vertical Mergers in the Technology, Media and Telecom Sector* (June 7, 2019), available at https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf (hereinafter, *OECD*).

[5] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, Yale Law Journal (2018), available at https://www.yalelawjournal.org/pdf/Salop_uidpngq1.pdf.

The current Assistant Attorney General at the U.S. Department of Justice has also publicly expressed skepticism in the efficacy of behavioral/conduct remedies in addressing anticompetitive harms arising from vertical mergers.[6] He noted that behavioral/conduct remedies require static rules that are incapable of addressing dynamic realities and alter a merged company's incentives, require ongoing monitoring and enforcement at great expense to the government, and cause intrusion into market dynamics.

III. Rise of "Big Data"

As companies are better able to gather and analyze so-called "big data" (*i.e.*, vast amounts of data collected frequently and on an ongoing basis in a number of wide ranging industries), antitrust authorities are considering whether their long-established approach to vertical mergers needs to adapt to better address new competitive dynamics.

The antitrust authorities are working to balance the potential pro-competitive benefits against the risks of vertical mergers involving big data and/or a potential future competitor, in light of heightened political pressures to take action.

While traditional vertical merger review would consider data as an underlying input or final output in the supply chain, there is an ongoing debate as to whether this framework appropriately considers firms' use of big data, which may provide a competitive advantage in and of itself. Big data allows firms to analyze data for patterns and consumer trends, which helps to improve operations and customer service, create new products, and enhance marketing strategies to target specific customer needs/wants. Some commentators warn that this inherent competitive quality of big data is overlooked by antitrust agencies' current analytical frameworks for vertical and horizontal mergers. Another issue discussed is whether proper consideration is given to the possibility that access to big data could create opportunities in new industries where the merging parties do not currently operate and are not related to the relevant product market.

On the other hand, vertical and horizontal mergers involving big data can also lead to innovation and major evolutions for industries that are difficult to foresee. The antitrust authorities are working to balance the potential pro-competitive benefits against the risks of vertical mergers involving big data and/or a potential future competitor, in light of heightened political pressures to take action.

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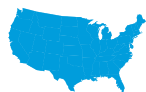
[6] Press Release from the Dep't of Justice, *Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum* (November 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.



UNITED STATES

I. Trends in U.S. Vertical Merger Enforcement

The last 40 years passed without a vertical merger challenge litigated in U.S. courts. That streak ended in 2019 with the government's failed attempt to block the much-publicized AT&T/Time Warner merger. The appellate opinion produced by that litigation represents the sole modern judicial guidance on the long- (but no longer) dormant subject of vertical merger enforcement in the United States.[7]

In the wake of the AT&T/Time-Warner merger, vertical mergers became a hot topic in the United States in 2019. Both the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") provided insight on how they will analyze vertical mergers. In March 2019, FTC Chairman Joseph Simons discussed the three prerequisites for vertical merger enforcement: "good documents, good testimony, and good economics" to support the government's theory of harm. Chairman Simons stated the FTC will likely bring vertical merger enforcement actions where at least two of the prerequisites are present. DOJ's Assistant Attorney General Makan Delrahim stated that the Antitrust Division is updating its 1984 Non-Horizontal Merger Guidelines to provide guidance on vertical merger analysis and enforcement. In September 2019, Chairman Simons confirmed the FTC is also preparing a new guidance document on vertical mergers and working with DOJ on joint vertical merger guidelines. On January 10, 2020, the agencies released Draft Vertical Merger Guidelines.[8] After a comment period, they will release the finalized guidelines.

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II. Recent Selected Vertical Merger Activity

A. AT&T/Time Warner

This case involved the proposed vertical merger between Time Warner Inc. – owner of several television networks – and AT&T Inc., owner of satellite (DirecTV) and cable (U-verse) distribution products. The government sought to enjoin the merger, arguing it would increase the bargaining leverage of Time Warner's television networks in negotiations with distributors other than AT&T, thus allowing the networks to extract supra-competitive prices for the right to carry their programming.[9] The government's somewhat complicated theory was that, post-merger, the cost to Time Warner of withholding its networks from a distributor – *i.e.*, a "blackout" of those networks on that distributor – would decrease because at least some customers of the other distributor would switch to AT&T to retain access to the networks. The added revenue to the combined AT&T-Time Warner entity from these new customers would offset some of the networks' losses from the lost distribution contract, making it less costly for the networks to threaten a blackout as a bargaining tactic, and thus increasing their leverage to extract supra-competitive prices from distributors other than AT&T.

The district court and court of appeals rejected the government's challenge, finding the government failed to establish its *prima facie* case that the merger was likely to substantially lessen competition. Both courts used the same burden-shifting framework that applies to horizontal mergers, except they required the government to make a "fact-specific" showing of the proposed merger's likely anticompetitive effect, rather than allowing the government to establish a presumption of anticompetitive effect through market-concentration statistics (as can be done with horizontal mergers).[10]

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[7] *United States v. AT&T Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

[8] U.S. Dep't of Justice and Federal Trade Commission, Draft Vertical Merger Guidelines (Jan. 10, 2020), https://www.justice.gov/opa/press-release/file/1233741/download.

[9] Complaint, *United States v. AT&T Inc.* (Nov. 20, 2017), available at https://www.justice.gov/atr/case-document/file/1012916/download.

[10] *See*, *e.g.*, *United States v. AT&T Inc.*, 916 F.3d 1029 1032 (D.C. Cir. 2019).

For evidence of anticompetitive effects, the government primarily relied on AT&T's and DirecTV's own statements in prior FCC filings that vertical integration incentivizes price increases and threatens competition, and an expert opinion based on the application of economic bargaining theory. The defendants, in turn, offered an econometric analysis of real-world data showing content pricing had not actually increased after prior vertical integration in the industry, as well as testimony of their own executives that vertical integration had not affected their past negotiations. The district court credited the defendants' evidence over the government's, finding the defendants' real-world evidence more probative than the government's theoretical evidence, and the executives' testimony about their own negotiating experience more persuasive than the defendants' prior statements.[11]

AT&T/Time Warner provides at least two significant lessons. First, both courts relied heavily on the defendants' irrevocable offer to roughly 1,000 distributors to engage in "baseball style" arbitration.[12] Because this conduct remedy eliminated the threat of a blackout, the courts viewed it as mitigating any bargaining leverage AT&T/Time Warner might otherwise have gained.[13] This suggests merging parties may be able to short circuit enforcement actions by self-imposing conduct remedies – potentially even *after* the government files suit (as happened in *AT&T/Time Warner*). Second, both courts placed great weight on the dynamic nature of the video programming and distribution industry – as highlighted by the emergence of on-demand video services like Netflix – because such rapid change made it difficult to forecast the merger's likely competitive effects.[14] This suggests the government may struggle to block vertical mergers in dynamic industries, where uncertainty surrounding a merger's effects may make the government's burden more difficult to carry.

B. Staples-Essendant

An additional high-profile transaction highlighted concerns frequently raised regarding vertical mergers in 2019. In January 2019, the FTC approved, by a 3-2 vote, the merger of office-supply seller Staples Inc. with distributor Essendant Inc. subject to the filing of a Consent Agreement, following allegations that the $482.7 million merger could harm competition in the office supply market for small- to mid-size businesses.[15] While the merger was approved, dissenters worried the concentrated secondary market for distribution of office products – consisting of only two competitors – could harm consumers through increased prices, a theory of harm the majority rejected.[16] Instead, the majority's primary concern was whether Staples could gain access to its rivals' commercially sensitive business information through Essendant.[17] The Consent Agreement required Staples to establish a firewall, separating its business-to-business sales operations from Essendant's wholesale business, restricting Staples' access to its rivals' information.

[11] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018).

[12] In baseball style arbitration, each party makes a final offer and the arbitrator chooses one or the other.

[13] *See*, *e.g.*, *United States v. AT&T Inc.*, 916 F.3d 1029, 1037, 1039 (D.C. Cir. 2019).

[14] *See*, *e.g.*, *United States v. AT&T Inc.*, 916 F.3d 1029, 1041-43 (D.C. Cir. 2019).

[15] Decision and Order, *In the Matter of Sycamore Partners II*, *L.P.*, Commission File No. 81-0180 (Jan. 25, 2019), available at https://www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_do_and_apps_a-g-redacted_public_version.pdf.

[16] Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Sycamore Partners II, L.P.*, Commission File No. 81-0180 (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf; Statement of Commissioner Rohit Chopra, *In the Matter of Sycamore Partners II, L.P.*, Commission File No. 81-0180 (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448335/181_0180_staples_essendant_chopra_statement_1-28-19_0.pdf.

[17] Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, *In the Matter of Sycamore Partners II, L.P.*, Commission File No. 81-0180 (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

LATIN AMERICA

I. Vertical Merger Trends

Latin American economic competition authorities have typically presumed that vertical mergers are pro-competitive. For instance, of the 2,335 mergers reviewed since 2015 by Brazil's *Conselho Administrativo de Defesa Econômica* ("CADE"), it only intervened in 13 vertical mergers: 11 cleared with commitments by the parties, 1 cleared with remedies, and 1 was blocked.[18] In Mexico, between September 2013 and August 2018, the Federal Economic Competition Commission ("COFECE") did not subject to conditions or block any vertical mergers.[19]

To date, there are no specific vertical merger guidelines in the region that clarify how the competition authorities should approach this kind of transaction. Latin American antitrust authorities will most likely consider following the approach of the updated vertical merger guidelines recently released by US Federal Trade Commission and the Department of Justice.[20]

Further, vertical mergers are gaining interest in countries such as Mexico, Brazil, Colombia, Costa Rica, and Chile due to the new concerns and challenges that digital economies pose. The following section provides an overview of vertical merger challenges from 2019. Specifically, the below section highlights three important developments in the region for vertical mergers: (i) a blocked merger between Walmart and Cornershop (Mexico); (ii) Disney/Fox (Mexico and Brazil); and (iii) a bill for the Strengthening of Competition Authorities (Costa Rica). These developments reflect the trend of the Latin American authorities triggered as a result of the new dynamics produced by digital economies, e-commerce, big data, and new technologies.

Latin American antitrust authorities will most likely consider following the approach of the updated vertical merger guidelines recently released by US Federal Trade Commission and the Department of Justice.

C. Walmart-Cornershop (Mexico)

In 2019, the COFECE blocked Walmart's acquisition of Cornershop.[21] Walmart is a large multinational corporation that operates chains of discount department stores and warehouse clubs, while Cornershop is a startup that operates a digital platform for home delivery purchases in supermarkets, pharmacies, and specialty stores, both in Mexico and Chile.

The authority defined the relevant market as "logistics services for display, purchase, and immediate delivery of goods offered by self-service stores and price clubs, through websites and apps to end users."[22] COFECE determined that physical and online stores were not substitutes for services provided by Cornershop´s platform, and thus not part of the relevant market, due to Cornershop's limited options and the timing of deliveries.

In blocking the deal, COFECE concluded that the transaction would result in foreclosure effects for Cornershop's competitors based on the assumption that Walmart would not participate in the platforms of other economic agents. This possibility of foreclosure to Cornershop's competitors was important for the competitive analysis because Walmart is the main player in discount department stores and warehouse clubs in Mexico.

COFECE also concluded that Walmart's competitors could be displaced through the merged entity's improper use of the consumer and price data that Cornershop receives from Walmart competitors. In addition, access to the Cornershop platform by Walmart´s competitors would be affected because these competitors would not want to share their data with Walmart through the Cornershop platform.

[18] OECD, *Vertical mergers in the technology, media and telecom sector – Note by Brazil* (June 7, 2019), https://one.oecd.org/document/DAF/COMP/WD(2019)26/en/pdf.

[19] COFECE, Numeralia COFECE, September 2013-July 2018.

[20] *See supra* n. 15.

[21] COFECE, CNT-161-2018.

[22] COFECE, Sobre el análisis de concentraciones con modelos de negocio innovadores (Aug. 2019), https://www.cofece.mx/wp-content/uploads/2019/08/AnCAs-CornerShop-12agsoto2019.pdf.

Regarding the Cornershop business, COFECE recognized the existence of barriers to entry in digital platforms: (1) requirements for high investment to develop, maintain, and expand the platform; (2) mistrust by consumers of new platforms; (3) mistrust by Walmart´s competitors in sharing their data on new platforms; and (4) a complex process and lengthy amount of time required to create a network of users and delivery people. These new factors specific to e-commerce have posed competition concerns.

To remedy COFECE's concerns, the parties offered to grant Walmart´s competitors the services of the platform on fair reasonable and non-discriminatory terms and to commit not to use Walmart's competitor information for its benefit. Despite these offered commitments, COFECE decided to block the merger.

D. Disney-Fox (Mexico and Brazil)

The Disney/Fox merger was cleared subject to conditions in 2019 by the Mexican Telecom Institute ("IFT"). While the case was not purely a vertical merger, the IFT's main competition concerns arose from the non-horizontal aspect of the proposed transaction.

Disney and Fox participate in businesses related to the provision and licensing of audiovisual content to providers of pay TV services, free-to-air broadcast TV, and over-the-top (*i.e.*, streaming services offered directly to consumers via the internet) content distribution.[23]

This Disney/Fox transaction is significant not only because it provides practitioners an overview of the vertical merger policy adopted by the IFT, but also because IFT is a relatively new competition authority in the telecommunication and broadcasting markets.

The IFT determined that the high share of international audiovisual sports content (around 80%) that Disney/Fox would obtain from the merger would also affect the competitive conditions in the downstream market for the provision and licensing of sports channels to pay television providers.[24]

Accordingly, the IFT approved the merger on the condition that certain behavioral and structural remedies would be implemented: (1) divestiture of the Fox Sports business and (2) preservation of independence, in terms of decision-making and the flow of information, between Disney/Fox and Group A&E.[25]

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Similarly, in Brazil, the CADE cleared the merger with commitments offered by Disney and Fox, including the sale of Fox Sports.[26] The CADE also analyzed vertical restraints as part of its review.

E. The bill for the Strengthening of Competition Authorities in Costa Rica

The Commission to Promote Competition ("COPROCOM") and the Office of the Superintendent of Telecommunications ("SUTEL") are the antitrust authorities in Chile. SUTEL is also a regulatory body and as a competition authority, has jurisdiction only over telecommunication networks.

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[23] OECD, *Vertical mergers in the technology, media and telecom sector – Note by Mexico* (June 7, 2019), https://one.oecd.org/document/DAF/COMP/WD(2019)17/en/pdf.

[24] *Id.*

[25] *Id.*

[26] Press Release from CADE, *Cade clears Disney/Fox merger with restrictions* (Mar. 1, 2019), http://en.cade.gov.br/press-releases/cade-clears-disney-fox-merger-with-restrictions.

Vertical mergers between telecommunications and radio broadcasting operators are one of the greatest challenges in Costa Rica, since this kind of mergers must be analyzed by COPROCOM and SUTEL. It requires coordinated work between both competition authorities to address possible concerns.

Currently in the Costa Rican national legislature, a bill for the Strengthening of Competition Authorities is being discussed.[27] The bill proposes instruments to formalize coordination between authorities to avoid discrepancies in the application of the law, to share guidelines, and to unify the content of competition analysis.

[27] OECD, *Vertical mergers in the technology, media and telecom sector – Note by Costa Rica* (June 7, 2019), https://one.oecd.org/document/DAF/COMP/WD(2019)11/en/pdf.

ASIA PACIFIC

I. Vertical Merger Trends

There have been a number of developments in and around merger control regimes across the Asia Pacific. Although with respect to vertical mergers, the pace has been slower. This update provides a snapshot of the changes in merger control regimes and discusses a handful of cases with a vertical component that have been reviewed by competition commissions in the region. There is a clear movement by competition authorities to review mergers which could have vertical implications rather than purely horizontal concerns. Yet, so far, these tend to be vertical mergers that involve only sizeable corporations.

Going into 2020, due to economic conditions, more vertical integration is anticipated. As this occurs, it is expected that competition authorities will continue their foray into reviewing such mergers.

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II. Merger Control Changes

The following provides a high-level overview of the key regulatory changes that have occurred, primarily across South East Asia:

- **Malaysia:** The Malaysia Competition Commission has announced that a Malaysia merger control regime is presently in the works. The merger control provisions will reportedly be introduced by mid-2020.
- **Vietnam:** The scope of the new Law on Competition ("VCL") (which came into force in July 2019) was expanded to include foreign companies and individuals with operations in Vietnam. For prohibited economic concentrations, the maximum administrative fine that may be imposed has been lowered from 10% of the total turnover in the relevant market in the financial year preceding the infringement period to 5%. However, the notification thresholds have not yet been finalized. Therefore, doubt remains as to whether mergers must nevertheless be notified under the prior thresholds.
- **Indonesia:** The Business Competition Supervisory Commission ("KPPU") issued a new merger control regulation on October 3, 2019, which expanded KPPU's merger review powers to include asset acquisitions. As a result, asset acquisitions crossing the notification thresholds will now have to be notified to the KPPU. Specifically, for a notification to be required, the transaction must take place between non-affiliated parties, where the combined revenue of the transacting parties in Indonesia exceeds IDR 5 trillion or the combined assets of the transacting parties in Indonesia exceed IDR 2.5 trillion, or in the case of mergers between banks, exceeds IDR 20 trillion.
- **Philippines:** The new fast-track merger review process introduced by the Philippines Competition Commission ("PCC") came into operation on 2 July 2019, which has a review period of only 15 working days instead of 30 calendar days, and only targets mergers that are unlikely to be anticompetitive.
- **Thailand:** In Thailand, the Trade Competition Commission ("TCC") published implementing rules on merger control under the new Trade Competition Act B.E. 2560 ("TCA"), which took effect on December 29, 2018. These implementing rules clarified the types of transactions which are subject to merger control under the TCA, as well as the notification thresholds for mandatory pre- and post-merger notifications. Mergers are now being notified to the TCC, and thus, Thailand is yet another jurisdiction to which to be alert when undertaking merger reviews.

III. Vertical Merger Cases

A. Philippines

Wingtech Technology, a Chinese smartphone manufacturer and most notably the contract manufacturer of Huawei and Xiaomi smartphones, acquired shares in Nexperia, a developer, manufacturer, and seller of semiconductors for general application, which can be used in the production of smartphones. Because the semiconductors manufactured by Nexperia could be used by Wingtech to produce smartphones, this was a vertical merger. However, the PCC determined that there was no real competition concern in the Philippines since Wingtech did not have facilities and operations in the Philippines and Nexperia's subsidiary in the Philippines was merely a manufacturer and assembler of semiconductor products, all of which were exported to Nexperia.[28]

Nevertheless, the PCC pursued a case on procedural grounds based on the late notification of the merger.[29] The PCC imposed a fine of PHP 716,150 (approximately USD 14,000) on Wingtech and Nexperia for this late notification because, in the Philippines, merger notifications must be filed within 30 days of signing the definitive agreements. However, in this case, the notification was filed 194 days from the date of signing. The penalty clearly illustrates the PCC's strict stance with regards to the proper adherence to merger notification procedures so long as thresholds are crossed, even where the merger itself may not be problematic. This appears to be part of a global trend, as competition authorities have increased their scrutiny regarding notification obligations and gun-jumping in recent years.

Nevertheless, the PCC pursued a case on procedural grounds based on the late notification of the merger.

B. Japan

On a more substantive front, the Japan Fair Trade Commission ("JFTC") reviewed and conditionally cleared the 2019 acquisition of Nihon Ultmarc Inc. by M3 Inc.[30] M3 operates a drug information platform through its website, which allows pharmaceutical companies to provide doctors with necessary drug information, while Nihon Ultmarc provides aggregated medical information databases to various healthcare and welfare organizations. The JFTC identified both vertical and conglomerate concerns in its review of the acquisition. One of the vertical concerns was that the combined entity would have the ability and incentive to foreclose the Online Drug Information Market from M3's competitors by refusing to supply them with its medical information databases or by offering the databases on less favorable terms. This issue was exacerbated by the fact that no competitor of Nihon Ultmarc was able to provide medical information databases of the same quality as those provided by Nihon Ultmarc. The information from such databases are necessary for pharmaceutical companies to carry out advertisements on drug information platforms. If a drug information platform is unable to obtain the information, pharmaceutical companies will not choose to use that platform. The JFTC also was concerned that M3

Notably, the acquisition did not cross the merger notification thresholds set out in the Antimonopoly Act of Japan. Yet, as it had competition concerns, the JFTC still proceeded with a review of the acquisition. This case therefore illustrates the question of whether traditional notification thresholds remain appropriate for mergers occurring in data-driven markets.

[28] Commission Decision No. 23-M-020/2019.

[29] PCC Case No. M-2019-006.

[30] Results of Review on the Acquisition by M3, Inc. of the Shares in Nihon Ultmarc Inc., available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024r.pdf.

would be able to obtain commercially sensitive information relating to its competitors (*e.g.*, new business strategies) through Nihon Ultmarc, thus placing M3's rivals at a competitive disadvantage. In response to these concerns, the parties agreed to (a) not refuse to supply medical information databases to, or discriminate against, M3's competitors; and (b) ensure that M3 will not be able to obtain its competitors' confidential information.

Notably, the acquisition did not cross the merger notification thresholds set out in the Antimonopoly Act of Japan. Yet, as it had competition concerns, the JFTC still proceeded with a review of the acquisition. This case therefore illustrates the question of whether traditional notification thresholds remain appropriate for mergers occurring in data-driven markets.

C. China

In China, on February 13, 2019, the State Administration for Market Regulation of China ("SAMR") conditionally cleared the proposed acquisition of Orbotech Ltd. by KLA-Tencor Corporation after an 8-month review process. KLA-Tencor was in the upstream market for the supply of process control equipment, and Orbotech was in the downstream market for the supply of semiconductor deposition and etch equipment. Specifically, the SAMR was concerned with the potential vertical foreclosure of Orbotech's competitors in the downstream market, the tying and bundling of the parties' products, and KLA-Tencor acting as a medium through which Orbotech would be able to obtain its competitors' commercially sensitive information. In response, KLA-Tencor undertook to (1) supply its downstream competitors on a fair, reasonable, and non-discriminatory basis; (2) refrain from tying and/or bundling the parties' products or imposing other unreasonable conditions; and (3) ensure that Orbotech will not access its competitors' commercially sensitive information through KLA-Tencor.

D. Australia

A notable development in 2019 in Australia was the Federal Court's dismissal of the proceeding initiated by the Australian Competition and Consumer Commission's ("ACCC") against Pacific National Pty Ltd and Aurizon Holdings Limited on May 15, 2019. By way of background, ACCC reviewed Pacific National's proposed acquisition of Aurizon's Acacia Ridge Intermodal Terminal and Queensland intermodal business in 2017. Following its review, the ACCC opposed the acquisitions. In the ACCC's view, Pacific National was the largest provider of intermodal rail, and the Acacia Ridge Terminal was key infrastructure necessary for entering the market for the provision of intermodal rail. By acquiring the Acacia Ridge Terminal, Pacific National would have the ability and incentive to foreclose other competing providers of intermodal rail freight services by discriminating against them or refusing to provide them access the Acacia Ridge Terminal. The ACCC also rejected Pacific National's offer of a court-enforceable undertaking to address these concerns.

The ACCC then brought a proceeding against the parties, alleging that the merger would substantially lessen competition in the market for the provision of intermodal rail. The Federal Court ultimately dismissed the proceedings because it found that the undertaking proposed by Pacific National was sufficient in resolving the competition concerns raised by the ACCC. The ACCC has lodged an appeal against the Federal Court's decision, and it will be making arguments on the Court's ability to accept undertakings despite the ACCC's concerns, and on the effectiveness of the proposed undertaking.

On November 14, 2019, the ACCC raised preliminary concerns regarding Swedish conglomerate Assa Abloy's acquisition of E Plus Building Products Pty Ltd. Following the concerns being raised, Assa Abloy notified the ACCC of its intention to abandon the proposed acquisition on November 21, 2019. The merger raised vertical concerns. Assa Abloy is vertically integrated and present in all levels of the fire door manufacturing supply chain, and both parties supplied fire door cores to licensed fire door manufacturers throughout Australia. The acquisition of E Plus by Assa Abloy would have reduced the number of suppliers of fire door cores to external manufacturers from three to two, given Assa Abloy an estimated market share of over 65 percent, and increased its ability and incentive to raise prices. Moreover, given that suppliers of fire door components are legally required to test their components in combination with other parts of a fire door set, the ACCC was concerned that post-acquisition Assa Abloy would have the ability and incentive to disallow its competing manufacturers of fire door components from testing their products with Assa Abloy products, thus resulting in the foreclosure of competition from its rivals.

EUROPE

I. Vertical Merger Trends

The below highlights three European Commission ("Commission") decisions concerning mergers with vertical effects, two of them adopted in the context of a Phase II in-depth investigation. One of the mergers was blocked and the Commission's decision is currently under appeal. A second one was cleared with commitments intended to eliminate the anticipated negative impact of the envisaged operation in effective competition, and the third one includes a noteworthy twist related to vertical integration.[31]

The below also includes additional topics that are currently under debate and might lead to future reforms of the EU merger control system, including calls for member state analysis to be considered in the EU process and calls to modernize the process in this digital era.

II. Vertical Merger Decisions

A. Commission blocked the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland

From a statistical perspective, it is quite rare for the Commission to block a merger – in the past ten years only ten mergers were blocked by the Commission, compared with over 3,000 mergers approved in the same period. However, on February 6, 2019, Wieland's intended acquisition of Aurubis and Schwermetall was prohibited by the Commission.[32] In this particular instance, the vertical effects of the merger weighed heavily on the decision to block it (although it was not a purely vertical merger).

Both Wieland and Aurubis Rolled Products ("Aurubis") produce copper products and alloys, while Schwermetall produces pre-rolled strip made of copper, which is used as an important input for the manufacturing of copper products. Schwermetall is a 50/50 joint venture between Wieland and Aurubis, and after the merger would have become solely controlled by Wieland.

The Commission raised important concerns regarding prospective vertical effects of the acquisition of Schwermetall, which following the merger would no longer operate independently. According to the Commission, the transaction would impact the merged entity's competitor's ability to access pre-rolled strip. Through the acquisition of Aurubi's shares on Schwemetall, Wieland would be able to raise input costs for its smaller competitors and gain access to their confidential information. These effects were aggravated by the apparent lack of alternative suitable suppliers of the pre-rolled strip input. Moreover, following the transaction, Wieland would eliminate the competitive pressure of one of its most relevant competitors and become a dominant player in the markets for rolled copper products in the European Economic Area ("EEA") (a market that is downstream of the pre-rolled strip).

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Despite the companies' proposed set of remedies – which included the divestment of two of Aurubis's plants that manufacture rolled copper products – these were considered insufficient by the Commission since they did not include a divestment of Aurubis's 50% stake in Schwermettall. The proposed remedies failed to address its competition concerns because: (1) the competitive pressure that existed prior to the merger would not be restored; (2) it would not address concerns regarding the rise in input costs for competitors and access to their confidential information; and (3) Wieland

[31] Considering the scope of this publication, and the number of transactions potentially involving vertical issues across the 28 Member States (now 27) of the European Union (EU), this review focuses only on mergers with an EU dimension, *i.e.*, falling within the scope of the EU Merger Regulation [Council Regulation (EC) No 139/2004, the 'EUMR'] and under the jurisdiction of the Commission.

[32] Case M.8900, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8900.

failed to find a suitable buyer for the plants to be divested that would be able to compensate for the difficulties in accessing the cost-competitive input from Schwermetall and that would not bring about new competition restraints.[33]

The Commission's decision was appealed before the General Court of the EU.[34] In its appeal, Wieland argued, *inter alia*, that "the Commission applied an unprecedented and untenable theory of harm *sui generis* inappropriately linking horizontal and non-horizontal effect."[35]

B. Telia's acquisition of Bonnier Broadcasting cleared subject to conditions

Telia Company's acquisition of Bonnier Broadcasting, a vertical merger, raised competition concerns which led to a conditional clearance, in a decision issued by the Commission on November 12, 2019.[36]

Telia group provides mobile and fixed telecommunications services as well as broadband and television services in certain European Nordic Countries. Bonnier Broadcasting Holding is a TV broadcasting company active in some of those countries, primarily in Finland and Sweden and to some extent in Denmark and Norway. In the television sector, Telia Group is a retail distributor and licenses television channels (including ancillary rights) from television broadcasters, such as Bonnier Broadcasting, to include channels in its retail audio-visual offering.

The proposed merger would create a vertically integrated player in the audio-visual industry in the aforementioned EU Nordic Countries. Hence, this transaction highlights the interconnectedness between telecom and television activities and potential competition concerns related to vertical effects resulting from such transactions. Here, these concerns were addressed through behavioral remedies, without the need to resort to structural measures.

In particular, the Commission was concerned that the merger would shut out Telia's competitors from the market. Post-merger, these competitors could be barred from accessing a set of the merged entity's services, notably its free-to-air and basic pay TV channels, its premium pay TV sports channels, its streaming services (namely, advertising video on demand ("AVOD") and subscription video on demand services ("SVOD")) and advertising space on the merged entity's TV channels.

Telia successfully proposed remedies to address these concerns, by committing itself, for 10 years, to:

- licensing the channels on fair, reasonable, and non-discriminatory terms;
- not limiting access to the streaming services and applications over the internet for end users;
- not discriminating competitors in the sale of TV advertising space; and
- protecting competitors' confidential information through information barriers within the company between the merged entity's wholesale and retail businesses.

While the enforcement of behavioral remedies could prove to be more difficult compared to structural remedies, the Commission can pursue companies for allegedly breaching behavioral commitments offered within a merger procedure, which it did for the first time in 2019.

This decision highlights the way behavioral access remedies are increasingly being used to obtain approval from the Commission in cases where vertical mergers raise competition concerns. While the enforcement of behavioral remedies could prove to be more difficult compared to structural remedies, the Commission can pursue companies for allegedly breaching behavioral commitments offered within a merger procedure, which it did for the first time in 2019.[37]

[33] Press release from the European Commission, *Mergers: Commission prohibits Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall*, (Feb. 6, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_883.

[34] Case T-251/19, *Wieland-Werke v Commission*.

[35] Summary of the application of Wieland, fourth plea in law, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=215469&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6279055.

[36] Case M.9046, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9064.

[37] Press Release from the European Commission, *Mergers: Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition* (Feb 22, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1371.

C. Acquisition of Seguradoras Unidas and AdvanceCare by Generali and some vertical twists

On November 20, 2019, the Commission cleared the acquisition of Seguradoras Unidas and AdvanceCare by Generali.[38] Both Generali and Seguradoras Unidas are active in the insurance sector in Portugal (Generali is also active in assistance services in Portugal, apart from its other activities around the world). AdvanceCare is active in health insurance management services, risk assessment, and claims management in Portugal, which are activities vertically related to insurance sales.

While the merger did not raise particularly relevant competition concerns it nevertheless had an interesting vertical twist related to health insurance management services provided by AdvanceCare.

Health insurance management services consist of administrative and management services (such as claims management, health provider network negotiations, contracts maintenance and management, payment management, and complaints handling) to insurance companies as well as managing access to a designated health network for health insurance policy holders and corporate entities. These services can be either provided by insurers through their own in-house structures or outsourced to a third party.

The Commission accepted the parties' view (also supported in the market investigation) that internal provision of health insurance management services exerts a competitive constraint on third party providers as many large and vertically integrated insurers provide these services to other smaller insurers in addition to providing them to their own health insurance branch.

Therefore, the Commission took into account market shares comprising of in-house services as well third-party services, which, in turn, considerably mitigated AdvanceCare's apparent strong position in the market for health insurance management services.

This rationale could well apply to future mergers involving vertically related activities where, conditions met, in-house capacity exerts a relevant and credible competitive pressure over market players.

III. Discussions on Merger Control Reforms and the Digital Era Report

A future merger control reform has become subject to ongoing debate in 2019 within the EU, mostly fueled by the controversy triggered by the Commission's prohibition of the Siemens/Alstom merger.[39] This merger would have allowed for the combination of the two largest European suppliers of railway signaling systems and high-speed trains. The transaction had already obtained the green light from the French and German governments as it pursued the aim of countering competition stemming from the Chinese company CRRC.

As a response to the Commission's prohibition decision, the French and German governments published "A Franco-German Manifesto for a European industrial policy fit for the 21st Century" based on three pillars.[40] One of those pillars relates to the need for changes in the EU competition framework, including "Updating current merger guidelines to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets."[41]

The Franco-German manifesto also suggests considering "whether a right of appeal of the Council [of the EU] which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions,"[42] a proposal that was subsequently dropped.

Furthermore, in July 2019, the French and German governments, also joined by the Polish government, submitted additional proposals aimed at "Modernising EU Competition Policy,"[43] encompassing the following main suggestions:

- Taking into account third countries' state interventions in merger control, notably the specificities of third countries' state control and subsidies for undertakings;

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[38] Case M.9531, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9531.

[39] Press Release from the European Commission, *Mergers: Commission prohibits Siemens' proposed acquisition of Alstom* (Feb. 6, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

[40] Available at https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

[41] *Id.* at 4.

[42] *Id.*

[43] Available at https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

- Tackling excessive market power of big tech firms, including the suggestion for the Commission to "evaluate whether the introduction of a transaction-based threshold in merger control would adequately widen the merger net to also deal with potentially anticompetitive mergers";
- "[E]valuate and modernize current guidelines on the assessment of horizontal mergers and on the definition of relevant market in order to introduce more flexibility, better take into account competition at global level and protect strategic common European interest";
- Strengthening European joint ventures and cooperation;
- Reinforcing advisory capacities and broadening the expertise;
- Strengthening the Council input into policy-and decision-making; and
- Encouraging behavioral remedies.

New developments on the discussion for the need of "European Champions" are certainly to be expected in 2020.

Apart from the above-mentioned discussions, the Commission published on May 20, 2019 a report on "Competition policy for the digital era,"[44] which addresses acquisitions of small start-ups with a quickly growing user base and significant competitive potential by dominant platforms. The report focuses on whether the current EU merger control regime needs an update to better tackle concerns relating, *inter alia*, to the early elimination of potential rivals.

While the Commission highlights that "it is too early to change the EUMR's jurisdictional thresholds" (for instance, to take into account the transaction value), it acknowledges the need to revisit substantive theories of harm in merger assessment, notably in cases where dominant "platform and/or ecosystem which benefits from strong positive network effects and data access, which act as a significant barrier to entry, acquires a target with a currently low turnover but a large and/or fast-growing user base and a high future market potential."[45]

New developments on the discussion for the need of "European Champions" are certainly to be expected in 2020.

[44] Available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[45] *Id.* at 10-11.

Cartels

Cartels

In recent years, an increasing number of countries are enacting competition legislation, pursuing these cartels, and imposing higher fines. In addition, numerous countries are using leniency or immunity programs to discover and investigate possible conspiracies. Enforcers also are increasingly focused on corporate compliance programs, and the steps companies are taking to prevent wrongdoing.

Across the globe, antitrust and competition enforcers work to uncover, investigate, and punish cartels – agreements among competing firms to manipulate prices and rates through price-fixing, output restrictions, market allocation, and bidding-manipulation schemes. Indeed, 43 countries have enacted criminal antitrust legislation. Antitrust enforcement agencies and courts typically view cartels as threats to the proper functioning of competitive, fair markets because they inflate prices and cheat consumers. Therefore, when discovered, enforcers impose penalties to deter future cartel conduct and to rectify the wrongdoing and send a signal to others that cartel conduct is not tolerated.

In recent years, an increasing number of countries are enacting competition legislation, pursuing these cartels, and imposing higher fines. In addition, numerous countries are using leniency or immunity programs to discover and investigate possible conspiracies. Enforcers also are increasingly focused on corporate compliance programs, and the steps companies are taking to prevent wrongdoing. Below, the laws, trends, and recent enforcement actions regarding cartels are described for various countries and regions.

UNITED STATES

I. United States Cartel Enforcement

Under U.S. Competition laws, agreements that unreasonably restrain trade are prohibited by Section 1 of the Sherman Act.[1] Certain types of agreements, such as price-fixing, are considered *per se*, or automatically, illegal because they have been found to be unambiguously harmful and with no offsetting benefits to consumers. The Antitrust Division of the U.S. Department of Justice ("Antitrust Division" or "Division") can criminally prosecute these *per se* illegal conspiracies, including price-fixing, output agreements among competitors, bid manipulation, and market allocation cartels. Corporations guilty of these criminal violations can pay significant fines and barred from doing business with the government, and individuals may face monetary penalties and significant prison sentences.

II. Current Enforcement Trends

Overall, criminal antitrust enforcement has decreased slightly in the United States over the last few years. After seeing Antitrust Division fines reach over $1 billion a year for a number of earlier years this decade, these fines have decreased to a low of $67 million in 2017 and $172 million in 2018.[2] The number of corporations and individuals that the Antitrust Division has criminally charged has similarly dropped.[3] The Division has pushed back on any claims that its enforcement efforts have slowed down and points to its 91 open grand jury investigations as evidence of its continuing activity in this area.[4] It seems likely that the decrease in enforcement – both in number and total dollar value – relates to the end of enforcement actions in some of the larger global cartels, most notably the auto parts cases,[5] and the wind down of its enforcement actions relating to benchmark rate collusion,[6] where large corporate pleas by financial institutions significantly pushed its total criminal fine amounts up over the last few years.

III. Compliance Policy Announcement

In a speech on July 11, 2019, Assistant Attorney General and head of the Antitrust Division Makan Delrahim announced that for the first time the Division would consider a company's pre-existing compliance efforts in the charging stage of cartel investigations and would also recognize effective compliance programs in the sentencing phase for purposes of reductions in sentencing calculations.[7] Previously, the Antitrust Division only credited prospective compliance programs at the sentencing phase.

The Antitrust Division's changed guidance is an effort to provide incentives for companies to invest in compliance efforts before the onset of an investigation or receipt of a Department of Justice ("DOJ") subpoena. However, the Antitrust Division made clear that a strong compliance program on its own would not be enough for a company to avoid charges or penalties completely. The Division also expects companies to take other actions including notifying law enforcement regarding wrongdoing, cooperating with government officials during investigations, and remedying of past misconduct. Even with this change, the Antitrust Division continues to emphasize that it remains committed to its leniency program and considers the program to be "the ultimate credit for an effective compliance program that detects antitrust crimes and allows prompt self-reporting."[8]

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[1] 15 U.S.C. § 1.

[2] Criminal Enforcement Trends Chart, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts (last visited Dec. 17, 2019).

[3] *Id.*

[4] Assistant Attorney General Makan Delrahim Delivers Opening Remarks at Roundtable Discussing the Antitrust Criminal Penalty Enhancement & Reform Act (Apr. 11, 2019), www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-roundtable-discussing.

[5] *See, e.g.*, Press Release from the Dep't of Justice, *Japanese Auto Parts Company Pleads Guilty to Antitrust Conspiracy Involving Steel Tubes* (May 31, 2018), https://www.justice.gov/opa/pr/japanese-auto-parts-company-pleads-guilty-antitrust-conspiracy-involving-steel-tubes ("The Antitrust Division's prosecution of widespread collusion in the auto parts industry has yielded more than $2.9 billion in fines and convictions of 46 corporations and 32 executives."); Press Release from the Dep't of Justice, *Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars* (Feb. 13, 2014), https://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

[6] Press Release from the Dep't of Justice, *Five Major Banks Agree to Parent-Level Guilty Pleas* (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

[7] Remarks of Assistant Attorney General Makan Delrahim, *Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs* (July 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

[8] *Id.*

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Along with the announcement, for the first time, the Antitrust Division released official guidance regarding how it would evaluate compliance programs.[9] That guidance, entitled "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations," is based on the DOJ's Criminal Division's newly released guidance titled "Evaluation of Corporate Compliance Programs,"[10] the U.S. Sentencing Commission Guidelines regarding compliance programs, and other DOJ resources.

Most critically, as part of these new changes, the Antitrust Division also announced that companies that have effective compliance programs in place could receive a deferred prosecution agreement ("DPA"). A DPA is a negotiated agreement that sets out specific conditions the company must meet for a period of time (typically including paying a negotiated fine and cooperating with the DOJ's investigation), and if the company complies, then the criminal charges against it are dismissed. This is another significant step for the Antitrust Division, which had previously disfavored the use of DPAs. Under the new guidance, the Antitrust Division will continue to disallow the use of non-prosecution agreements ("NPAs"), a prosecutorial tool used by other DOJ divisions, because it wants to continue its previous policy of allowing only leniency applicants to receive full protection from prosecution.

The Antitrust Division also clarified and expanded its consideration of compliance programs at the sentencing phase. In the past, the Division typically had not recommended credit for pre-existing compliance programs. The Antitrust Division will now review compliance programs to determine whether a company should get a reduction under the Sentencing Guidelines, the amount of the fine that should be recommended, and whether probation is warranted.

This announcement sends a strong signal to companies that they should review and strengthen their compliance programs to make sure they are in line with the Antitrust Division's new guidance.

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IV. Procurement Collusion Strike Force

On November 5, 2019, the DOJ announced the formation of the Procurement Collusion Strike Force, which will focus on one of DOJ's top priorities: protecting public funds from both bid-rigging and related fraud.[11] The Strike Force seeks to deter, detect, investigate, and prosecute antitrust cartels, such as bid-rigging conspiracies and related fraudulent schemes, which undermine competition in government procurement, grant, and program funding.

[9] U.S. Dep't of Justice Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (July 2019), https://www.justice.gov/atr/page/file/1182001/download.

[10] U.S. Dep't of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Apr. 2019), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[11] Press Release from Dep't of Justice, *Justice Department Announces Procurement Collusion Strike Force: A Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding* (Nov. 5, 2019), https://www.justice.gov/usao-dc/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national.

DOJ's formation of the Strike Force is consistent with its recent focus on combating alleged bid-rigging and anticompetitive conduct in government procurement. The Strike Force is an interagency partnership consisting of prosecutors from DOJ's Antitrust Division and a number of U.S. Attorney's Offices, and investigators from the Federal Bureau of Investigation and four Offices of Inspector General. In addition to the aggressive prosecution of criminal bid-rigging and antitrust violations and pursuit of related civil penalties, the Strike Force's efforts will include increasing education efforts on both the "buy side" and the "sell side" of the procurement process and improving data analytics programs to better analyze government procurement data to identify potential "red flags" of bid-rigging and anticompetitive conduct.

V. No-Poach Agreements[12]

After the DOJ's 2016 announcement that it would criminally enforce no-poach agreements[13] (*i.e.*, agreements between companies not to solicit or compete for each other's employees), the Antitrust Division has yet to criminally prosecute any such cartel. Despite this lack of prosecution, the Division claims that no-poach agreements remain an enforcement priority and that it continues to investigate these cases.[14]

VI. Specific Enforcement Actions

Some of the Division's more notable cartel enforcement activities over the last year include the Korean fuel, packaged seafood, and generic pharmaceuticals cases.

In the Korean Fuel case, the Antitrust Division reached both criminal and civil settlements with the fuel companies, including concurrent resolutions for both Sherman Act and False Claims Act violations.[15] The civil settlements highlights the Division's recent focus on using section 4A of the Clayton Act to seek civil recoveries on behalf of the government where the government itself is a victim of cartel conduct.[16] This statute has not traditionally been used in cartel cases and its use may signal a significant expansion in the Antitrust Division's enforcement arsenal, particularly in matters handled by the Strike Force.

In the generic pharmaceuticals cases, the Antitrust Division entered into a groundbreaking DPA with Heritage Pharmaceuticals.[17] Previously, the Division had only entered into DPAs with financial institutions, and this resolution is likely related to the Division's new compliance policy guidance. The DPA was likely used to avoid the collateral consequence of Heritage's mandatory exclusion from federal healthcare programs, which is triggered by a criminal conviction.[18]

In the packaged seafood case, after a four-week trial, the former president and CEO of Bumble Bee Foods LLC was convicted of conspiring to fix the prices of canned tuna. Both StarKist Co. and Bumble Bee, as well as three other executives from the companies, previously pleaded guilty for their roles in the conspiracy.[19]

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[12] For more discussion on the treatment of no-poach agreements by U.S. antitrust regulators, please refer to the chapter on Competition Law and Labor.

[13] Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[14] Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets (Oct. 29, 2019), https://www.justice.gov/opa/speech/counsel-assistant-attorney-general-antitrust-division-doha-mekki-testifies-house.

[15] Press Release from the Dep't of Justice, *Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts* (Nov. 14, 2018), www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids.

[16] Remarks of Assistant Attorney General Makan Delrahim, *November Rain: Antitrust Enforcement on Behalf of American Consumers and Taxpayers* (Nov. 15, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

[17] Press Release from the Dep't of Justice, *Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations* (May 31, 2019), https://www.justice.gov/opa/pr/pharmaceutical-company-admits-price-fixing-violation-antitrust-law-resolves-related-false.

[18] 42 U.S.C. § 1320a-7.

[19] Former CEO Convicted of Fixing Prices For Canned Tuna (Dec. 3, 2019), https://www.justice.gov/opa/pr/former-ceo-convicted-fixing-prices-canned-tuna.

EGYPT

I. Antitrust Regulation in Egypt

Competitive activity is regulated under the Egyptian Competition Law No. 3/2005 (“ECL”) and its Executive Regulations No. 1316/2005 (“ECLER”). The ECL regulates, among other things, dominant positions in relevant markets, restrictions applicable to market players with dominant positions, and prohibited horizontal and vertical agreements. The Egyptian Competition Authority (“ECA”), as the regulator, is mandated by the ECL to supervise anticompetitive practices adopted by all persons conducting business in or with effect in the Egyptian market.

Article 6 of the ECL and Article 11 of the ECLER prohibits competitors from entering into agreements that may have a negative effect on competition, such as price-fixing, bid-rigging, market allocation, and output restrictions. However, they do allow competitors to submit an application to the ECA in order to obtain its approval on a potentially anticompetitive agreement prior to its execution.

II. ECA’s Recent Crackdown on Anticompetitive Practices – Including Cartels

In recent years, the ECA has played a more active role in monitoring and mitigating anticompetitive practices, including cartels among competitors.

As a recent illustration, in early May 2019, the ECA intervened in an arrangement between Delivery Hero and Glovo, both acting in the Egyptian market for on-demand delivery through internet applications.[20] Glovo was Delivery Hero’s biggest competitor in Egypt. After Glovo announced it would be exiting the Egyptian market, the ECA investigated Glovo’s conduct and uncovered anticompetitive practices. Specifically, Delivery Hero had acquired a minority stake in Glovo. The ECA determined that, through this acquisition, Delivery Hero had gained access to its competitor’s confidential information and could materially impact Glovo’s strategic decisions. The ECA further concluded that the parties entered into prohibited horizontal agreements to divide up markets, which resulted in Glovo’s planned exit from Egypt.

The ECA issued a warning to both parties to cease performance under the prohibited horizontal agreements and for Glovo to halt its liquidation process and resume its activities in the Egyptian market. The ECA further requested the parties to officially notify the ECA of the steps taken to comply with the warnings. These steps included restoring Glovo’s operations, maintaining independent businesses in Egypt, prohibiting the exchange of competitively sensitive information, and, for Delivery Hero, refraining from influencing Glovo’s strategic decisions. Glovo resumed its activities in the Egyptian market in June 2019.

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[20] Press Release from the Egyptian Competition Authority Press Release, *Following Glovo’s Exit from the Egyptian Market* (May 28, 2019), http://www.eca.org.eg/ECA/Upload/News/Attachment_E/8285/Glovo’s%20exit%20from%20the%20Egyptian%20market.pdf.

I. United Arab Emirates

A. UAE Cartel Enforcement

Several years ago, the United Arab Emirates (UAE) promulgated legislation to specifically address the regulation of competition (Federal Law 4 of 2012 or the "Competition Law"). The implementing regulations under the Competition Law have now been issued, and the designated regulator, the UAE Ministry of Economy ("Ministry"), has formed the required committee and issued the anticipated guidance and forms for seeking permits and consents.

The Competition Law aims to prevent all types of "anticompetitive" behavior and to ensure that entities in the UAE compete with each other for customers in a manner that promotes the consumers' best interests, as well as the sustainable development of the UAE market. When considering how the Competition Law is likely to be applied, it is helpful to bear in mind that the Competition Law is essentially a consumer protection law.

The Competition Law controls cartel activity by limiting so-called "restrictive agreements." The concept of a restrictive agreement covers any agreement or arrangement – including conduct which may be considered "collusion" – the subject or aim of which is to reduce, prevent or prohibit competition. Restrictive agreements would also include exclusive distribution agreements that ensure that products of a particular type are only sold to a single entity; agreements among suppliers or purchasers to refrain from competition on price or other terms of supply, on the basis of territory or end-user, or with respect to specific products; or other types of agreements that have the effect of limiting competition. Unless exempted, such an agreement would be permissible only if approved by the Ministry on the basis of a showing that the agreement would not adversely harm the economy.

Given that the Competition Law and implementing regulations are so new, there is limited enforcement activity and guidance available regarding the foregoing prohibitions. For the same reason, there is limited experience at the present time with the criteria for obtaining a permit, especially given that most of the cartels that exist in the UAE fall under one of the exemptions set out in the Competition Law, which are explained more fully below.

The Competition Law aims to prevent all types of "anticompetitive" behavior and to ensure that entities in the UAE compete with each other for customers in a manner that promotes the consumers' best interests, as well as the sustainable development of the UAE market. When considering how the Competition Law is likely to be applied, it is helpful to bear in mind that the Competition Law is essentially a consumer protection law.

B. Specific Exemptions Available under the Competition Law

The Competition Law exempts several sectors and businesses from antitrust enforcement activity. To the extent that one or more of the concerned parties would qualify for an exemption, the obligation to seek clearance does not arise because the Competition Law is not applicable in such instances.

1. Sector Specific Exemptions

The Competition Law contains the following sectoral exemptions:

- telecommunication;
- financial sector;
- cultural activities (readable, audible, and visual);
- oil and gas;

- production and delivery of pharmaceutical products;
- postal services including the express mail service;
- activities relating to the production, distribution, and transportation of electricity and water;
- activities relating to the treatment of sewerage, garbage, hygiene products, and similar goods, in addition to the environmental services that support these activities; and
- land, marine, air, and railway transport, and related services.

2. Businesses Owned by the Federal or an Emirate Level Government

There is also a carve-out for entities that are at least 50% owned by the Federal or an Emirate level government. At this time, it is unknown whether indirect ownership qualifies for the government exemption. The Ministry has discretion to interpret the scope of each exemption.

3. Small and medium sized enterprises (SMEs)

Finally, SMEs, defined in Cabinet Resolution 22 of 2016, are exempt from antitrust enforcement. The definition uses prescribed quantitative thresholds concerning revenue and employee count to determine whether the exemption is available to the underlying business. A different threshold applies depending on whether the business in question is classified as falling within the "services," "trade," or "industry" sector.

II. Israel

A. Updates to Israeli Cartel Law

On January 1, 2019, a series of amendments to the Restrictive Trade Practices Law, 5748-1988 (the "Law"), went into effect as a part of Amendment No. 21 (the "Amendment"). The name of the Law was amended, and it is now called "the Economic Competition Law." Correspondingly, the name of the Antitrust Authority was changed to "the Competition Authority" (the "Authority").

As part of the Amendment, the criminal sanction for committing a restrictive arrangement offense (*i.e.*, a cartel) has been increased, so that the maximum imprisonment penalty is now five years. In addition, the Amendment revokes the vicarious liability that is imposed on an officeholder in a corporation in breach and, instead, imposes on an officeholder a broad duty to supervise and to take active measures in order to ensure compliance with the Law by the corporation and by its employees. With respect to a breach of this duty, officeholders could face a maximum term of one year of imprisonment and monetary fines based on the principal offense that was committed by the corporation or any of its employees.

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B. Related Civil Cartel Litigation: *R.L.F.I. Agriculture Ltd. vs. MAN Truck & Bus AG et al.*

This civil private damages case was filed as a petition for the certification of a class action against seven truck manufacturers (the "respondents") concerning a claim that they were party to an international cartel for the coordination of the prices of trucks, which caused an increase in truck prices in Israel.[21] Essentially, the petitioner sought to establish his claims by relying mainly on a decision of the EU Competition Commission (the "EU Decision").[22]

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[21] Case No. CA 31367-09-16.

[22] *See* Press Release from the European Commission, *Antitrust: Commission fines Scania €880 million for participating in trucks cartel* (Sept. 27, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3502.

The petitioner filed a motion for discovery of documents in the class action proceeding. Within the motion, the petitioner requested that the respondents be required to disclose key documents regarding the EU Decision, price lists, and the database that was available to the respondents' economic expert. Pursuant to the discovery motion, the court had to address the merits of the case as part of the condition that the petitioner must present initial evidence of fulfilment of the conditions for certification of the claim as a class action. Under the circumstances of this case, the petitioner was required to present a cause of action under the Law.

The District Court denied the motion. Specifically, the Court determined that the petitioner's arguments regarding the application of the Law were not sufficient at that stage because the petitioner failed to prove, even *prima facie*, that the alleged foreign cartel had a substantial, direct, and deliberate effect on the Israeli market.

This decision is of great significance because it erects a substantial barrier to private plaintiff suits and reliance on foreign enforcement decisions in such cases. In this regard, the court mentioned that, in the event that the effect of an alleged cartel on the Israeli market is found to be incidental or negligible, the Israeli market will benefit from the fruits of the enforcement in the other foreign jurisdictions, and the Israeli economy will be a "free rider."

Furthermore, the Court stated that the respondents' argument that the EU Decision is inadmissible under the Israeli law is a "heavyweight argument." This statement, if eventually accepted, might block potential future plaintiffs' arguments where they rely on foreign decisions as evidentiary onus contrary to the provisions of the European Damages Directive.[23]

The petitioner filed a motion before the Supreme Court for permission to appeal the decision.

[23] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN.

AUSTRALIA

I. Australia Cartel Enforcement

Part IV, Division I of Australia's Competition and Consumer Act of 2010 (Cth) ("CCA") prohibits cartel conduct. Under the law, cartel conduct includes price-fixing, bid-rigging, market division, and output restrictions. This conduct can be pursued both civilly and criminally. The Australian Competition and Consumer Commission ("ACCC") investigates potential offenses and decides whether to initiate *civil* proceedings. For more egregious conduct, the ACCC can also refer matters to the Commonwealth Director of Public Prosecutions ("CDPP") for *criminal* prosecution.

Criminal sanctions for cartel conduct include imprisonment of up to ten years for individuals and for corporations, on a per contravention basis, the greater of ten million Australian dollars, three times the gain from the contravention (if the gain can be quantified), and ten percent of the annual turnover of the infringing company and related companies (if the gain cannot be quantified). Individuals may also be subject to banning orders disqualifying them from acting as a director or officer, as well as criminal fines of up to A$420,000 and civil penalties of up to A$500,000 per contravention.

The Australian Competition and Consumer Commission ("ACCC") investigates potential offenses and decides whether to initiate *civil* proceedings. For more egregious conduct, the ACCC can also refer matters to the Commonwealth Director of Public Prosecutions ("CDPP") for *criminal* prosecution.

II. Current Enforcement Trends

The ACCC has taken a number of high-profile enforcement steps in relation to cartels in the past year. Its practice is to now treat all instances of cartel conduct as *prima facie* criminal before a decision is made about whether to pursue criminal or civil sanctions. The expectation is that this will continue into 2020. Further, over the past year, the ACCC has been active in the press saying that it is interested in pursuing "massively higher penalties," and that the level of the penalty or fine needs to matter enough that it is not just a cost of doing business.

III. Recent Enforcement Actions

Cartel conduct was criminalized in Australia in 2009, but the ACCC and CDPP did not commence any court proceedings until 2017. On August 3, 2017, the first criminal fine for cartel conduct of A$25 million was imposed on a Japanese shipping company, Nippon Yusen Kabushiki Kaisha ("NYK") in relation to its participation in a vehicle shipping cartel.[24] Later, arising from the same shipping cartel, a record criminal fine of A$34.5 million was imposed against another Japanese shipping company Kawasaki Kisen Kaisha Ltd ("K-Line").[25] Both criminal fines were imposed by the Court after the parties admitted liability (with NYK obtaining a 50% discount for an early guilty plea, cooperation, and contrition by its early guilty plea).

It is worth noting that the fine against K-Line is now the second highest cartel fine ever imposed under Australian competition law. To date the highest penalty which has been imposed is the A$46 million civil penalty imposed on Yazaki Corporation in 2018 for cartel conduct in relation to a wire harness cartel. In that case, the original penalty was increased on appeal by the ACCC from A$9.5million.[26]

The ACCC and CDPP are also increasingly taking action against individuals (as well as corporations) in relation to cartel conduct. This year, the Managing Director of a supplier of assistive technology products is standing trial for criminal

[24] *CDPP v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876.

[25] *CDPP v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

[26] *ACCC v Yazaki Corporation* [2018] FCAFC 73.

cartel conduct (together with the corporation)[27] and civil cartel proceedings have been commenced against a large steel producers' former General Manager of Sales and Marketing (as well as the corporation) for alleged cartel conduct involving the supply of flat steel products.[28]

The high profile criminal cartel case against ANZ (a major Australian bank) and a number of investment banks, and senior executives of those banks, has also continued this year in relation to a capital raising for ANZ in August 2015.[29] The alleged cartel conduct involves the investment banks who underwrote the capital raising who were said to have reached an alleged cartel arrangement relating to trading shortfall ANZ shares following an ANZ institutional share placement in August 2015. The case is currently before the court at the committal stage.

The ACCC's internal investigation processes as part of a cartel immunity application are being closely examined by the court as part of the committal process. Serious allegations have been made by counsel for the defendants in relation to the way in which witness statements were prepared and signed, including allegations that witnesses may have been pressured or encouraged to give evidence that fit the investigator's case theory.

IV. Concerted Practices No Longer Covered by ACCC's Cartel Immunity Policy

Since November 2017, Australian law has prohibited conduct between one or more persons that is a concerted practice with a purpose or effect or likely effect of substantially lessening competition.

What constitutes a concerted practice is not defined in the prohibition itself. However, it is generally understood that it can include single as well as repetitive acts. The ACCC has also indicated that anticompetitive concerted practices will include conduct that reduces the strategic uncertainty of competition, or results in conduct that is less robust than competition on the merits. This broadly aligns with the EU and UK law as well as other jurisdictions where a concerted practices prohibition exists, such as the EU, UK, Singapore, China, South Korea, Taiwan, and Malaysia.

Although there have been no decided Australian cases to date, it is understood that the prohibition is intended to capture instances of anticompetitive price signaling or sharing of strategic and competitively sensitive information (*e.g.*, forward looking, non-public, non-aggregated, or de-identified information), which falls short of an "agreement, arrangement or understanding."

The ACCC's revised Cartel Immunity Policy ("Policy") took effect in October 2019. Under that Policy, "first-in" conditional immunity is available for agreements that amount to price-fixing, bid-rigging, and market sharing, but not for conduct that is *solely* a concerted practice–*i.e.*, that involves communication or cooperative behavior that does not require all of the elements of an understanding but involves more than a person independently responding to market conditions. Put differently, conditional immunity is not available for conduct that does not involve some meeting of the minds or commitment or reciprocity. Only cartelists that are a party to an unlawful "agreement, arrangement or understanding" may obtain first-in conditional immunity.

This change is significant because it means the position in Australia misaligns with immunity policies in other overseas jurisdictions, including in the EU, UK, Singapore, and Hong Kong, which all cover concerted practices or their equivalents as part of an application for cartel immunity. This misalignment creates risk and a conundrum for clients and their advisers in cases where the existence of an "agreement, arrangement or understanding" is not clear and, potentially, where immunity is being coordinated globally. Where an immunity application is made and the ACCC decides that there is no "agreement, arrangement or understanding," the ACCC could still file a concerted practices case against the immunity application. Such a case would be civil, not criminal, and whether the ACCC does so will be subject to the ACCC's discretion (although the ACCC may offer leniency in exchange for cooperation, the discretionary nature of this leniency is unlikely to provide full comfort). Any leniency will be determined under the ACCC Cooperation Policy for Enforcement Matters, which recognizes that leniency may take the form of complete or partial immunity or submissions to the Court, supported by the ACCC, for a reduction in penalty.

Another material change under the new Policy is that the ACCC will ask applicants to sign a cooperation agreement, which sets out the ACCC's expectations of the application in order to maintain conditional immunity under the Policy.

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[27] *CDPP v The Country Care Group Pty Ltd & Ors* (trial in February 2020).

[28] *ACCC v BlueScope Steel Limited & Anor* (trial expected in 2020).

[29] *R v Australia and New Zealand Banking Group Limited* (case number 2018/00175183) (committal hearings ongoing).

V. Intellectual Property Exemption from Cartel Conduct

Prior to September 2019, transactions involving intellectual property rights were exempt from the cartel prohibition. The IP exemption operated to protect IP rights owners from risks and penalties for anticompetitive conduct (other than misuse of market power) where the owner imposed certain types of restrictions on the manner in which the commercialization of IP rights occurred, such as through market segmentation, quality specifications, quantity restrictions, and territorial restrictions. The health, biotech, technology, telecommunications, and pharmaceutical sectors are industries in which businesses relied upon the IP exemption.

That exemption was repealed in September 2019. While not retrospective to market effects prior to September 2019, the effect of the repeal is that transactions involving IP rights will be treated in the same manner as any other arrangements governing the right to use or supply goods or services. As a result, agreements made prior to the repeal will still run afoul of the CCA if such agreements contain prohibited cartel provisions that continue in effect after the repeal date.

Recognizing that the exclusive nature of IP rights is an important incentive for parties to invest in innovation and commercialization, the ACCC has indicated that the repeal should not impact the majority of IP rights arrangements.

Following the repeal, market restrictive conditions in the licensing or assignment of IP rights, such as patents, registered designs, copyright, or eligible circuit layout rights, will be exposed to and will need to comply with the general obligations in Part IV of the CCA.

These include:

- not to make or give effect to arrangements that have a purpose or effect which may substantially lessen or hinder competition in Australian markets;
- not to engage in exclusive dealing or third line forcing or refusals to supply that have a purpose or effect which may substantially lessen or hinder competition in Australian markets; and
- cartel arrangements – such as market allocation or price-fixing with competitors or bid-rigging.

Recognizing that the exclusive nature of IP rights is an important incentive for parties to invest in innovation and commercialization, the ACCC has indicated that the repeal should not impact the majority of IP rights arrangements.

LATIN AMERICA

I. Latin America Cartel Enforcement and Trends

The punishment of cartels in Latin America and the size of the fines imposed by these national authorities have been steadily growing. This is mostly likely a result of the increasing use of leniency programs, which have proven to be highly efficient tools for the prosecution of cartels. Latin America does not have one centralized competition authority, and countries across the region have their own competition laws and enforcement procedures with respect to cartel conduct.[30] Thus, some Latin American enforcers are a step ahead in their application of leniency programs, as is the case with Brazil, whereas other enforcers are facing the primary challenges intrinsic to leniency applications, such as confidentially issues – considered a cornerstone of leniency programs. While the most active enforcers are now discussing or regulating the details of the interplay between leniency and private claims, other Latin American countries are still struggling with the application of this extremely helpful, but also complex and sophisticated tool.

In 2019, there were numerous cases related to the detection, investigation, and sanctioning of cartels in Latin America. Some of the most relevant cases in the region are below described, with an emphasis on those that began with the aforementioned leniency applications.

In 2019, there were numerous cases related to the detection, investigation, and sanctioning of cartels in Latin America.

II. Recent Enforcement Actions

A. Argentina

In Argentina, the most relevant cartel case during 2019 was the "*notebooks case*."[31] Oscar Centeno, a driver who worked for high-level government officials, kept track of an organized corruption scheme in his notebooks. These notebooks included details of the delivery of bribes to locations and people, including businessmen at major companies that benefited from the award of large public contracts from 2005 to 2015. These payments described in the notebooks amounted to $160 million.

As a result of the criminal investigation, the Antitrust Authority initiated an investigation on bid-rigging allegations and requested that the parties involved provide explanations, which are still under review. Although the antitrust case did not involve leniency applications, which were recently permitted in Argentina under the antitrust law passed in 2018, ten of the accused individuals cooperated in the criminal proceedings with the investigators in order to negotiate reduced sentences and, therefore, used a similar mechanism to that of leniency in many other antitrust regimes. As a consequence of this case, in 2019, the Organization for Economic Co-Operation and Development issued guidelines and recommendations to fight bid-rigging in the procurement of public works in Argentina.

B. Brazil

For its part, the Brazilian competition authority ("CADE") adjudicated several cases involving cartels in 2019. The largest fines were imposed in the subway-construction cartel[32] after a six-year investigation. Some of the biggest transport manufacturing companies in the world – including Alstom, Bombardier, and Mitsui – and 42 individuals were fined for approximately $140 million for rigging public bids to build trains and subways throughout the country between 1999 and 2013.

[30] *See*, *e.g.*, Argentina: Antitrust Law No. 27,442 dated May 2018, Article 1 and 2; Brazil: Competition Law No. 12,529 dated November 2011, Article 36, paragraph 3; Colombia: Decree No. 2,153 dated December 1992 (as amended), Article 47; Ecuador: Organic Law of Regulation and Control of Market Power dated 2011, Article 11; Mexico: Federal Law of Economic Competition dated May 2014 (as amended), Article 53.

[31] The "*notebooks case*" was first investigated in docket No. 9.608/2018, named "Fernández Cristina Elisabet y otros s/ asociación ilícita," prior to the criminal proceedings before the National Federal Criminal and Correctional Court No. 11. As the antitrust investigation is still ongoing, there are no public records of the docket or docket number.

[32] *See* Proceeding No. 08700.004617/2013-41, CADE.

In addition to the fines, CADE also banned Alstom from bidding on public tenders in the cities affected by the cartel for five years, since the authority considered Alstom to be the leader of the conspiracy. CADE also issued a recommendation to public bodies not to grant any federal tax incentives or subsidies over the next five years to Alstom, Bombardier, and CAF. CADE's decision is currently suspended as a result of motions for clarifications submitted by the convicted defendants.

In this case, leniency played an important role. For example, Siemens reached a leniency agreement, in which it cooperated during the proceedings and admitted being part of a cartel to bid on contracts for the São Paulo metropolitan transit system in exchange for full immunity. Moreover, the subway-construction cartel decision evidences that bid-rigging remains high on the priority list for CADE and that fines imposed by the authority for cartel activity have steadily risen in recent years.

Overall, in 2019, eleven Leniency Agreements were executed by CADE – seven of them were related to the biggest corruption scandal in Brazilian history, known as Operation Car Wash – and seven other cartel investigations were concluded. Some cartels convicted by CADE in 2019 included fuel distributors[33] (total of approximately $38 million), the international LCD cartel[34] (total of approximately $6.4 million), and an electric equipment cartel[35] (total of approximately $13 million).

C. Colombia

Colombia's competition authority ("SIC") has applied fines of $21.9 million in eight cartel-related cases, most of which were initiated due to the leniency program. The SIC imposed its highest fine in 2019 ($3.7 million) to companies producing concrete pipes for sewerage and to their employees, as it was demonstrated that they entered into a restrictive agreement of market distribution for more than a decade.

American Pipe and Construction International entered into the leniency program as an informer.[36] The company confessed to its participation in the cartel and provided relevant documents that supported the existence and operation of the conspiracy. In exchange, the company and its employees did not have to pay any fines.

In Colombia, as in many other countries, the leniency program proved to be efficient in the detection and sanctioning of cartels, even though Colombia only opened its first investigations as a result of leniency applications in 2014.

D. Ecuador

With respect to leniency in Ecuador, the country first introduced its leniency program in 2011, but it only has been used on a few occasions. Further, a decision by Ecuador's competition regulator ("SCPM") in the *Kimberly Clark* and *Productos Familia* case caused huge outcry and was accused of threatening the effectiveness of leniency programs in the region.[37] In that case, SCPM denied the leniency request made by the companies by declaring that the scope of the matter surpassed its jurisdiction, which is limited to national cartels. SCPM then forwarded the case to the regional authority, General Secretariat of the Andean Community ("SGCAN"), along with the information that was provided by the parties through the leniency program, which included evidence of the regional cartel. The companies were fined approximately $18 million each by SGCAN. Immediately after, Kimberly Clark filed a claim against SCPM's decision and requested the court to declare that the forwarding of the information provided to SCPM through the leniency program to other authorities was illegal. The court ruled that the declassification of the information was arbitrary and illegal. However, several questions regarding the usage of the information provided in the leniency applications remained unanswered. The proceedings are now before the National Court of Justice, and it remains to be seen whether a decision from this court will shed more light on the issue.

In 2019, SCPM issued a new leniency program. This new program will be relevant to the discussion before the National Court of Justice, as well as to the ongoing SGCAN case. Among other items, the new program stresses the competition authority's confidentiality duties and establishes the need for prior and express authorization from the parties before forwarding any information to other competition agencies, which is seen as a direct result of the *Kimberly Clark* case and recognition of the system's past shortcomings.

[33] *See* Proceeding No. 08700.010769/2014-64, CADE.

[34] *See* Proceeding No. 08012.011980/2008-12, CADE.

[35] *See* Proceeding No. 08012.001395/2011-00, CADE.

[36] *See* Resolution No. 369386 of 2016 issued by the SIC on August 26, 2019.

[37] *See* Resolution No. 2006 of the SGCAN issued on May 28, 2018.

E. Mexico

The Mexican competition authority ("COFECE") penalized several cartels in 2019. It imposed fines of approximately $4 million on Aeroméxico and Mexicana airlines for reaching an agreement to set the minimum rates for airline routes into and out of Mexico.[38] Moreover, certain cases decided in 2019 began as a result of leniency applications, such as a matter involving toothbrush suppliers coordinating bids tenders organized by the public health system.[39]

However, one particular case caught the public's attention as it involved COFECE's request for criminal penalties against individuals allegedly involved in a cartel. COFECE submitted a complaint to the Attorney General's Office against several individuals who, according to its investigations, coordinated to manipulate the results of public tenders issued by the health sector. This is the second occasion in which COFECE used this power, which demonstrates, once again, that public procurement remains within its top priorities.

Also, this past year, in September, COFECE released guidelines recognizing attorney-client privilege in investigations for the first time.[40] Prior to this time, COFECE did not specifically recognize the attorney-client privilege, which allowed COFECE to obtain arguably privileged materials through dawn raids of suspected cartel participants. The guidelines allow parties to submit a written request within 20 days to a special committee appointed by COFECE, which will then review the documents to make a privilege determination. Although there are concerns that the deadlines for making privilege review requests are too short, this appears to be a positive step for companies under investigation by COFECE.

F. Cases in Other Latin American Countries

Competition authorities in other Latin-American countries, such as Chile's Fiscalia Nacional Económica ("FNE") and Peru's National Institute for the Defense of Free Competition and the Protection of Intellectual Property ("INDECOPI"), have also imposed – or intend to apply – significant fines in cartel cases from the past year. In Chile, the FNE accused the main salmon food producing companies of collusion and imposed fines of approximately $70 million.[41] The Court of Defense of Free Competition ("TDLC") is currently reviewing the investigation, and it remains to be seen whether it will uphold these fines. In Peru, the INDECOPI fined 63 vehicle natural gas companies and individuals for price-fixing with fines of approximately $138 million.[42]

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[38] *See* Docket file No. IO-002-2015.

[39] *See* Docket file No. IO-005-2016.

[40] Mediante el cual el Pleno de la Comisión Federal de Competencia Económica emite las Disposiciones Regulatorias de la Comisión Federal de Competencia Económica, para la calificación de información derivada de la asesoría legal proporcionada por los agentes económicos (Sept. 30, 2019), https://www.cofece.mx/wp-content/uploads/2019/09/DOF-30septiembre2019-01.pdf; Charley Conner, *Mexico recognises legal privilege in antitrust probes*, GCR (Oct. 4, 2019), https://globalcompetitionreview.com/article/1209247/mexico-recognises-legal-privilege-in-antitrust-probes.

[41] *See* Requirement issued by the FNE on December 16, 2019.

[42] *See* Resolution No. 104-2018/CLC-Indecopi issued by the INDECOPI.

EUROPE

I. European Cartel Trends

The previous year has, once again, proven to be a turbulent and interesting one in Europe. Although 2019 was quieter for the European Commission ("the Commission") with regard to horizontal cartel investigations, it did impose substantial fines in a number of sectors. For example, the Commission attained a 1.068 billion Euro fine against five banks in connection with two foreign exchange cartels. After a lengthy court proceeding where earlier penalties were overturned twice, the Commission reimposed a 16 million Euro cartel fine on five Italian steel producers. The Commission also imposed a 413.8 million dollar fine against car safety equipment manufacturers that allegedly exchanged competitively sensitive information and coordinated their conduct. In addition, the Commission imposed a 35.6 million dollar fine against two suppliers of canned vegetables.

As a result of the ECJ's recent judgments in follow-on cartel damage claims, it has become even more crucial to invest in compliance training and related efforts. Infringement of the European and national competition provisions may not only result in major fines, but also expose offenders to private claims for damages that are potentially many times higher – and that are becoming easier to pursue in court.

Relatedly, the European Court of Justice ("the ECJ") issued important decisions in private litigations that followed criminal cartel investigations. As a result of the ECJ's recent judgments in follow-on cartel damage claims, it has become even more crucial to invest in compliance training and related efforts. Infringement of the European and national competition provisions may not only result in major fines, but also expose offenders to private claims for damages that are potentially many times higher – and that are becoming easier to pursue in court.

II. Examples of Member State Cartel Enforcement

The EU Member States were also active in cartel enforcement. Among the actions was France's Autorite de la Concurrence's imposition of a 415 million Euro fine against the four historical issuers of meal vouchers for preventing rivals from entering the market for the employee benefit for nearly two decades. France also charged the same companies with improperly exchanging market share data. Separately, the French authority fined six fruit compote manufacturers 55.3 million Euro for engaging in cartel activity over a four-year period.

Germany's antitrust authority was similarly busy with cartel investigations, including in the steel industry. For example, Germany fined three steelmakers a total of 646 million Euro related to an agreement among them on surcharges and price supplements for quarto plates, a type of hot-rolled steel used in building bridges, ships, pipelines and machinery. The cartel was alleged to have run for 14 years. Germany also fined carmakers Daimler, BMW and Volkswagen 100 million Euro for another cartel to fix steel prices.

III. Follow-on Cartel Damage Claims in Full Swing

Two rulings by the ECJ make it easier to claim damages for cartel infringements in civil law proceedings.

The landmark Skanska ruling concerned a preliminary reference from the Finish Supreme Court regarding an asphalt cartel. Near the end of the cartel, the market had started to consolidate and various cartel members were acquired by other asphalt producers. All of the acquired companies were subsequently liquidated by their new owners, whereas the capital and business activities were retained within their respective groups. After fines were issued for the cartel, the City of Vantaa initiated civil proceedings, claiming damages from the companies that had acquired cartel participants – not only for their own behavior but also for cartel behavior that was attributed to the acquired companies. However, under Finish law, only the specific legal entity that caused damage may be held liable for it. In this case, these entities were liquidated and hence had ceased to exist.

In this context, the ECJ has long held that where a legal entity that committed a cartel infringement ceases to exist, another entity may be liable for any fines for that infringement if it acquired all relevant assets of the disappeared entity and hence continued the relevant business. This is called the principle of economic continuity. The Finnish Supreme Court asked the ECJ whether the principle of economic continuity should also be applied to national law for civil liability in cartel damage proceedings.

The ECJ stated that the determination of the entity to be held liable for compensation for damages caused by an infringement of Article 101 of the TFEU is not governed by national law, but by European law.[43] Thus, the entities to be held liable are the so-called "undertakings" – as defined under European law – that participated in the cartel. To ensure the effectiveness of European law, the ECJ held that this concept of undertaking must have the same scope in the context of national civil law actions for damages – in so far as these are based on European competition law – as in the context of the imposition of fines by the Commission (or national competition authorities). Therefore, the principle of economic continuity applies in national civil law.

In the Tibor Trans case, a Hungarian freight transport company brought suit in Hungarian courts to recover the damage it had suffered as a consequence of a truck manufacturers' cartel. The freight transport company had, however, never purchased any trucks directly from these manufacturers. The ECJ considered that any damage suffered by Tibor Trans was a direct consequence of the artificially high prices created by the cartel and that, as such, it constituted direct – as opposed to a consequential – damage that could be claimed by Tibor Trans.[44] Such damage may be claimed in the Member State in which it occurred from the producer. The ECJ held that this ruling was not contrary to legal certainty as cartel members could have reasonably foreseen this.

[43] ECJ Case No. C 724/17 (Mar. 14, 2019), available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=5B26E8928EB984B88F2456196BBFB251?text=&docid=211706&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4674777.

[44] ECJ Case No. C 451/18 (July 29, 2019), available at http://curia.europa.eu/juris/document/document.jsf?docid=216540&doclang=ENI.

Labor & Employment and Competition Law

Labor & Employment and Competition Law

In addition to no-poach and non-compete agreements, competition authorities are considering the line between the right for employees to bargain collectively and the establishment of anticompetitive agreements among employees. This issue is especially relevant to workers in the gig economy, such as Uber and delivery drivers.

Numerous countries around the world are examining what role antitrust and competition law plays in labor markets. As they do, enforcers and courts are grappling with whether competition law can or should be used to protect worker mobility and wages. In the United States and elsewhere, non-compete agreements between employees and employers and "no-poach" agreements between employers, in which companies agree not to solicit or hire each other's employees, have garnered antitrust scrutiny.

In addition to no-poach and non-compete agreements, competition authorities are considering the line between the right for employees to bargain collectively and the establishment of anticompetitive agreements among employees. This issue is especially relevant to workers in the gig economy, such as Uber and delivery drivers. Below, the labor-related issues arising under competition law are discussed from the perspective of various jurisdictions around the world.

EUROPE

This section examines three issues of significance in relation to the interaction between competition law and employment rights in Europe: (i) collective bargaining; (ii) no-poach agreements; and (iii) labor rights in the context of merger control.

It is estimated that the European digital labor market is worth 28 billion euros in turnover. A key challenge for European policymakers is how this new gig economy is regulated from both an employment and a competition law perspective.

I. Collective Bargaining in the Gig Economy

It is estimated that the European digital labor market is worth 28 billion euros in turnover.[1] A key challenge for European policymakers is how this new gig economy is regulated from both an employment and a competition law perspective.

The right of self-employed workers to collectively bargain in relation to their pay and working conditions has been a key area of reform over the past few years. Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") (and equivalent national legislation in Member States) prohibits agreements between undertakings which have as their object or effect the prevention, restriction, or distortion of competition. Traditionally, individual workers were classified as "undertakings" for the purposes of European competition law to the extent that they engaged in an economic activity in their own right.

However, the rise of the gig economy has changed the way regulators and competition authorities view the interaction between Article 101(1) and collective bargaining. In 2014, the EU Court of Justice drew an important distinction between *bona fide* self-employment – where it deemed collective bargaining could be restricted on competition grounds – and 'false' self-employment – where the workers are not considered undertakings under the competition rules.[2]

Similar cases have arisen in the national courts. In 2018, the English Court of Appeal ruled that Uber drivers should be classed as employees, with access to the minimum wage and paid holidays.[3] The decision followed an earlier High Court ruling that Deliveroo riders are self-employed; however, the court was careful to note that the case was fact-specific, limiting the implications of the ruling for the broader industry.[4] Further clarity is expected when the Uber case moves to the UK Supreme Court in 2020.

At the EU level, Commissioner Margrethe Vestager, whose portfolio now includes both competition policy and the regulation of the digital economy, has publicly called for gig economy workers to be allowed to collectively bargain for their rights, saying: "We need to make sure that there is nothing in the competition rules to stop those platform workers from forming a union, to negotiate proper wages as you would do in any other business."[5] The Commission is working with national competition authorities to formulate a policy on this issue.

Further, a recent report recognized the trend of national courts finding such workers to be employees of the platform.[6] The report notes that "because it is usually impossible to work at the same time for two different employers, these rulings might impede multi-homing and reduce competition." It is unclear how the Commission will approach balancing the interests of businesses and gig workers, while ensuring fair prices for consumers. However, a more considered approach to the issue of collective bargaining rights for gig economy workers is highly likely.

[1] A. Aloisi, V. De Stefano, S. Silberman, *A Manifesto to Reform the Gig Economy, Regulating for Globalization*, http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/.

[2] Case C-413/13 FNV K*unsten Informatie en Media v Staat der Nederlanden* (2014).

[3] *Uber BV v Aslam* [2018] EWCA Civ 2748. Uber is appealing the decision to the UK Supreme Court, which is expected to hear the case in July 2020.

[4] *R (on the application of the IWGB) v Central Arbitration Committee* [2018] EWHC 3342 (Admin).

[5] V*estager says gig economy workers should 'team up' on wages*, Financial Times, Oct. 24, 2019.

[6] Crémer, de Montjoye and Schweitzer, *Competition Policy for the Digital Era*, Apr. 4, 2019.

In this context, Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union (the "Directive") was adopted in June 2019. The Directive is intended to protect the rights of workers in more precarious jobs, including 'false' self-employed workers, while maintaining labor market adaptability. The Directive can be seen as part of a trend towards greater protection for workers in the gig economy, without necessarily removing or loosening competition rules in this area. EU Member States have until August 1, 2022 to transpose the Directive into their domestic law.

II. No-Poach Agreements

The competitive impact of agreements between businesses not to hire each other's workers has recently attracted attention, particularly in the United States. While there has been less of a focus on this issue in the EU, a number of national authorities have considered these issues or suggested that they are likely to do so in the near future. In the Netherlands, the courts struck down a joint agreement between fifteen hospitals that anaesthesiologists would not be hired by any of the other hospitals for a period of 12 months following termination or resignation.[7] The President of the French Competition Authority has also strongly suggested that no-poach agreements would be the subject of future investigation.[8] It is likely European regulators (either at an EU or Member State-level) will follow the lead set by the US authorities and scrutinize no-poach and non-compete clauses to a greater extent.

III. Merger Control and the Labor Market

While the Commission's merger control policy is based on economic impacts, it has recently considered how proposed mergers will shape the labor market. In 2018, Commissioner Vestager publicly encouraged a wider range of stakeholders to engage in the merger control process, inviting trade unions in particular to contact the Commission during mergers that may affect their members. The Commissioner also recommended companies involved in mergers in the EU to take care to respect the national and European obligations for worker consultation.[9] Notably, the proposed merger of Tata Steel and ThyssenKrupp was blocked in June 2019, and the Commission highlighted in its press release, announcing the decision, that one of its goals was to protect and maintain European jobs.[10] This decision and the comments of the Commissioner suggest a potentially more expansive approach to merger control that accounts for a wider variety of societal goals beyond consumer welfare, including the welfare of labor.

[7] Gerechtshof's-Hertogenbosch, May 2010, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2010:BM3366.

[8] Comments of Isabelle de Silva, "10 ans de l'Autorité," Autorité de la Concurrence, Paris, March 5, 2019.

[9] Statement by Commissioner Vestager at ITRE Committee, July 9, 2018.

[10] Commission prohibits proposed merger between Tata Steel and ThyssenKrupp, Press Release, June 11, 2019.

HONG KONG

I. Hong Kong Competition Law

The Competition Ordinance (Cap. 619) ("Ordinance"), Hong Kong's first comprehensive competition law that covers all business sectors, was passed in June 2012 and went into full effect on December 14, 2015.[11] The Ordinance provides for general prohibitions in three areas of anticompetitive behavior, described as the First Conduct Rule (prohibition of anticompetitive agreements, concerted practices, and decisions), the Second Conduct Rule (abuse of market power), and the Merger Rule (which currently applies only to the telecommunications and broadcasting sectors). The Ordinance separates enforcement and adjudication, relying on the Competition Commission ("Commission") for the former and the Competition Tribunal ("Tribunal") for the latter.

Despite the lack of formal legal actions or publicly known investigations in the context of the labor market, in its public advocacy campaigns, the Commission has been clear in its position against potentially anticompetitive practices in the employment market.

As of December 2019, the Commission had brought four cases before the Tribunal. One of the four cases involved firms in the information technology sector, while the other three all involved companies in the construction and renovation industry. None of the four legal actions taken by the Commission concerned issues that were related to the employment market.

Despite the lack of formal legal actions or publicly known investigations in the context of the labor market, in its public advocacy campaigns, the Commission has been clear in its position against potentially anticompetitive practices in the employment market. Most notably, one of the three advisory bulletins the Commission has published thus far targets the labor market, entitled *"Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment"* ("Labor Market Advisory Bulletin").[12]

II. The Labor Market Advisory Bulletin

A competitive market results in better prices, higher quality products, and more and better choices for consumers. Likewise, the Labor Market Advisory Bulletin recognizes that competition among employers for the services of employees also results in better employment terms (such as higher compensation or more attractive benefits) and increased opportunities for employees.

For the purposes of the Ordinance, the Commission notes there can be competition within the employment market for the procurement of labor, regardless of whether the employers themselves compete in the provision of the same (or similar) products or services in the downstream market. Moreover, the Commission stresses that it may prioritize a specific case if the employers are also competitors or potential competitors in the downstream market.

The Labor Market Advisory Bulletin notes that the Commission is actively scrutinizing potentially anticompetitive employment-related practices by businesses across all sectors in Hong Kong.

[11] https://www.elegislation.gov.hk/hk/cap619. Legislative proposals prohibiting certain types of anti-competitive conduct in the telecommunications and broadcasting segments were passed in 2000 and 2001, respectively.

[12] https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf. The advisory bulletin was released on April 9, 2018.

The Commission has identified a number of employment-related practices by businesses in Hong Kong that may contravene the rule against anticompetitive agreements and concerted practices of the Ordinance (*i.e.*, the First Conduct Rule).

- **Wage-fixing agreements.** Agreements between businesses in relation to any element of compensation for employees – including salaries, benefits, and allowances – may amount to illegal price-fixing, which is considered "Serious Anti-competitive Conduct" under the Ordinance.[13]
- **Non-poach agreements.** Agreements between businesses in relation to the solicitation or hiring of each other's employees may amount to illegal market sharing, considered "Serious Anti-competitive Conduct" under the Ordinance.
- **Exchange of sensitive information.** Sharing of competitively sensitive information between businesses regarding employee compensation or hiring practices, whether done directly or through a third party, unilaterally or reciprocally, may contravene the Ordinance.

In light of the Labor Market Advisory Bulletin, it is likely that the Commission will take enforcement actions against individuals or businesses whom it suspects have engaged in anticompetitive employment practices. Such enforcement actions may include issuing warning notices to the infringed parties to rectify the anticompetitive practice, and/or bringing legal actions to the Competition Tribunal against the infringed parties.

III. Trade Unions

Under section 40 of the Hong Kong Trade Unions Ordinance (Cap. 332), the purpose of any registered trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such registered trade union liable to criminal prosecution for conspiracy or otherwise.[14] In other words, the establishment of a trade union itself does not amount to anticompetitive conduct.

In line with the position of many other overseas jurisdictions such as the United Kingdom and the United States, in its *Guideline on the First Conduct Rule*, the Commission states that when a trade union acts on behalf of its members in collective bargaining with their employer on terms and conditions of work, the trade union is not considered to be engaged in an economic activity and is not an undertaking that falls within the scope of the Ordinance.[15] Thus, arrangements regarding employee compensation and conditions of work agreed between a trade union and an employer during collective bargaining fall outside the scope of the First Conduct Rule. However, when the trade union carries on an economic activity in its own right, it will be considered an undertaking and the First Conduct Rule applies.

IV. Trade Associations and Professional Organizations

The Commission cautions that a decision or recommendation by a trade association comprised of competitors, regardless of whether the decision or recommendation is binding or not, can potentially be considered anticompetitive, especially when it relates to recommended salaries or allowances.

In particular, the Labor Market Advisory Bulletin highlights the common practice among many trade associations in Hong Kong to conduct regular wage surveys related to association members' outlook and/or intention with respect to the future salaries and benefits of their employees or contract workers. The Commission cautions trade association members to avoid sharing such competitively sensitive information, whether directly between competitors or indirectly through a third party (*e.g.*, via a wage survey), as such conduct may contravene the competition law.

[13] A violation of the First Conduct Rule involving "Serious Anticompetitive Conduct" is subject to the full range of enforcement options provided under the Ordinance. Specifically, no warning is required before legal proceedings may be brought against the infringing parties. With respect to other activities covered by the First Conduct Rule that do not constitute "Serious Anticompetitive Conduct," the Commission is required to issue warning notices to the infringing parties before instigating any legal proceedings.

[14] https://www.elegislation.gov.hk/hk/cap332.

[15] Hong Kong Competition Commission, Guideline on the First Conduct Rule, §2.19.

BAHRAIN

I. Bahraini Competition and Labor Law

Despite rapid development of Bahrain's legislation in order to stay abreast with global legal advancements, recent statutory reforms in Bahrain have not addressed antitrust in a detailed manner with respect to employment and labor markets. Currently, the only available Bahraini antitrust legislation is the 2018 law No. 18, which addresses antitrust in the context of commercial markets.

The sole reference to non-compete agreements and antitrust is in the 2012 Law No. 36, promulgating the labor law for the private sector ("Labor Law"). Article 73 of the Labor Law states:

> *"If work performed by the worker gives him access to the employer's customers or clients, or access to the work secrets, the two parties may agree on non-competition against the employer by the worker after the termination of the contract of employment, or on non-participation in any competing venture.*
>
> *For the non-competition clause to be valid, the following conditions must be fulfilled:*
>
> *1. The worker must have completed eighteen years of age at the time of agreement; and*
>
> *2. The restriction must be limited in terms of time, place and for a period of time not to exceed one year subsequent to termination of the contract of employment, and must be limited as well in terms of place and nature of the work to the extent necessary to safeguard the employer's legitimate interest.*
>
> *The employer may not invoke such agreement if he revokes the contract or refuses to renew it without an act justifying this being committed by the worker. Further, he may not invoke the agreement if he commits an act justifying the worker's revocation of the contract."*

II. Bahraini Court's Application of Labor Law

Courts have applied a lenient interpretation of Article 73, which mainly resulted in outcomes that favor the employee over employers, even in cases where the criteria outlined in the Article were satisfied. Indeed, as of the currently available precedents of the Court of Cassation, the Labor Courts of Bahrain have yet to enforce an order restricting the employee from joining a competitor in accordance with Article 73. The Bahrain courts' current approach may result from the fact that the domestic market is relatively small in light of the geographic size of the Kingdom of Bahrain. Therefore, a non-compete clause is likely to be considered a "harsh" provision against employees who may only have limited options in terms of employment. A ruling in favor of employers under Article 73 of the Labor Law may lead to social consequences that the courts view as detrimental to employees, who receive a higher level of protection when compared with employers under the Labor Law.

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LATIN AMERICA

I. Latin American Trends

In Latin America, the relationship between labor and competition laws has led to recent debates and court decisions as well as contradicting views across various countries. First, this report explores the uncertainty regarding the relationship between ride-share and delivery applications and the drivers and delivery personnel that perform work for these companies. In Latin American countries, to determine if an employment relationship exists between, on the one hand, drivers or delivery personnel, and on the other hand, companies, one must analyze the existence of the factual elements that characterize a labor contract. The absence of these elements can prevent judges from declaring the existence of an employee-employer relationship, which in turn can impact laborers' collective bargaining rights under competition law. Second, this report examines the differing approaches to non-compete and no-poach clauses taken across Latin America.

II. The Obligation to Hire Drivers or Delivery Personnel Directly by Ride-Sharing and Delivery Application Companies

Latin America is one of the regions in the world that reports the most growth in the number of users and income for ride-sharing companies, such as Uber, Lyft, DiDi, and Cabify, or delivery applications, such as Uber Eats, Rappi, Glovo, or Pedidos Ya. These statistics are not surprising: for many citizens in Latin America this model turned out to be a very attractive alternative, to earn additional income, but in most cases as primary "employment." Indeed, these platforms have had a substantial impact on labor markets because ride-sharing and delivery services have become the primary occupation for millions.

Few resolutions have been reached; the labor relationship between drivers or delivery personnel with technological platforms is questioned and debated in the region. These issues are challenging governments, legislators, and judges.

During the first years of operation of these companies in Latin American countries, there was a massive reaction by the traditional service operators, which showed dissatisfaction for the lack of regulation and alleged unfair competition. The proposed business structure and operation through mobile applications started the discussion about the adoption of contemporary rules to manage the massive consumption of these services and public policies that balance innovation, free competition, consumer rights and labor policies. Consequently, most Latin American governments have been gradually considering and implementing regulations, in some cases negotiated directly with these companies, for example, on the commission percentage paid to drivers, as in the case of Uber in Mexico. Few resolutions have been reached; the labor relationship between drivers or delivery personnel with technological platforms is questioned and debated in the region. These issues are challenging governments, legislators, and judges.

Despite the current uncertainty, there are some announcements and court decisions worth highlighting, particularly in Colombia, Mexico, Brazil, and Argentina.

In Colombia, no precedent obligates the platform companies to hire their drivers and delivery personnel. In a December 2019 judicial decision of the National Competition Authority, however, declared that Uber engaged in unfair competition and gained a competitive advantage when it violated local transportation regulations by steering customers away from taxis and providing public transportation without a license. As a result, the National Competition Authority ordered Uber's exit from Colombia.[16] This has left a gap for 88,000 associated drivers who, in most cases, used Uber as a primary source of income. In contrast, Colombia's largest private employer – Grupo Exito – employed less than half of that figure (around 42,000) in 2018. Despite the massive number of associated drivers being left without this source of income, neither the antitrust authority, nor any other authority, established any procedure or measure to mitigate the impact of the judicial

[16] Public Hearing Minute No. 2383, File Number 16-102106.

decision on the labor market. Nonetheless, the Colombian government recently reported that it is working on a project to provide social protection coverage for workers in collaborative and gig-economy platforms, like Uber. In connection with that project, the government has already started negotiations with several companies.

In Argentina, the services offered by companies such as Glovo, Rappi, and Pedidos Ya are not regulated. The issue has only been subject to discussion before the Labor Appeals Chamber in the case of the mobile application Rappi.[17] In this case, a group of "Rappitenderos" sued, arguing that the application access/login was blocked, preventing them from working, and filed a suit claiming labor rights. The labor authority determined that an employment relationship between Rappitenderos and delivery personnel does not exist, and to the contrary, ruled that they are independent workers.

In the case of the Uber application, in August 2018 the National Supreme Court of Justice of Argentina ruled on the legality of Uber, but not on the recognition of drivers' labor rights.[18] However, it seems that in Argentina the world trend of regulating the use of these apps will continue. An indication of this is the document "Urgent Agenda for a Labor Society," signed by the current Deputy Chief of Staff Cecilia Todesca Bocco in July 2019.[19] This document mentions the urgency to regulate work on digital platforms based on the recognition of individual and collective rights and the existence of a formal employer-employee legal relationship.

In Brazil, there are legal requirements to operate as a ride-sharing driver (*e.g.*, individual taxpayer registration with the municipality and the National Social Security Institute[20]), and the Congress is making efforts to regulate such businesses. Additionally, in January 2020, a challenge was launched to the iFood app claiming that the company failed to recognize labor rights and associated employment relationship. As had happened previously in a 2019 Uber case, the Supreme Court of Justice found an employment relationship was not established because of the particularities and business structure of the company.[21]

III. Contradiction with Labor Law or Labor Constitutional Protections and Non-Compete and No-Poach Clauses

In Colombia, non-compete and no-poach clauses in agreements between companies are generally not considered restrictive of competition if (i) they are ancillary to a principal contract (*e.g.*, a concentration) and (ii) they are reasonable in the territory they cover (*e.g.*, Colombian territory) and in their duration (a maximum of 5 years).[22] However, in Colombia a non-compete clause intended to bind a natural person is likely unenforceable, because a judge would likely give priority to the individual's constitutional rights, such as the right to work and the right to the free choice of an individual's profession or trade.

In Mexico labor and constitutional law and court precedent[23] do not contemplate the existence of "non-compete" and "no-poach" clauses. Regardless of limitations on scope, duration or geography, such provisions are unenforceable against an employee or former employee. Non-compete agreements exclusively apply between companies and are usually accepted by Mexican authorities if they are ancillary to a lawful agreement and reasonable and limited in time, geographic scope, and scope of products and services.

In Argentina, there is a distinction between three types of non-compete clauses: (i) those that prevent employees from working for competitors at the same time during their employment relationship; (ii) those that prevent executives who retire from a company and take valuable know-how with them from sharing it with competitors; and (iii) those that are agreed to between companies during a transaction and which oblige sellers not to engage in the same activity for a certain period of time. These three types of non-compete clauses are allowed both under antitrust and labor law if (i) they have been expressly accepted by the employee and (ii) the time limitation, territorial limitation, and activity limitation are considered reasonable.

Finally, in Brazil, there is a very specific regime considering no-poach clauses related to specific transactions.[24] Within this regime, the Brazilian competition authority ("CADE") sets no-poach obligations within the merger control review. These obligations exclusively apply to the merging parties' employees covered by CADE's decision and cannot prevent such individuals from being hired by companies that are not parties to the agreement with CADE.

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[17] Labor Appeals Chamber, Case file No. 46618/2018.

[18] National Supreme Court, Case No. CCC 29155/2016/2/1/1/RH2.

[19] Available at http://www.centrocifra.org.ar/docs/Agenda_urgente_para_una_sociedad_de_trabajo.pdf.

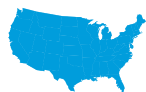
[20] Federal Law 13,640/2018.

[21] *Brazilian court favors iFood by considering that couriers have no employment bond with the company*, Latin America Business Stories (Jan. 29, 2020), https://labs.ebanx.com/en/news/business/brazilian-court-favors-ifood-by-considering-that-couriers-have-no-employment-bond-with-the-company/.

[22] SIC Concept File No. 15-191960.

[23] Review Appeal 348/2008. Inelap, S.A. de C.V. 19 de marzo de 2009.

[24] Section 3.1.2.4 of CADE's remedies' guidelines, available at http://www.cade.gov.br/



UNITED STATES

I. U.S. Trends in Labor Markets and Antitrust

In 2016, the U.S. Department of Justice ("DOJ") and the U.S. Federal Trade Commission ("FTC") released a report providing guidance on how the antitrust laws should be applied to job markets ("HR Guidelines").[25] The HR Guidelines followed cases brought by DOJ challenging agreements entered into by certain technology companies with their competitors not to solicit or hire each other's employees. Such agreements are commonly referred to in North America as "no-poach agreements." Since the HR Guidelines were issued, there has been increased focus on how or whether the competition laws should be applied to no-poach agreements and if they should also be applied to non-compete agreements between employees and their employers.

A common concern among employers is that employees will use the expertise or trade secrets learned during their employment to compete against the employer by either joining a competitor or starting a competing business. Traditionally, employers have addressed this concern through the use of non-compete agreements with their employees, which have generally been viewed for antitrust purposes as ancillary to pro-competitive business transactions and therefore subject to a rule of reason analysis. While non-compete agreements have typically withstood antitrust scrutiny, the increased focus on labor markets as a result of the HR Guidelines has caused non-competes to come under renewed scrutiny.

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II. Approach to Labor Markets by Federal Enforcers

The federal antitrust enforcers continued to explore the proper role of antitrust in labor markets as both the DOJ and the FTC have recently sought public input on how best to balance protections for employers' legitimate concerns against the promotion of fair competition for American workers. In September 2019, the DOJ held a public workshop that covered a variety of labor competition issues, including no-poach and wage-fixing agreements, approaches to labor market definition, the role of employer collaboration and contractual arrangements between employers, labor monopsony in merger enforcement, and antitrust exemptions for collective bargaining and other labor union activity.

Similar to the DOJ's workshop, the FTC held a hearing in early January 2020 "to examine whether there is a sufficient legal basis and empirical economic support to promulgate a [Federal Trade] Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts."[26] The workshop focused on the growing use of non-compete agreements, the competitive impact of these agreements, and what authority the FTC could use to regulate these agreements. During the hearing, there appeared to be a consensus that a *per se*, or automatic, ban on non-compete agreements would be difficult for the FTC to justify, but there was not a consensus on what, if any, new restrictions should be imposed.

While both the DOJ and the FTC have actively investigated no-poach and non-compete agreements, neither initiated any new litigation challenging agreements in 2019. However, the DOJ intervened in private litigation with statements of interest including one it filed in three related fast-food franchise no-poach suits pending in the U.S. District Court for the Eastern District of Washington.[27] In its filings, the DOJ advocated that no-poach agreements between franchisees and a franchisor should be evaluated under the rule-of-reason standard because such agreements likely constitute ancillary restraints reasonably necessary to otherwise legitimate, pro-competitive business relationships.

[25] Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[26] Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (2020), https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

[27] *See* Corrected Statement of Interest of the United States of America, *Stigar v. Dough, Inc.*, No. 2:18-CV-00244- SAB (Auntie Anne's), *Richmond v. Bergey Pullman*, No. 2:18-cv-00246-SAB (Arby's) and *Harris v. CJ Star*, No. 2:18-cv-00247-SAB (Carl's Jr./Hardee's) (E.D. Wash. filed Mar. 8, 2019), https://www.justice.gov/atr/case-document/file/1141721/download.

In addition, while the DOJ has yet to file any criminal cases involving no-poach agreements, the DOJ has not backed away from its warnings that it will pursue criminal charges against naked no-poach agreements.[28]

III. Approach to Labor Markets by the States

Many states, on the other hand, have been very aggressive in challenging non-compete and no-poach agreements, and it was no surprise that in 2019 several states' antitrust enforcers intensified their focus on no-poach and non-compete provisions. Over the past several years, 19 states have enacted new laws that restrict the enforceability of non-compete agreements,[29] including seven in 2019 alone.[30] Some states, including California, render them essentially unenforceable unless they fall within very narrow exceptions. Other states prohibit such agreements for specific types of employees or professions, such as physicians and low-wage employees. In March 2019, the California Attorney General announced that a multistate effort had resulted in settlement agreements with four major fast food companies that resulted in those franchise corporations removing their no-poach provisions from their franchise agreements in the United States.[31] The multi-state settlements included a nationwide prohibition on enforcing no-poach provisions in existing franchise agreements and the removal of the provisions in all new agreements. But perhaps the most active state enforcer was the Washington State Attorney General, which has continued a campaign to end the use of no-poach provisions in franchise agreements nationwide and has now signed legally enforceable agreements with nearly 200 corporate chains to remove no-poach clauses from their franchise contracts.[32]

In addition, the states have taken the firm stance that no-poach provisions should be deemed *per se* unlawful. This divergence from federal enforcers has played out in several private cases where the DOJ's statement of interest advocated the rule of reason while the state AG advocated for a *per se* standard. Most private litigants have opted to settle rather than continue to litigate in the midst of this controversy.[33]

IV. Impact of Diverging Views

What this patchwork of different government enforcement means is that while no-poach and non-compete agreements have received significant attention, it is still uncertain how they will be regulated. Private plaintiffs can look to the states' attorneys general to support their arguments that the agreements should be *per se* violations of the antitrust laws, and private defendants can point to federal agencies statements that the agreements should generally be evaluated under a rule of reason analysis. Regardless, 2020 is likely to bring further developments and, with any luck, greater clarity regarding antitrust enforcement in labor markets.

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[28] At a hearing in front of the Antitrust Subcommittee of the U.S. House Judiciary Committee on Competition in Labor Markets, the DOJ emphasized that "criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division." Doha Mekki, *Remarks as Prepared for Delivery* (2019), https://www.justice.gov/opa/speech/counsel-assistant-attorney-general-antitrust-division-doha-mekki-testifies-house.

[29] *See* The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country, https://www.faircompetitionlaw.com/changing-landscape-of-trade-secrets-laws-and-noncompete-laws/.

[30] Florida (banned for physicians if they are only provider of that specialty in a county); Maine (banned for low-wage workers and imposed a minimum period of employment before they can be effective); Maryland (banned for low-wage workers); Oregon (required post-termination notice of a non-compete); New Hampshire (banned for low-wage workers); Rhode Island (banned for low-wage workers); and Washington (banned for low-wage workers).

[31] Press Release from the State of California Dep't of Justice, *Attorney General Becerra Announces Multistate Settlements Targeting "No-Poach" Policies that Harm Workers* (Mar. 12, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-multistate-settlements-targeting-%E2%80%9Cno-poach%E2%80%9D.

[32] Press Release from the Washington State Office of the Attorney General, *AG Ferguson's Initiative Ends No-Poach Clauses at 10 More Corporate Chains with Nearly 2,500 Locations Nationwide* (Sept. 20, 2019), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-ends-no-poach-clauses-10-more-corporate-chains-nearly.

[33] DOJ's No-Poach Stance 'Somewhat Surprised' State Enforcers (Mar. 28, 2019), https://www.law360.com/articles/1143874/doj-s-no-poach-stance-somewhat-surprised-state-enforcers.

Digitization and Antitrust/ Competition Law

Digitization and Antitrust/ Competition Law

Facebook, Google, Apple, Amazon, and other so-called "big data" companies play prominent roles in global news stories. Many of these stories include discussions about the role antitrust and competition law should play in the regulation of these big data companies and the digital economy more generally. Although a clear consensus has not yet emerged, there appears to be a general consensus that enforcement agencies should or will consider the adequacy of the existing laws and systems with respect to the evolving digital economy.

Concerns over big data have emerged because that data can allow competitors to engage in unfair and anticompetitive practices, such as identifying and taking steps to remove burgeoning competitive threats through the acquisition of nascent companies and increasing barriers to entry or deterring potential new competition by blocking access to data. At the same time, technology companies can be important innovators, and authorities do not want to over-regulate pro-competitive and consumer-desired innovations. Big tech companies have also come under scrutiny for privacy violations relating to practices of illegally collecting or sharing big data without the appropriate consents. Some authorities and academics have questioned whether or how competition law should apply to such privacy matters.

This section examines the current debate and inquiries regarding competition law's involvement with big technology companies and digital markets, the current and possible future laws used to regulate big data, and recent cases and enforcement actions in the tech space.

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CHINA

I. "Either-Or" Restrictions under Chinese Competition Law

Over the last several years, private plaintiffs have filed suits challenging the restrictions that e-commerce platforms place on e-retailers that prevent them from selling on multiple sites. These "either-or" restrictions, or exclusive dealing, even triggered concerns from regulators, and on November 5, 2019, one week before the annual "Single's Day" (akin to online Black Friday in China), the State Administration for Market Regulation ("SAMR") held a meeting with the top e-commerce players in China, including Alibaba and JD.com. During the meeting, SAMR officials emphasized that "either-or" restrictions are expressly prohibited by China's E-commerce Law, further, such behavior may also violate Anti-monopoly Law ("AML") and Anti-Unfair Competition Law ("AUCL").[1]

Although certain rules under each of the E-commerce Law, AML, and AUCL could be used to regulate "either-or" restrictions, they have different implications and penalty mechanisms.

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A. E-Commerce Law

Article 35 of the E-Commerce Law stipulates that, "e-commerce platform operators shall not make use of their service agreement, transaction rules and technology etc. to impose unreasonable restrictions or unreasonable conditions on the transactions of operators on platform or the price of such transactions, or collect unreasonable fees against operators on platform." Further, according to Article 82, violators of Article 35 shall be ordered to make restitution within a stipulated period. These violators may be subject to a fine ranging from RMB50,000 to RMB500,000, and in serious cases, a fine ranging from RMB500,000 to RMB2 million shall be imposed. It seems that "either-or" restrictions would be deemed infringements under the E-Commerce Law even if the platform did not enjoy market dominance. If the revenue size of the undertaking concerned is significant, the penalties available under the E-Commerce Law, which do not depend on an undertaking's turnover, are relatively moderate compared to the AML.

B. Anti-Monopoly Law

Exclusive dealing with no justification is explicitly prohibited by the AML as an abuse of dominance. Furthermore, the Interim Regulation Prohibiting Conduct Abusing Dominant Market Positions ("SAMR Abuse Regulation") specifically points out that, for internet and similar businesses, the industry specificity, business models, user numbers, network effects, foreclosure effects, technological characteristics, market innovation, and data control and processing are factors that can be taken into account in the course of a dominance assessment. It seems that the "either-or" restriction would be deemed an infringement of the AML if the undertaking concerned has a dominant position based on the specific factors for e-commerce businesses. For an abuse of dominant position under the AML, a fine ranging from 1% to 10% of the turnover would be imposed.

C. Anti-Unfair Competition Law

Article 12 of the Revised AUCL also specifically addresses unfair competition activities conducted on the internet. Prohibited conduct includes taking advantage of technical means to maliciously make a network product or service offered by another incompatible with one's own and forcing users not to use the network product or service offered by another. Violators of Article 12 face a fine from RMB100,000 to RMB500,000, and in serious cases, from RMB500,000 to RMB 3 million. Similar to the E-commerce Law, a dominant position is not required to find that Article 12 has been infringed. Fines may be moderate compared to the AML if the revenue size of the undertaking concerned is significant.

Although scholars may have concerns on the overlap or even potential conflict between these different sets of rules, the fact remains that regulators are equipped with various weapons to regulate the "either-or" issues for e-commerce. Accordingly, more attention to compliance with these laws should be paid by e-commerce players in China.

[1] Available at http://www.cnr.cn/sd/ppsd/20191105/t20191105_524846264.shtml.

LATIN AMERICA

I. Digital Market Questions Facing Competition Authorities in Latin America

Should competition authorities intervene in digital markets or should these markets self-regulate? When and how should competition authorities intervene? Are authorities properly equipped and prepared to interfere? Will innovation be hindered if competition authorities proactively decide to intercede in digital markets with merger remedies or in the strategies of tech giants? These are the burning questions arising out of the effects of the fast-moving technology markets in Latin America's competition environment.

II. Brazil

Brazil is possibly the springboard to Latin America's technology market. With its population of 210 million people constantly generating data, Brazil has attracted the interest of many established companies and start-ups. Most global tech giants, such as Uber, Airbnb, Facebook, and Amazon, have offices in the country, and Brazilian start-ups are attracting significant foreign investment (*e.g.*, China's mobile giant Tencent has recently invested US$180 million in Nubank, a Brazilian fintech with more than 15 million users). According to McKinsey's April 2019 Brazil Digital Report, Brazilian consumers and users have been increasingly including technology in their daily routine, placing the country in the tech spotlight.

McKinsey reports that (i) two out of three Brazilians have access to smartphones and internet; (ii) Brazilians spend more than nine hours connected each day (one of the highest global rates); (iii) Brazil is the most active country on Netflix, within the non-English speaking countries; (iv) Brazil is the third main base of Facebook users and second of Instagram; (v) Google has a 97% plus market share of the e-search market, and it is the most accessed site in Brazil; and (vi) Brazil has 8 "unicorns" (understood as start-ups with private investments above US$1 billion) and joined the ranks of leading countries in terms of number of startups (as opposed to 16 in the UK, 13 in India, 10 in Germany and 14 in Israel). This seems to indicate that the answers to the "golden questions" that the Competition Authority in Brazil ("CADE") establishes may play an important role in the development of digital markets in Latin America.

CADE has shown great interest in understanding how digital markets work and their potential implications for competition in Brazil. It has even created a Task Force within the Authority, headed by the Department of Economic Studies, to assist all units involved in digital market issues. However, the appropriate situations and the willingness to intervene are still controversial among its members.

According to CADE's President, Alexandre Barreto, the level of intervention in digital markets should be minimal in order not to discourage innovation. He declared that "[d]ifferently from Europe, we don't have any perspective to go after tech companies to check if there's an abuse of dominant position or anticompetitive practice." On the other hand, Commissioner Paula Farani, who also shows a special interest in digital markets, has expressed that "[a]uthorities need to acknowledge that they are inexperienced and remedies in digital markets are difficult." She also appears to defend the sentiment that the fear to make mistakes should not prevent action by competition authorities; authorities should acknowledge that "[m]istakes will be made," and should be willing to fix them whenever necessary.

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[2] McKinsey & Company. Brazil Digital Report. (1st Edition, Apr. 2019), available at https://www.mckinsey.com/br/~/media/McKinsey/Locations/South%20America/Brazil/Our%20Insights/Brazil%20Digital%20Report/Brazil-Digital-Report-1st-Edition_Portuguese-vAjustado.ashx.

Diverging opinions are seen not only in public speeches, but also in the first decisions that CADE is rendering in digital markets. CADE recently ruled on four probes[3] involving digital markets (three of them against Google), but votes were not necessarily consistent – quite the contrary. For example, in the "Google Shopping" case, which investigated whether Google abused its search-engine in online shopping, half of the Tribunal members, following the strong opinion posed by Commissioner Paula Farani, took the view that Google was discriminating by giving preference to its own shopping service, suggesting a fine of BRL 30 million (US$7.5 million). The other half was not sufficiently convinced of the effects and found that, in the absence of an effective remedy, the authority should not interfere. The case was eventually dismissed with the deciding vote cast by President Barreto.

Despite many different views, the challenge on Latin American authorities has already been presented and agencies are preparing themselves. In addition to the Task Force, CADE has announced that it plans to have engineers and personnel with IT backgrounds help in digital market cases. The agency is also very active in relevant studies (such as the recent report BRICS in the digital economy: Competition Policy in Practice[4]), and events have been planned with the purpose of triggering these discussions with other agencies in Brazil and abroad. Interestingly, and in line with this new tendency, CADE has recently launched a mobile app to facilitate user access to case files, ruling sessions, and news reports.

III. Efforts in Other Latin American Countries

Similar moves are also seen in other Latin American jurisdictions. The Mexican Authority, the Federal Economic Competition Commission ("COFECE"), has recently published a comprehensive study called "Rethinking Competition in the Digital Economy," which discussed several of the challenges noted herein, including the need (or not) to regulate markets and new activities that emerge from the digital economy.[5] The Argentinean Authority seems to be more concerned on updating regulations to deal with digital markets. In one investigation of payment methods, the agency settled with the local VISA operator with non-discriminatory commitments, but also recommended to the Argentine Central Bank that it review and amend the regulation of the electronic payments' methods. It has also recently suggested to the Secretary of Information and Communication Technologies to amend the draft regulation for Interconnection and Access so as to include concepts such as essential facilities, relevant markets, and significant market power.

[3] The investigations refer to: Google's scraping practice; Googles' advertising platform; Google shopping; and a probe against Booking.com, Decolar.com, and Expedia involving price parity clauses.

[4] Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/brics_report.pdf.

[5] Available at https://www.cofece.mx/wp-content/uploads/2018/03/EC-EconomiaDigital_web_ENG_letter.pdf.

EUROPE

I. European Trends

In 2019, several remarkable developments with regard to digitization took place within European Competition law, including abuse of dominance proceedings against Amazon, discussions on platform regulation, the German proceedings against Facebook embedded in the overall European discourse on how to approach data in the digital economy, pricing algorithms, and merger control in the digital field.

II. Dominance of Online Platforms

Digital platforms have proven to be disruptive technologies in many markets and are leading to extensive structural changes across all industries. Because the attractiveness of platforms often depends on the large number of users, these network effects can also lead to market entry barriers. A dominant market position, once attained, can thus become entrenched quickly and strongly. Competition authorities are, therefore, especially concerned about the threat of market tipping, ultimately leading to monopolization of the market. In addition, platforms may restrict traders from using other platforms ("multi-homing") by contractual obligations or by establishing technical barriers to limit data interoperability.

In this context, there is ongoing discussion in Europe regarding whether there is a need for regulation of online platforms. The expert committee "Commission Competition Law 4.0," which was established by the German Federal Minister for Economic Affairs and Energy, for example, recommends imposing specific rules of conduct on dominant online platforms operating as intermediaries between companies and consumers ("B2C"), by way of a platform regulation.[6] Also, the Dutch Authority for Consumers & Markets suggested in its market study into mobile app stores that further investigation into options for ex-ante regulation might be warranted.[7]

Moreover, in 2019, competition authorities have paid special attention to dominant online platforms. For example, the European Commission opened an investigation to assess whether Amazon's use of data from independent retailers is a breach of EU competition law.[8] According to the European Commission, Amazon continuously collects data by providing a marketplace for independent sellers on its platform. Based on their preliminary investigation the European Commission concluded that Amazon appears to use competitively sensitive information about marketplace sellers, their products, and transactions on the marketplace for its own advantage.

Also, in response to competition concerns expressed by the German Federal Cartel Office ("FCO"), Amazon amended its terms of business for sellers on Amazon's online marketplaces in Europe, North America, and Asia.[9] The amendments address the numerous complaints about Amazon the FCO received from sellers: the unilateral exclusion of liability to Amazon's benefit; the termination and blocking of sellers' accounts; dictating the court of jurisdiction in case of a dispute; the handling of product information; and many other issues.

III. The Significance of Data in the Digital Economy

Another key issue for digital business models and EU competition law is the use of data. Some say that data is the new oil. It certainly is a valuable resource for any company that aims to place the right products or services with potential customers. This is of particular importance to "multi-sided platforms," which often have consumers on one side of the platform and companies trying to reach these consumers via the platform on the other side. Indeed, even the definition of multi-sided platforms has become a topic for discussion.

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[6] Available at https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.pdf?__blob=publicationFile&v=12.

[7] Dutch Authority for Consumers & Markets, Market study into mobile app stores (Apr. 11, 2019, available at https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf.

[8] Press Release from the European Commission, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon* (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

[9] Press Release from German Federal Cartel Office, *Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces* (July 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html?nn=3591568.

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For a number of years, the German Federal Cartel Office has been at the forefront of vertical restrictions with aggressive enforcement and strict guidance regarding, for example, retail price maintenance. The case that has probably attracted the greatest attention so far is the FCO's *Facebook* decision.[10] In early 2019, the FCO found that Facebook had abused its dominant position in the German market for social networks by breaching data protection law when collecting, using, and merging data from the Facebook website, Facebook-owned services, such as WhatsApp and Instagram, and third party websites.

The decision of the FCO has sparked a discussion especially about the relationship between competition law and European data protection law. Upon appeal by Facebook, the Higher Regional Court of Düsseldorf granted Facebook interim relief in August 2019 ordering that the FCO's decision should have suspended in effect as it is likely that the FCO was wrong in issuing its decision. The FCO appealed the ruling to the German Federal Court of Justice, but there is yet to be a decision. Furthermore, it remains to be seen how the Higher Regional Court of Düsseldorf and the German Federal Court of Justice will decide on the main proceedings following this interim relief proceeding.

In general terms, Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements and concerted practices between undertakings that restrict competition unless the pro-competitive effects outweigh the anticompetitive effects in accordance with the cumulative criteria defined in Article 101(3) TFEU. The Vertical Block Exemption Regulation ("VBER") declared the prohibition of Article 101(1) TFEU inapplicable to certain categories of vertical agreements that presumably satisfy the conditions of Article 101(3) TFEU.

The current version of the VBER expires in 2022, prompting the Commission to undertake a review of the VBER and its accompanying Guidelines, which involves a public consultation that launched in February 2019. Stakeholders were invited to submit their comments up to the end of May 2019.[11] The respondents were broadly satisfied with the VBER's contribution to the functioning of the market, but they also identified shortcomings in its application to online sales restrictions. The last decade saw a surge in online sales and e-commerce developments, but many perceive that the current VBER is ill-equipped for these new circumstances. Issues mainly arise with the application of the VBER to two-sided platforms, price parity clauses, dual pricing, and other forms of online sales restrictions. Clear guidance is necessary as national competition authorities of the EU Member States have been using the room to maneuver left by the VBER to try to push the law in particular directions.

It is generally expected that the Commission will want to extend the application of the present VBER without a fundamental overhaul, but with some changes to provide for clearer guidance regarding the issues that have become prominent due to the rise of online sales. The Commission's Staff Working Document, which should clarify its intentions, is expected to be adopted in the second quarter of 2020.

The Commission has increased its efforts in vertical enforcement, notably regarding e-commerce sales restrictions and licensing agreements. This led to decisions in cases regarding Guess, Nike, Sanrio, and NBCUniversal, in which the Commission alleged that the companies concerned sought to control online competition. Interestingly, all four decisions were adopted under the Commission's new cooperation procedure, which resulted in significant fine reductions of up to 50%. These cases were the first enforcement actions regarding vertical infringement by the Commission in many years.

In the Guess action, the authorized distributors and retailers in a selective distribution network were restricted from bidding on Google AdWords, could only sell online with prior authorization by Guess, faced cross-selling and territorial restrictions, and were subject to resale price maintenance.[12] Such restrictions are deemed hard-core infringements as they result in compartmentalization of the EU Single Market. Interestingly, regarding the restrictions on the use of online search advertising through Google AdWords, the Commission reproached Guess because not only did these restrictions limit the findability of the authorized retailers towards consumers, but they also reduced the advertising costs of Guess as it did not have to compete for advertisement space with its resellers.

[10] Press Release from German Federal Cartel Office, *Bundeskartellamt prohibits Facebook from combining user data from different sources* (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568.

[11] A summary of all comments, as well as the contributions itself, are currently available to the public on the website of the Commission. *See* Review of the Vertical Block Exemption Regulation (last visited Feb. 19, 2020), https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

[12] Press Release from the European Commission, *Antitrust: Commission fines Guess €40 million for anticompetitive agreements to block cross-border sales* (Dec. 17, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6844.

The Nike,[13] Sanrio,[14] and NBCUniversal[15] cases concern non-exclusive licensing agreements, in which territorial restrictions for the sale of various products were imposed on licensees. In all cases, the licensees were prohibited to sell out-of-territory, both online and offline, and were subject to various penalties if they acted in violation of these prohibitions. Again, the Commission considered that these licensing agreements, despite their non-exclusive nature, served to partition the Single Market. Such practices, by their nature, have as their object the restriction of competition within the meaning of Article 101(1) of TFEU.[16]

Throughout Europe, competition authorities tend to focus more than ever on the significance of data. For example, the Italian Competition Authority, together with the telecommunications regulator and the data protection authority, published a set of guidelines and policy recommendations on how to address big data.[17] Similarly, the UK Competition and Markets Authority Consumer launched a market study which shall, among other things, assess whether consumers are able and willing to control how data about them is used and collected by online platforms.[18] The Austrian Regulatory Authority for Telecommunications is joining forces with the Austrian Federal Competition Authority to monitor how data is being used on digital platforms, such as messaging applications, operating systems, and app stores.

Another aspect of data relates to the obligations to grant third-party access. There is currently a heated debate in Europe whether and, if so, when the refusal of a dominant firm to grant access to data may result in an abuse of dominance. This is particularly relevant for the automotive industry, in which independent service providers seek access to in-vehicle data collected by OEMs in the area of connected driving.

IV. Machine Learning and Pricing Algorithms

Competition authorities in Europe have been focusing on the potential competitive harm that may result from practices enabled or facilitated by algorithms, such as collusive pricing, price discrimination, or resale price maintenance. After the French and German competition authorities already published a joint working paper "Competition Law and Data,"[19] they continued their collaboration with the recently published joint "Algorithms and Competition" study.[20] While the study acknowledges that the use of algorithms can provide important benefits for the economy, it also points out that algorithms might have detrimental effects on the competitive functioning of markets. In particular, the study distinguishes between three different scenarios: (i) algorithms as supporters or facilitators of "traditional" anticompetitive practices, (ii) algorithm-driven collusion between competitors involving a third party, and (iii) collusion induced by the parallel use of individual algorithms. While in the first two scenarios, an anticompetitive outcome is being reached directly via an algorithm or through a hub-and-spoke constellation, in the third scenario an infringement of competition law is considered more challenging to prove by competition authorities. So far, there have not been any cases in which these issues played a major role. However, with the focus of competition authorities on these topics, many predict that we will see the first enforcement actions in this field in the near future.

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[13] Press Release from the European Commission, *Antitrust: Commission fines Nike €12.5 million for restricting cross-border sales of merchandising products* (Mar. 25, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1828.

[14] Press Release from the European Commission, *Antitrust: Commission fines Sanrio €6.2 million for restricting cross-border sales of merchandising products featuring Hello Kitty characters* (July 9, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_3950.

[15] Press Release from the European Commission, *Antitrust: Commission fines NBCUniversal €14.3 million for restricting sales of film merchandise products* (Jan. 30, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_157.

[16] Article 101 of the TFEU prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."

[17] Big Data Joint Survey, Guidelines and Policy Recommendations (July 2019), available at https://en.agcm.it/dotcmsdoc/pressrelease/Big%20Data_Guidelines%20and%20policy%20recommendations.pdf.

[18] Online platforms and digital advertising market study (last visited Feb. 22, 2012), https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study.

[19] French Competition Authority and German Federal Cartel Office, Competition Law and Data (May 10, 2016), available at http://bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.

[20] French Competition Authority and German Federal Cartel Office, Algorithms and Competition (Nov. 2019), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.pdf?__blob=publicationFile&v=5.

V. Merger Control in the Digital Field

2019 saw many acquisitions by dominant digital platforms of small start-ups with a quickly growing user base and significant competitive potential. This has led to a discussion whether the current EU merger control regime needs to be adjusted to better address concerns relating to early elimination of potential rivals, which are also referred to as "killer acquisitions." Many acquisitions may escape merger control because they take place when start-ups do not (yet) generate sufficient turnover to meet the relevant thresholds.

One way to tackle this issue could be to adjust jurisdictional thresholds in order to catch these transactions. Some EU Member States, such as Germany and Austria, have recently introduced new merger control thresholds based on the value of the transaction. Whether such a threshold could also be introduced at the EU-level to the EU Merger Regulation is one of the subjects analysed in the report "Competition policy for the digital era," which was issued by the EU's Competition Commissioner, Margrethe Vestager.[21] According to the report, which was published in April last year, it is too early to change the thresholds of the EU Merger Regulation as the practical effects of transaction value thresholds still have to be verified. As a result, the report suggests monitoring the performance of the newly introduced thresholds of the above-mentioned Member States. It remains to be seen whether such thresholds constitute a successful means of protecting nascent competition and innovations. At least in Germany, the transaction value threshold so far mostly has caught transactions in the life sciences or pharmaceutical industry rather than in the digital field.

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[21] Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, Competition Policy in the Digital Era (2019), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

UNITED STATES

I. The Current Landscape

In 2019, discussion and debate abounded over whether and how antitrust law should be used to curb the conduct of big technology companies and to protect digital markets.

As to the federal legislature, in January 2019, a group of Democratic Senators, including former Presidential nominee Senator Amy Klobuchar, introduced Senate Bill 307, "Consolidation Prevention and Competition Promotion Act of 2019," which aims to increase the antitrust burden on large tech firms in merger reviews. Among other items, the bill seeks to ban companies with a market cap of $100 billion or more from participating in mergers and to prohibit companies from acquiring more than $5 billion in securities or assets of an entity by shifting the burden to the parties to prove that the deal will not "materially lessen competition."[22] On the presidential campaign trail, Senator Elizabeth Warren even called for the break-up of big tech companies, the unwinding of certain mergers such as Facebook/WhatsApp, and a prohibition against platforms both offering an e-commerce marketplace and participating in it.[23] On the other hand, the Republican Chairman of the Antitrust Subcommittee of the Senate Judiciary Committee, Senator Mike Lee, has called for restraint and questions whether antitrust law is the appropriate tool to regulate the tech industry, arguing that antitrust enforcement entails highly fact-specific inquiries and rigorous economic analysis and not "easy generalizations" or "blanket condemnations" of an industry.[24] Both the Senate and House of Representatives have held hearings on and demanded vast quantities of documents from tech companies regarding these issues. For example, the House held a multi-part hearing on "Online Platforms and Market Power," and the Senate held a hearing entitled "Competition in Digital Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms."[25]

In addition, federal antitrust enforcement agencies began studying and investigating the tech industry. In February 2019, the Federal Trade Commission ("FTC") created the Technology Task Force to monitor competition and investigate potential anticompetitive conduct in digital markets, including the review of consummated mergers in the space.

In addition, federal antitrust enforcement agencies began studying and investigating the tech industry. In February 2019, the Federal Trade Commission ("FTC") created the Technology Task Force to monitor competition and investigate potential anticompetitive conduct in digital markets, including the review of consummated mergers in the space.[26] Then, a year later in February 2020, the FTC announced that it had issued special orders to Amazon, Apple, Facebook, Google, and Microsoft requesting documents and information on the terms, scope, structure, and purpose of smaller transactions that each company consummated over the past decade that were not reportable under the Hart-Scott-Rodino Act ("HSR").[27] With this information, the FTC will conduct a study to assess whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below the HSR thresholds and to evaluate whether more extensive

[22] Consolidation Prevention and Competition Promotion Act of 2019, S. 307, 116th Cong. (2019).

[23] Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Teach Giants Like Amazon and Facebook*, New York Times, Mar. 8, 2019.

[24] Sen. Mike Lee, *Facebook, Google, Others Have Big Problems, But Antitrust Law Is Not the Answer*, Fox News, Mar. 22, 2019.

[25] *See, e.g., Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies Before the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law* (Nov. 13, 2019), available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2287; *Competition in Digital Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms Before the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights* (Sept. 24, 2019), available at https://www.judiciary.senate.gov/meetings/competition-in-digital-technology-markets-examining-acquisitions-of-nascent-or-potential-competitors-by-digital-platforms.

[26] Press Release from the Federal Trade Commission, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets* (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

[27] Press Release from the Federal Trade Commission, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies?utm_source=slider.

premerger reporting requirements are needed for tech mergers.[28] The Department of Justice Antitrust Division ("DOJ") is also examining the tech industry. In July 2019, it announced that it is reviewing whether market-leading digital platforms have market power and are engaging in anticompetitive conduct.[29]

Although the FTC is considering the possibility of premerger notification reporting changes for tech deals, both the FTC and DOJ have expressed opposition to any major overhaul of US antitrust law.[30] Indeed, FTC Chairman Joseph Simons has made clear that "current law provides the Commission with several potential avenues to counter anticompetitive" conduct and mergers by technology firms, and the DOJ has highlighted the importance of using "evidence-based enforcement in digital markets" within the "existing legal framework."[31] Moreover, regulators are wary of over-enforcement of the antitrust laws against technology companies, which could stymy innovation.[32] As Assistant Attorney General Makan Delrahim has stated, "Big is not bad. Big behaving badly is bad."[33]

Finally, it is not only the federal government that has taken an interest in these tech giants; states have also expressed concerns regarding the impact these companies have on competition. More than a dozen state attorneys general have begun their own antitrust inquiries into technology firms.[34]

It remains to be seen what specific challenges the federal agencies and states will bring arising out of their current investigations and reviews of large technology companies. Although it seems unlikely that any dramatic changes will be made to the antitrust laws in the near term, given the intense focus on digital markets, it is very possible that the authorities make some adjustments as to how they enforce those laws and maybe even to the laws themselves.

II. Digital Economy Case Study: Two-Sided Platforms in *Surescripts*

Typically, a two-sided platform occurs when two user groups interact through an intermediary for the benefit of both groups. Common examples of these platforms are Amazon, Uber, Airbnb, and eBay. An aspect of two-sided platforms is that they can create dependency between users on both sides of the platform, called a network effect. In a two-sided platform with network effects, the value that one group derives from the platform is determined by the number of participants on the other side, and vice versa. Therefore, neither side will join the platform unless they believe the other side will also join – what regulators call the "chicken-and-egg-problem."[35] This chicken-and-egg-problem increases the barriers for any potential new platform entrant. Based on this theory, the FTC brought suit against health information company Surescripts in April 2019.

Surescripts provides two distinct e-prescribing platforms. First, it provides a platform linking healthcare providers' electronic health records ("EHR") to pharmacies, called routing transactions. Second, it provides a platform for the electronic transmission of a patient's formulary and insurance coverage information from a pharmacy benefit manager ("PBM") to the prescribing provider's EHR, called eligibility transactions.[36] In its complaint, the FTC alleged that, in reaction to the threat of new competition, Surescripts maintained its near monopoly of these routing and eligibility e-prescribing markets by imposing anticompetitive contract provisions and threats.[37]

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[28] *Id.*

[29] Press Release from the Dep't of Justice, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

[30] *See*, *e.g.*, Address of FTC Commissioner Christine S. Wilson, *All (Industries in the Same Boat: Staying the Course on the High Seas of Tech*, at 8-9 (Mar. 28, 2019) ("Although much interesting work remains to be done, I see little about Big Data that is inherently different from the types of markets and types of cases that we have seen before. I therefore see little reason to create special antitrust rules for mergers and conduct cases that implicate its use."), https://www.ftc.gov/system/files/documents/public_statements/1512148/wilson_remarks_ccia_3-28-19.pdf; Remarks of Assistant Attorney General Makan Delrahim, *"Blind[ing] Me With Science": Antitrust, Data, and Digital Markets* (Nov. 8, 2019) ("While the Division is always willing to engage with Congress on legislative proposals, it bears repeating that our existing framework is flexible enough to detect and to address harms in old industries and emerging ones alike."), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition.

[31] FTC Chairman Joseph Simons, Prepared Statement of the Federal Trade Commission Before the Subcommittee on Antitrust, Commercial and Administrative Law Of the Judiciary Committee United States House of Representatives, Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies (Nov. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1553856/p180101_house_competition_oversight_testimony_-_platforms_part_4_11-13-2019.pdf; Division Update Spring 2019, The Division Tackles Digital Markets, available at https://www.justice.gov/atr/division-operations/division-update-spring-2019/division-tackles-digital-markets.

[32] Remarks of Assistant Attorney General Makan Delrahim, *"As Time Goes By" Protecting the Future of Innovation Through Effective Antitrust Enforcement Markets* (Nov. 8, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-abas-2019-antitrust-fall-forum.

[33] Rob Copeland, *Breakup of Tech Giants 'on the Table,' U.S. Antitrust Chief Says*, Wall Street Journal, updated Oct. 22, 2019.

[34] Steve Lohr, *State Attorneys General Said to Be Near Formal Investigation of Tech Companies*, New York Times, Aug. 19, 2019.

[35] Complaint at 6-7, *Federal Trade Commission v. Surescripts, LLC*, No. 1:19-cv-01080 (D.D.C. Apr. 1, 2019).

[36] *Id.* at 5-6.

[37] *Id.* at 13-14.

Specifically, per the FTC allegations, Surescripts imposed exclusivity in its pharmacy, PBM, and EHR contracts through offering loyalty discounts to those that used Surescripts for all of their routing and/or eligibility transactions and by penalizing any company that switched from exclusive to non-exclusive agreements.[38] Second, Surescripts provided an exclusivity discount and required a non-compete provision with one of its largest customers and a potential rival.[39] Third, Surescripts used contract provisions and coercion to secure a large EHR customer away from a competitor by requiring the customer to end its routing connection to the competitor's network and by threatening to cut the customer off from important pharmacy and medication history information unless it agreed to exclusivity.[40]

According to the FTC, through these contractual provisions and threats, Surescripts was able to maintain at least a 95% share in each of the relevant e-prescribing markets. Through Surescripts's control of such a large portion of the transaction volume, a rival could not overcome the chicken-and-egg-problem; a rival would not be able to convince one side of its platform that there are a substantial number of participants on the other side, as too many participants were exclusive to Surescripts. The FTC alleged that with its monopoly power, Surescripts harmed competition – imposing high prices, stalling innovation, and reducing quality – and thus violated Section 5 of the FTC Act and Section 2 of the Sherman Act.[41]

Surescripts moved to dismiss the FTC's complaint based on its argument that the FTC must plead facts showing "anticompetitive effects in the market as a whole and cannot focus only on the effects on one side" of the platform. The U.S. District Court for the District of Columbia found that the FTC's complaint does take into account both sides of the network, alleging that Surescripts's loyalty program "foreclosed at least 70% of each market," *i.e.*, at least 70% of both two-sided markets, at issue and that the net price based on both sides of the market would be lower but for Surescripts's anticompetitive course of conduct.[42]

III. No Monopoly Leveraging in the United States

Unlike in other areas of the world, such as the European Union,[43] US antitrust law does not recognize monopoly leveraging.[44] In other words, a big tech firm using its monopoly in one market to gain a competitive advantage in a second market does not necessarily violate antitrust law. Instead, US law finds a violation only if the threat of monopoly in the second market is dangerously probable.[45] Because leveraging can generate efficiencies, such as technology ties resulting in product integration or improvements that benefit consumers, courts and regulators do not want to chill pro-competitive conduct by making leveraging illegal.

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[38] *Id.* at 14-17.

[39] *Id.* at 19-21, 32-37.

[40] *Id.* at 22-27.

[41] *Id.* at 39, 43-48, 51-54. Section 5 of the FTC Act prohibits unfair methods of competition. 15 U.S.C. § 45. Sherman Act Section 2 forbids monopolization and attempted monopolization. 15 U.S.C. § 2.

[42] *Federal Trade Commission v. Surescripts, LLC*, No. 1:19-cv-01080, at 1, 11-18 (D.D.C. Jan. 17, 2020).

[43] Press Release from the European Commission, *Antitrust: Commission fines Google € 4.2 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (June 26, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784.

[44] Under Section 5 of the FTC Act and the FTC's broad authority to determine enforcement priorities thereunder, it is possible that the FTC could use the statute to pursue a monopoly leverage theory. Only the FTC, however, is permitted to bring actions under the statute.

[45] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004).

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