REVIEW OF COMPETITION LAW CASES FROM OTHER JURISDICTIONS

A. Introduction

The table below contains cases from different jurisdictions, aimed at deepening the competition knowledge and entrenching international best practice in case analysis and eventual decision making.

B. Specific cases

The following cases are highlighted for further review on potential lessons on competition enforcement by the Authority.

Country	Sector/ Market	Parties	Case Summary	Lesson Learnt
MERGERS				
US Federal Trade Commission	Health / Medical services	**DaVita Inc. -** Owns and manages outpatient dialysis facilities throughout the United States. Provides acute inpatient dialysis services within hospitals. **The University of Utah** – Has a dialysis unit	The Federal Trade Commission issued a proposed order imposing strict limits on future mergers by DaVita, Inc., a dialysis service provider with a history of fueling consolidation in life-saving health industries. The complaint alleged that DaVita's proposed acquisition of the University of Utah Health's dialysis clinics would reduce competition in vital outpatient dialysis services in the Provo, Utah market. Under the proposed order, DaVita is required to divest three Provo-area dialysis clinics to Sanderling Renal Services, Inc. and is prohibited from entering into or enforcing non-compete agreements and other employee restrictions.	When defining the relevant market, it is imperative to consider all aspects: the product market, the geographical market, and the barriers to entry. It is also vital to consider all the possible economic effects of the merged entity to the competition in all the relevant markets.

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			DaVita had proposed the acquisition of all the assets of the dialysis business of the University of Utah dated September 23, 2021. DaVita was to acquire all rights, titles, and interests in, and substantially all the assets and properties of the University's dialysis business, including its 18 dialysis clinics. **Relevant Market:** Provision of outpatient dialysis services. The relevant geographical market is within Provo, Utah area. **Market Structure:** In Utah there were five providers of outpatient dialysis services: The University, Fresenius, DaVita, Intermountain Healthcare, and Anthem. In the greater Provo market, there were only three providers: The University (which had three clinics in the market), DaVita (four clinics), and Fresenius (one clinic). The University and DaVita directly and substantially competed in the relevant geographic market. **Barriers to entry:** Entry into the relevant market would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the expected anticompetitive effects of the Agreement.	

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			• The most significant entry barrier is engaging a nephrologist with an established referral base to serve as the dialysis clinic's medical director. By law, each dialysis clinic must have a nephrologist medical director. Locating and contracting with a nephrologist to serve as medical director is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. • Finding patients may also be difficult if the nephrologist does not have local ties, because most nephrologists typically refer their patients to the clinic at which they (or one of their partners) are medical director. • A potential entrant into the relevant markets would also need to develop a reputation for consistent quality and service before referrals would be made. • Additionally, other things being equal, an area must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry.	

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			The effects of the Agreement - If consummated, the acquisition would substantially lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. The Acquisition would eliminate actual, direct, and substantial competition between DaVita and University in the market for outpatient dialysis services in the relevant area, increasing the ability of the merged entity unilaterally to raise prices for outpatient dialysis services and reducing incentives to improve service or quality in the relevant market.	
South Africa (CCSA)	Recycled paper	Corruseal Group (Pty) Ltd (Corruseal) , Neopak (Pty) Ltd (Neopak)	• The proposed merger whereby Corruseal Group (Pty) Ltd (Corruseal) intends to acquire Neopak (Pty) Ltd (Neopak) because the merger is likely to result in a substantial prevention and lessening of competition • The investigation shows that the merger will result in the merged entity having high market shares irrespective of	In assessment of mergers there is need to consider, upstream, downstream, import markets that can be affected by the transaction and weigh against public interest.

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			whether production capacity, production volumes or domestic sales volumes are used to measure their size. The Commission found that the merged entity will have the ability to act unilaterally by, for example, raising the prices of recycled containerboard, refusing to supply competitors of Corruseal who also rely on Neopak for recycled containerboard, or supplying downstream competitors on poor terms. • The increase in concentration brought about by the merger is of particular concern given that it would further increase concentration in an already highly concentrated upstream market (at the paper manufacturing level), where there is a history of cartel investigations. • This Commission further found that barriers to entry into the upstream market are high the Commission found that imports of recycled containerboard paper is not a viable alternative for downstream market participants due to the prohibitive price of imports.	

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			• the merger could not be justified on public interest grounds • Prohibited the merger on Corruseal and Neopak	
RTPs				
Germany (Bundeskartellamt – Germany Competition Authority)	Manufacture and distribution of consumer electronics	Bose GmbH (Bose) They Manufacture and distribute consumer electronics. The company mainly focuses on the distribution of audio products, especially speakers and headphones.	• Bose GmbH company which deals with Manufacturing and distributing consumer electronics was accused of Resale Maintenance Price which hampered the free formation of prices in the distribution of their audio products through the authorized dealers involved. The company tried to make sure that the prices for headphones or speakers, for example, did not significantly undercut the recommended retail price. The Bundeskartellamt's investigation also discovered that Bose employees in particular agreed on concerted measures for setting resale prices with resellers. Bose was also said to have intervened on several occasions against sales partners who deviated from the RRP. • In some instances, the resellers themselves complained to Bose about low	The company was accused of Resale Maintenance Price which hampered the free formation of prices in the distribution of their audio products through the authorized dealers involved. The company tried to make sure that the prices for headphones or speakers, for example, did not significantly undercut the recommended retail price Vertical resale maintenance price can also happen in Kenya and RPM is prohibited under the Act as indicated under section

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			resale prices offered by other authorized resellers, soliciting intervention by Bose. The proceeding was initiated within the context of a request for official assistance by the Austrian Competition Authority and a dawn raid conducted in March 2018. • The Bundeskartellamt has imposed a fine totaling around 7 million euros on Bose GmbH. In setting the fine the authority took into account that Bose had cooperated extensively with the Bundeskartellamt and that a settlement could be reached. No fines were imposed on the dealers involved and the persons acting on behalf of Bose.	21(3)(d).
South Africa (CCSA)	Face Masks	Tsutsumani Business Enterprises, South African Police Services	• South African Police Services (SAPS) procured face masks for its 197 000 members during the pandemic. SAPS required nine million masks per month from their prequalified supplier Tsutsumani Business Enterprises • Tsutsumani exploited the crisis presented by the pandemic, and in response to a request for a quotation sought on an	Evaluation of government procurement of COVID-19 medications and related products to government. Suppliers may have taken advantage of the crisis to engage in ACPs.

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			emergency basis, charged the SAPS R16 250 000 (sixteen million two hundred and fifty thousand rand) for the bulk supply of 500 000 surgical face masks during the hard lockdown in April 2020. The Tribunal found that Tsutsumani charged the SAPS an excessive price of R32.50 (inclusive of VAT) per mask. • Tsutsumani earned a total of 87% mark-up and 46% gross margin per mask. The Commission estimated that the excessive profits earned by Tsutsumani amounted to R5, 3 million rand. • The Tribunal fined Tsutsumani the maximum administrative penalty of 10% of its relevant turnover in the sum of R3 441 689.10 (three million four hundred and forty-one thousand six hundred and eighty-nine rand and ten cents).	
Japan (Japan Fair Trade Commission)	Pharmaceutical Industry	JFTC, National Hospital Organization, Medicine wholesalers in Kyushu	• On Nov. 9, 2021, JFTC conducted an on-site inspection of six major medicine wholesalers in Kyushu suspected of bid-rigging pharmaceuticals ordered by the National Hospital Organization.	Japanese Antimonopoly Act permits for imposition of orders on executives of companies that engage in competition law contraventions

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			• According to the JFTC, from around 2016 at the latest, six medicine wholesalers are suspected of trying to coordinate orders for thirty one (31) hospitals drugs by selecting in advance the winning bidder. The annual order size is around JPY 20 billion. • On 7th January 2022, three of the six medicine wholesalers were convicted of engaging in bid-rigging for pharmaceuticals made by the Japan Community Healthcare Organization in violation of the Antimonopoly Act in 2019. • The JFTC fined each of the three companies 250 million yen and imposed a suspended sentence on seven former company executives.	
Japan (JFTC)	Securities Exchange	JFC, Japanese stock market, Financial Services Agency	• The Japan Fair Trade Commission (JFTC) launched an investigation into the pricing of initial public offerings (IPO), the first investigation of its kind. In Japan, the difference between the offer price and the opening share price was larger than that	There is need for surveillance for competition law concerns with regard to Initial Public Offers (IPOs).

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			in the United States and Europe, resulting in companies raising less money. • The JFTC reportedly sent questionnaires to approximately 100 companies listed on the Japanese stock market, requesting the contents of the negotiation with the underwriting securities companies regarding the determination of the IPO price, level of satisfaction with the offer price. • The JFTC also will work with the Financial Services Agency to ascertain the facts and scrutinize whether there are any problems under the Antimonopoly Law or in light of Japan's competition policy.	
South Africa (CCSA)	Airlines	South African Civil Aviation Authority, Comair PTY Ltd, Kulula.com and British Airways	• The South African Civil Aviation Authority announced that it had suspended with immediate effect the Air Operator Certificate of Comair PTY Ltd, with its subsidiaries Kulula.com and British Airways. Consequently, this suspension meant that significant airline seat capacity had been removed from the market and that would undoubtedly	Preventive strategies can be used to avoid or reduce the intensity of ACPs in the market following a government policy or action.

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			result in travelers having scramble up the remaining tickets in higher fare buckets. It emerged that there are reports and complaints of large increases in price for seats on the remaining airlines some even quoting R5000 single flight ticket from Johannesburg to Cape Town. Though the removal of airlines does certainly have impact on the airfares, the situation that stranded passengers found themselves in should not be unduly exploited by other airlines. • The Commission encouraged all airlines to put more capacity into the market where possible until the Comair situation has been resolved in order to assist stranded passengers at more moderate prices. In addition, where the Commission finds that airlines have actively removed seats from low fare buckets and allocated them to higher priced fare buckets or introduced new much higher fare buckets on popular routes, then the Commission may consider this an act of price gouging	

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			designed to deliberately exploit the current situation. The Commission would also be engaging airlines to establish what plans they have in place to address the current situation and any complaints from travellers about prices in the market.	
CONSUMER PROTECTION				
Canada (Competition Bureau of Canada)	Environmental claims and greenwashing	Keurig Canada	• Keurig Canada Inc. reached an agreement with the Competition Bureau to resolve concerns over false or misleading environmental claims made to consumers about the recyclability of its single-use Keurig K-Cup pods. • The Bureau's investigation concluded that Keurig Canada's claims regarding the recyclability of its single-use coffee pods are false or misleading in areas where they are not accepted for recycling. The Bureau found that, outside the provinces of British Columbia and Quebec, K-Cup pods are currently not widely accepted in municipal recycling programs. The Bureau also concluded	Companies may sometimes portray products or services as having more environmental benefits than they truly have. False or misleading claims by businesses to promote "greener" products harm consumers who are unable to make informed purchasing decisions, as well as competition and businesses who actually offer products with a lower environmental impact.

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			that Keurig Canada's claims about the steps involved to prepare the pods for recycling are false or misleading in certain municipalities. Keurig Canada's claims give the impression that consumers can prepare the pods for recycling by peeling the lid off and emptying out the coffee grounds, but some local recycling programs require additional steps to recycle the pods. Keurig Canada's recyclable claims are made on its website, via social media and on text and logos on the K-Cup pods and packaging. The settlement also covers recyclability claims made on packages of K-cup pods for brands marketed in partnership with Keurig Canada. • As part of this settlement, Keurig Canada agreed to: i. Pay a $3 million penalty and donate $800,000 to a Canadian charitable organisation focused on environmental causes ii. Pay an additional $85,000 for the costs of the Bureau's investigation	

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			iii. Change its recyclable claims and the packaging of the K-Cup pods iv. Publish corrective notices about the recyclability of its product on its websites, on social media, in national and local news media, in the packaging of all new brewing machines and via email to its subscribers v. Enhance its corporate compliance program as necessary to promote compliance with the laws and prevent deceptive marketing issues in the future	
BUYER POWER				
US Federal Trade Commission	Logistics	Amazon	• In 2015, Amazon launched Amazon Flex, a service through which consumers can sign up as drivers to deliver products to Amazon customers. Amazon pays drivers for making deliveries, and for some deliveries, allows customers to tip their drivers. • **From 2015** through late 2016, Amazon paid drivers at least $18 per hour plus 100% of customer tips, as represented to drivers at the time of enrollment. During that period, Amazon also displayed to	Could this be an issue of Abuse of Buyer Power or Consumer protection? Interesting case for further discussion

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			drivers the amount they had been tipped. • **Beginning in late 2016**, however, Amazon made changes to the program to reduce its costs. At that point, Amazon implemented what it called "variable base pay" for Amazon Flex drivers on a rolling basis in various locations across the country. Under the variable base pay approach, for over two and a half years, Amazon secretly reduced its own contribution to drivers' pay to an algorithmically set, internal "base rate" using data it collected about average tips in the area. The base rate varied by location and sometimes varied within the same market. But this algorithmically set "base rate" often was below the $18-$25 per hour range that Amazon had promised at the time of drivers' enrollment and in specific block offers. 8 33. • Under this approach, rather than provide drivers 100% of tips in addition to the range it offered drivers in a delivery block, Amazon treated the bottom of the	

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			range as its guaranteed minimum payment and often used drivers' tips to meet that minimum. In the App, Amazon displayed driver earnings as the combined total of its base rate and any customer tip—it did not separately display to drivers the amount of any customer tip. This practice contradicted Amazon's representation to drivers and consumers' expectations that drivers would receive 100% of customer tips on top of their offered pay. Through variable base pay, Amazon harmed both its drivers and its customers. Drivers received less than Amazon promised them for completing delivery blocks, and customers paid over $61 million in tips meant for drivers that Amazon instead diverted to subsidize its own labor costs. • **In late 2018 and early 2019,** news articles suggested that Amazon was secretly using customer tips to fund guaranteed payments to drivers. Amazon continued these practices for over two and a half years despite hundreds of complaints	

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			from drivers, critical media reports, and internal recognition that it was misguiding consumers. • Amazon changed its practices only after learning it was under investigation by the FTC. **On May 23, 2019**, the FTC issued a civil investigative demand ("CID") to Amazon seeking information and records relating to Amazon Flex, including Amazon's representation that Amazon Flex drivers receive 100% of their tips. **On August 22, 2019,** Amazon announced to its current drivers an "Updated Earnings Experience," which was similar to the original compensation program that had been in effect from 2015 through late 2016 at the start of the Amazon Flex program. • The acts and practices of Respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.	