VIRTUAL ROUND TABLE

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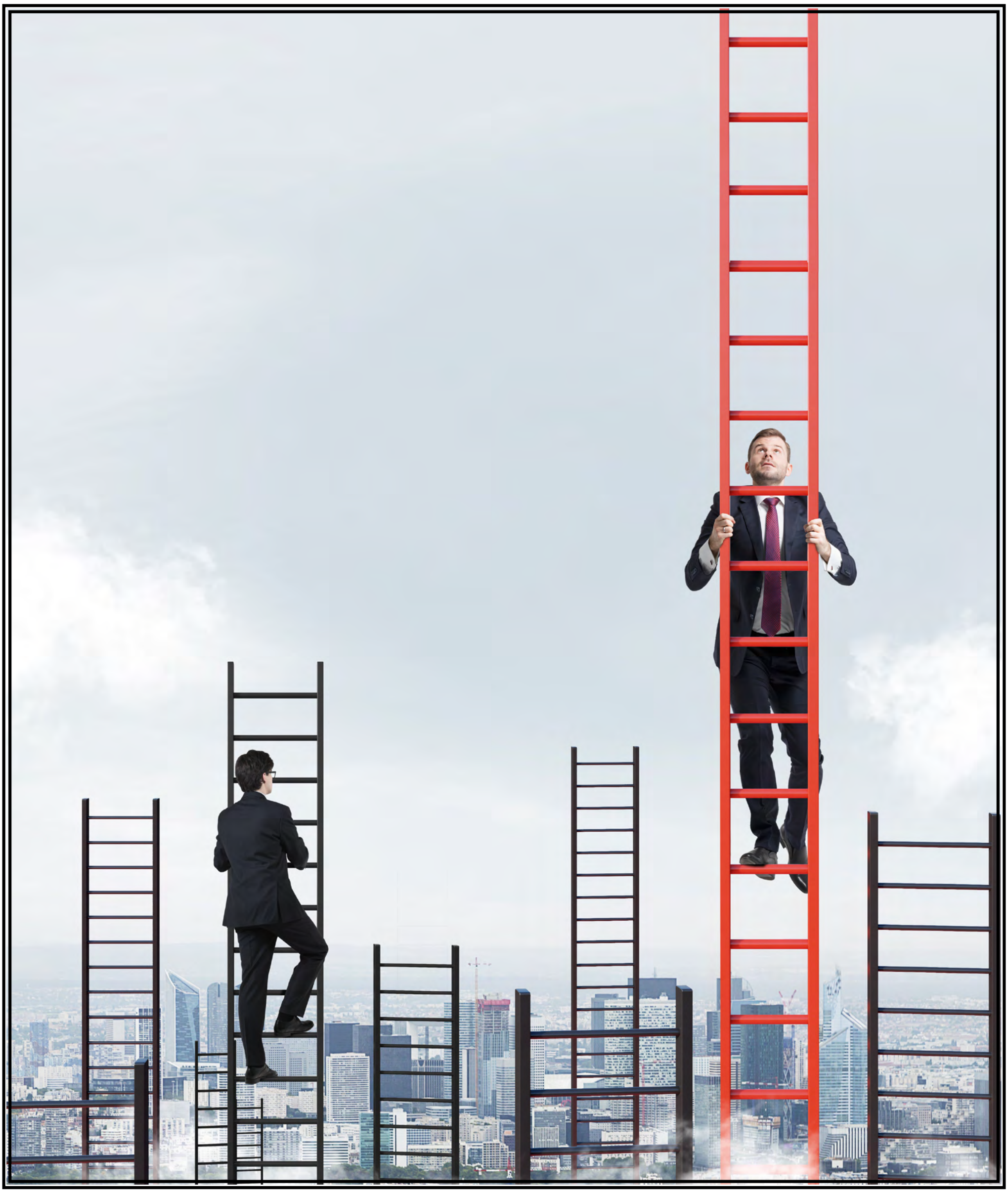
COMPETITION & ANTITRUST 2016



MEET THE EXPERTS

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Michael is a respected and practised litigator who acts for and advises parties in a wide range of competition matters, a variety of commercial disputes, including contractual disputes, shareholders' disputes, commercial fraud, and employment matters, and also in administrative law and constitutional issues.

Michael has also successfully represented the Commissioner of Competition in cases before the Competition Tribunal. Additionally, he has acted as trial and appellate counsel before all levels of court, including the Superior Court of Justice and Court of Appeal for Ontario, the Federal Court of Appeal, and the Supreme Court of Canada.

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Anthony Maton, London Managing Partner at Hausfeld, has over 20 years experience litigating claims in the UK and other jurisdictions. Anthony has established Hausfeld as the market leading claimant firm in Europe and been at the centre of the development of European competition damages litigation. Anthony is regarded by peers in the profession as one of the leading competition litigators and is a much sought-after speaker on the global competition circuit. Most recently, Anthony was invited by the President of the Competition Appeal Tribunal (a specialist competition tribunal in the UK) to assist in the drafting of new rules for the Tribunal on the bringing of collective competitive law actions. Whilst litigating professionally & creatively, Anthony always seek the best commercial and pragmatic results for his clients utilising creative approaches to the funding of costs and risk in litigation.

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Ulrich is mainly active in European and German antitrust law, in particular in antitrust proceedings, merger control, issues of abuse of dominant position and the Treaty antitrust (recommended for antitrust law in Legal 500 2012/13). He also advises domestic and foreign companies on corporate law, M & A transactions and in distribution law. A special focus of Ulrich is advising on cross-border mandates, in particular clients from English-speaking countries, from Western and Southern Europe and Asia.

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Lucia Ojeda Cardenas has over twenty years of professional practice in economic competition matters, specialising in the private and academic fields.

Lucia has been a partner at SAI Law & Economics since October 2002, and has worked as an associate in the firm since 1998. She specializes in the area of economic competition and regulated markets, mainly in the telecommunications, food, pharmaceutical, auto parts stores self, steel and railway industries, among others.

Lucia was legal advisor to the government of Mexico and technical secretary of the negotiating team on investment during the negotiations of North American Free Trade Agreement. She was also adviser in negotiating other trade agreements concluded with Colombia and Venezuela (G3), Costa Rica and Bolivia. She also participated in the process of accession of Mexico to the Organization for Economic Cooperation and Development (OECD).

MEET THE EXPERTS

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Sinem Ugur is attorney-at-law in Istanbul and practices competition law at ACTECON Competition & Regulation Consultancy. She has expertise and experience in cartel investigations, preliminary investigations, national and international merger control filings, negative clearance/ individual exemption applications, abuse of dominance matters and litigation aspects of Turkish competition law. Clients that she represents and whom she applied competition compliance programs are active in various sectors worlwide.

Her areas of practice also include international trade. She was involved in antidumping cases in which she represented importers, exporters and industrial associations before the Turkish Ministry of Economy.

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Dr. Nils Gildhoff has more than 10 years of experience in the fields of German and EU competition/antitrust law. He advises undertakings and private individuals in the above mentioned fields on a regular basis. His work includes the competition law aspects of M&A transactions (notably merger control law and compliance), cartel proceedings, distribution agreements, cooperation of competitors and competition law compliance. He has experience in several industry sectors, notably consumer products, oil, pharmaceuticals, engineering and construction. Nils Gildhoff is qualified as an Attorney-at-Law. From 2005 until 2011 he was a member of the competition law team of Allen & Overy. In 2011 he joined Corinius (since 2012 as a salary partner). In 2014 he joined HAPP LUTHER as a partner. He is fluent in English, French and German.

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Partner Mattan Meridor is one of the fastest rising stars in antitrust and competition law in Israel, having worked on some of the highest profile mergers and acquisitions in the country.

Domestic and international clients benefit from Mattan's diverse experience in complex antitrust and competition issues including requests for approvals of mergers and acquisitions, such as the 2014 acquisition of Ma'ariv newspaper by the Jerusalem Post. He also handles civil and criminal litigation of antitrust and competition violations, as well as in proceedings relating to the designation as a cartel or monopoly by the Israel Antitrust Authority.

Mattan appears in various committees in front of the Kensset in regards to new antitrust and competition regulation matters, such as the recently passed concentration Law. In addition, Mattan advises clients with the creation and implementation of internal antitrust and competition compliance programs.

International legal directory Chambers Global 2014 describes Mattan as an "active leader" in the complex field of antitrust and competition law.
He represents an extensive roster of heavyweight clients across many sectors including telecommunications, media, energy and food retail, to name just a few. Previously with the London office of Berwin Leighton Paisner, Mattan joined Agmon & Co Rosenberg Hacohen & Co in 2004.

MEET THE EXPERTS

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Lisl Dunlop is a partner in the firm's New York office and a member of the Litigation Division. She advises leading U.S. and multinational companies in an array of industries—in particular in the media, technology and healthcare sectors—on a broad range of antitrust counseling, antitrust litigation and transactional matters. Ms. Dunlop advises on antitrust-related aspects of mergers and acquisitions, joint ventures and other combinations, and sales and distribution matters; represents clients in antitrust agency investigations; and has represented major corporations in complex antitrust litigations, including multidistrict treble damages class actions. Ms. Dunlop has regularly been recognized as a leading antitrust lawyer inChambers USA, Legal 500, Who's Who Legal and Global Competition Review.

In addition to over 20 years of experience practicing U.S. antitrust law, Ms. Dunlop has significant international experience in both Australia and Europe. Ms. Dunlop has appeared before U.S. federal and state antitrust enforcement agencies, the European Commission, the UK Office of Fair Trading, and the Australian Competition and Consumer Commission, and has coordinated the multijurisdictional defense of transactions throughout the world. Ms. Dunlop's experience in competition matters in a broad range of jurisdictions brings added value to clients that conduct business internationally and interact with different legal systems and regulators.

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Tatiana Iurkovska heads the Corporate and M&A Department at Law Firm Nobles. She has substantial experience in complex due diligences, drafting and negotiating agreements on cross-border mergers and acquisitions as well as obtaining respective regulatory approvals. Mrs. Iurkovska is focusing on M&A projects as well as consulting clients on corporate, employment, banking and competition law.

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Rene Frolov has been described by Legal 500 as a "smart and energetic rising star in Estonian competition law".

His major projects include…

- Modern Times Group (MTG), a broadcasting heavyweight in the Nordic and Baltic regions, on all competition and regulatory aspects of its bid to buy a majority stake in Starman, the largest supplier of Pay-Tv and a leading provider of broadband internet in Estonia. The regulatory assessment carried out focused on horizontal and vertical aspects, and ensuing competitive implications, of a potential deal.

- Liviko, the leading producer and distributor of alcoholic beverages in Estonia, before the Estonian courts against an allegation (criminal indictment) of horizontal price fixing and a violation of the cartel prohibition. The Supreme Court cleared Liviko and its CEO of all charges in July 2011.

- Philip Morris Estonia before the Estonian Competition Authority in its investigation into practices by PME relating to share of space arrangements with retailers and their conformity with Estonian rules on unilateral conduct (national equivalent of Art 102). ECA closed its case in December 2010 without finding of an infringement or imposing sanctions.

- RSA in all competition and regulatory aspects of an agreement between RSA and Estonian banking and leasing arms of SEB, a leading financial institution in the Baltics, for the exclusive distribution of RSA's non-life insurance products in Estonia. The co-operation went live in May 2011.

MEET THE EXPERTS

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John practices broadly in the regulatory field and principally in competition law including industry restructuring initiatives, joint ventures, cartel investigations, leniency applications, merger control, merger intervention, general competition litigation and commercial litigation, before the local South African and regional competition authorities, and South African Courts. He holds both BA and LLB degrees from the University of Cape Town and completed a diploma in competition law at the University of the Witwatersrand. John previously worked as a foreign antitrust adviser in the antitrust group at Howrey LLP in Washington, DC.

John has advised clients on a range of regulatory compliance initiatives including competition law, corruption, white collar crime and consumer protection law programmes. John continues to advise clients in relation to antitrust matters throughout sub-Saharan. John is also an integral member of the white collar crime and fraud practice and has represented various clients in relation to corruption and fraud matters. John regularly advises clients on local and foreign anti-corruption legislation including compliance with the Prevention and Combating of Corrupt Activities Act of South Africa; the Bribery Act of the United Kingdom and the Foreign Corrupt Practices Act of the United States of America.

Competition & Antitrust Roundtable 2016

In our Competition & Antitrust 2016 Roundtable we spoke with 11 experts from around the world. We discover whether the appointment of Margrethe Vestager as the EU Antitrust Commissioner has shifted the landscape. Other highlighted topics include a discussion on platform regulation, how to respond to an antitrust raid and a summary on key regulatory changes and interesting developments. Featured countries are: Germany, Estonia, Ukraine, Turkey, Israel, USA, Mexico and South Africa.

1. Have there been any recent regulatory changes or interesting developments?

Uğur: In 2015, three positions of the Turkish Competition Board (the "Competition Board" or "Board") were vacant for nearly three months. The appointment was particularly important since the entire Board was not able to adopt any decisions on any substantive matter from April 2015 until June 2015.

Draft Block Exemption Regulation on Vertical Agreements in the Fuel and Liquefied Petroleum Gases (LPG) (except for bottled and bulk LPG) sector and Draft Block Exemption Regulation on R&D Agreements were opened to public consultation.

A Cooperation Protocol between the Turkish Information and Communication Technologies Authority and Turkish Competition Authority ("TCA") was entered for the purpose of improving the efficiency in cooperation and coordination between the two institutions.

Likewise, a Cooperation Protocol between the Energy Market Regulatory Authority and the TCA is prepared in order to establish, promote and protect a free and healthy competition in the energy market.

Osborne: Canada's Supreme Court held that a landfill merger that gave the buyer a monopoly and would prevent prices from falling was saved by efficiencies amounting to one-half of one person's annual salary, because the Commissioner of Competition had not quantified the anti-competitive effects of the merger. The court elaborated a two-step process for evaluating efficiency claims that involves comparing the quantitative efficiencies against the quantitative anti-competitive effects, and the qualitative efficiencies against the qualitative efficiencies, and finally determining whether the total efficiencies outweigh the total anti-competitive effects.

Major changes to the Competition Act that were made in 2009 and 2010 are beginning to be interpreted by the courts and the Competition Tribunal. In 2009, a number of pricing practices, including resale price maintenance, price discrimination, and predatory pricing, were decriminalized. A new civil RPM provision allows the Competition Tribunal to prohibit RPM when it causes an adverse effect on competition. Otherwise, RPM is now legal in Canada. Then, in 2010, a new conspiracy provision came into effect that makes it a per se criminal offence for competitors to fix prices, allocate markets, or restrict output.

The Competition Bureau's attempt to challenge certain credit card rules under the new RPM provision failed, because there was no resale of credit card services. In a class action alleging that the same credit card rules breach the Act's conspiracy provisions, a court held that the rules could not beach the new conspiracy provisions, because credit card issuers do not compete in relation to the product at issue, namely the credit card network services offered by Visa and MasterCard.

There have been a number of other developments in price fixing class actions. Courts are presently debating whether breaches of the criminal provisions of the Competition Act can support common law causes of action such as conspiracy in addition to the statutory cause of action. As well, an Ontario court recently rejected the notion that plaintiffs can recover for higher prices charged by firms that were not parties to a price fixing conspiracy, but sheltered price increases under the "umbrella" of the conspiracy.

Meridor: The Restrictive Trade Practices Law, 1988 ("RTPL") imposes civil, administrative and criminal restrictions on companies. In recent years, the RTPL has undergone many changes, which resulted in the expansion of the Israeli Antitrust Authority ("IAA") investigative power and enforcement authorities. Concurrently, the IAA had gained extensive enforcement powers under additional laws other than the RTPL (namely, the Food Act and the Law for Promotion of Competition and Reduction of Concentration).

In addition, the RTPL was amended to include the power to impose administrative fines. Recently, in December 2015, the IAA had for the first time in Israel, fined a company and its officers due to abuse of monopoly power.

Maton: In October 2015, Schedule 8 of the Consumer Rights Act 2015 ("the CRA") came into force, accompanied by the new Competition Appeal Tribunal rules. It provided for enhanced powers for the Competition Appeal Tribunal (the "CAT"). In standalone cases the court acts as if it was a National Competition Authority ("NCA") in that it has the power to decide whether there was a breach of competition law. Fast track procedure and injunctive relief were also introduced in the CAT as a measure designed to facilitate recovery by Small and Medium Enterprises. Perhaps most notably, the CRA has expanded the pre-existent collective redress regime which was opt-in only, by allowing for opt-out collective action and settlements. No such actions have been brought to date - which may be attributable to the lack of clarity over the new transitional limitation provisions.

Schnelle: One of the more interesting developments, in particular in comparison to other jurisdictions in the EU such as the UK or the Netherlands, is the specific focus of the Federal Cartel Office (*Bundeskartellamt*) on restrictions of internet (online) trade. The Federal Cartel Office has launched proceedings against suppliers of consumer goods, in particular sportswear or kitchen appliances, for discrimination of online trade in distribution networks, including selective distribution systems, as opposed to stationary offline trade. The vehicle used by the Federal Cartel Office for this purpose is not Art. 102 TFEU respectively the German equivalent of but any restriction of online trade is considered as a core restriction in the sense of Art. 4 lit. b) of the Block Exemption Regulation for vertical contracts (Regulation No. 330/2010).

Dunlop: 2015 saw several significant merger reviews and challenges by both the FTC and DOJ, continuing a trend of aggressive merger enforcement. The agencies challenged the proposed merger of Comcast and Time Warner Cable, Sysco Corporation's planned acquisition of US Foods Inc., GE's attempted sale of its home appliance division to Electrolux, and Staples' proposed acquisition of Office Depot. The FTC continued its crusade against pharmaceutical "reverse payment" settlements, with a record-breaking $1.2 billion settlement with Cephalon (now owned by Teva). And on the criminal antitrust front, a memorandum regarding Individual Accountability for Corporate Wrongdoing was issued by Deputy Attorney General Sally Q. Yates (Yates Memo), articulating new policies to strengthen DOJ's efforts to hold corporate executives accountable for unlawful conduct, including antitrust cartel violations.

Iurkovska: At the end of 2015, Antimonopoly Committee of Ukraine (AMCU) published Guidelines on the method of setting fines for antitrust law infringements.

Based on that, a two-step methodology will be used when setting the fine. First, AMCU will determine a basic amount depending on the degree of gravity of the infringement. Second, it may adjust that basic amount upwards or downwards with up to 50% taking into account aggravating or mitigating circumstances.

The principal law on competition was significantly amended in 2015 and already in 2016. Key amendments are as follows:

Publication of AMCU decisions: currently, AMCU decisions are not published. The new rule requires publication of all decisions, excluding confidential information and commercially sensitive data. This will take effect on March 2016.

Increased thresholds: the new threshold system provides for increased thresholds triggering notification requirement as well as for two basic alternative options. Namely, a) worldwide sale/assets of all parties exceed €30m (instead of €12m currently applied) and the sales/assets in Ukraine of at least two parties exceed €4m (instead of €1m currently applied) OR sales/assets in Ukraine of the target exceed €8m and sales of either party exceed €150m worldwide. This amendment will take effect on April 2016.

Fast track procedure: the fast track procedure of 25 days from filing date (instead of 45 days currently applied) will be available in case of meeting certain requirements regarding market share in Ukraine. This amendment will take effect also on April 2016.

Oxenham: The Competition Commission published 'Guidelines for the Determination of Administrative Penalties for Prohibited Practices' during 2015 ("Guidelines"). The Guidelines provide for a six-step approach to determining the quantum of a potential administrative penalty to be imposed on a firm for contravening the provisions of the South African Competition Act, 89 of 1998 ("Act").

Notably, the Guidelines make provision

for the imputation of a subsidiary's liability onto a parent or holding company. Importantly, the Guidelines are not binding on the competition authorities and have, to date, been used with a considerable degree of flexibility.

Cardenas: The competition legal framework went through major changes on 2013 as a result of a constitutional amendment in Mexico. Thus, a new Federal Law on Economic Competition and the Regulatory Dispositions of the Federal Law on Economic Competition were enacted on 2014. Pursuant to such legal framework, the two competition authorities, the Federal Telecommunications Institute ("FTI") and the Federal Economic Competition Commission ("FECC"), are obliged to issue guidelines considering certain matters related with competition, such as mergers and the investigation the authorities carry out concerning monopolistic practices. Therefore, the FTI and FECC issued guidelines considering different specific matters. Accordingly, both opened public consultations of drafts of the guidelines and provided a term for everyone to submit their comments. After such period is closed, the competition authorities publish them in the Federal Official Gazette. The FECC issued guidelines of how to develop the investigation procedure for relative monopolistic practices or illegal concentrations; guidelines to begin investigations on monopolistic practices; guidelines on how to develop the investigation procedure for absolute monopolistic practices; guidelines concerning exchange of information among competitors; guidelines to notify concentrations; guidelines of the exemption and fine reduction procedures, and guidelines for the leniency program. Further, the FTI issued guidelines concerning must carry and must offer duties. As a result, the competition authorities now have a more active role in developing their own regulations and legal criterions.

Frolov: There have been multiple regulatory changes in Estonia recently. Firstly, abuses of dominance were completely de-criminalized, but fines for first time offenders increased. Until 31 December 2015 the maximum fine for abuse of dominance was €32,000 for first time offenders while repeat offenders could be prosecuted for a criminal offence (with criminal fines up to €16 million). From 1 January 2016 all suspected abuses – whether first, second or third – are investigated as misdemeanours, but the maximum fine for every offense is €400,000. Secondly, on 1 September 2015 the shaping of competition policy and enforcement, including the Estonian Competition Authority, were moved from the auspices of the Ministry of Economic Affairs and Communications to that of the Ministry of Justice, which is already responsible for the courts, the Public Prosecutors Office etc.

2. Can you talk us through the current competition and antitrust landscape in your jurisdiction?

Uğur: The draft Turkish competition law closely modelled to EU competition legislation was a hot topic back in 2014 but currently the draft law is still pending at the Turkish Parliament. Nevertheless, it is still an important issue since the competition law practice is expected to become much more efficient when the Parliament approves the draft Law.

For instance, after the draft law becomes effective, the Competition Board will be able to focus on serious infringements and avoid trivial cases thanks to the *de minimis* rule and have tools to end ongoing investigations, wholly or partially, or settle with parties subject to investigation, under certain conditions.

Osborne: The Competition Bureau remains vigorous in enforcing the Competition Act. Investigating and prosecuting conspiracies is always a priority, as is dealing with merger notifications. Other current Bureau priorities include:

- The "digital economy", particularly false or misleading advertising online and in emails
- Compliance outreach: the Bureau has recently published guidance on compliance programs and is taking its message on the road

Private litigation remains busy. Several class actions alleging price fixing are at various stages in the courts. After a hiatus of a few years, 2015 saw two applications to the Competition Tribunal for leave to commence a private application. One, involving music recordings, was granted; the other, involving used car data, was denied.

Maton: England is known as one of the most active jurisdictions in private enforcement of competition law. With no statutory limits on legal fees it allows for provision of innovative fee structures and service, therefore facilitating private enforcement. The judiciary is considered "claimant friendly" and, in fact, many claimants, where there exists a genuine factual link between the defendants and England, are eager to anchor their damages claims in England.

In terms of public enforcement, the CMA is not nearly as active as, for instance, the German Bundeskartellamt. Consequently, most of the follow-on claims for damages are based on the infringement and settlement decisions issued by the European Commission.

The new collective redress regime introduced by the CRA was welcomed with much excitement, however we now see that it may be slow to fully develop.

Schnelle: There is a continued focus in the activities of the Federal Cartel Office against any restrictions of online trade, in particular against the prohibition to distributors to use standard online platforms such as Amazon or eBay. Furthermore, there is a continued focus on limiting the demand power of the German food retail chains. As far as public enforcement against cartels is concerned, the tendency is clearly to settlements between the Federal Cartel Office and the cartelists.

Within the European Competition Network, the focus of the activities in Germany will lie in the restriction of power and influence of platforms such as Google or similar organizations.

The law maker is focused on transposing the cartel damages directive into German law which is a challenge since henceforth German law has an understanding of "undertaking" which is different from that under European law.

Dunlop: In the US, antitrust laws are enforced on both a federal and state level. Federal antitrust laws are enforced by the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC), which have concurrent civil jurisdiction to enforce the Sherman Act, Clayton Act, and Hart Scott Rodino Antitrust Improvements Act. The FTC also enforces the FTC Act, which prohibits unfair methods of competition. The DOJ has criminal jurisdiction over cartel and other per se illegal antitrust violations. The states have their own antitrust statutes, which largely mirror the federal laws, and state Attorneys General conduct investigations and enforce the antitrust laws, often in conjunction with the federal regulators. Finally, the federal antitrust laws permit private plaintiffs to sue for treble damages and injunctive relief.

Iurkovska: Ukrainian laws reflect largely the key principles set forth in TFEU, while including certain local specifics. For instance:

Mergers reaching certain turnover thresholds are subject to merger control. The key difference is that Ukrainian laws provide for lower financial threshold triggering a notification (currently €12 m, and starting from April 2016 €30m or €150m worldwide in foreign-to-foreign transactions).

Concerted practices are defined similarly as in TFEU. However, concerted practices require prior approval of AMCU and there is no self-assessment procedure. At the same time, the issue of the state aid in competition is very new to Ukraine. The respective law adopted in 2014 will become effective in August 2017.

Oxenham: The Competition Act is the governing legislation. From an agency perspective, there are two bodies responsible for the enforcement of the Act. The Competition Commission ("Commission") investigates and prosecutes cases involving prohibited anti-competitive conduct. The Commission also evaluates and approves small and intermediate merger, while making recommendations to the Competition Tribunal ("Tribunal") in relation to large mergers.
The Tribunal is the adjudicative body which must approve all large mergers and adjudicate on prohibited practices. A decision by the Tribunal may be taken on appeal to the Competition Appeal Court and ultimately to the Constitutional Court. Judicial review to the South African High Courts and the Supreme Court of Appeal is also available in certain circumstances.

Cardenas: As part of the above mentioned constitutional amendments the FTI was invested as the competition regulator in all sectors within telecommunications and the competition authority, the FECC, kept the attribution to preserve and regulate competition in the rest of the markets. The new competition legal framework aims for the competition authorities to perform in order to achieve great results.

Besides, the competition authorities have an "Investigative Authority", which is in charge of heading the investigation of monopolistic practices. By this, the FTI and the FECC clearly separate the internal organs that investigative cases from the one that prosecutes them. The FECC's Investigative Authority is actively carrying out dawn raids and investigations of absolute monopolistic practices.

Moreover, the amendments created specialized courts that act as appellate bodies for all cases related with com-

petition matters. Thus, this caused a major impact in all the competition legal system. It is noteworthy that the specialized courts are solving cases showing a great deference towards the FTI and FECC's decisions.

Currently, the competition field in Mexico is still adjusting to the paradigm change. For instance, the FECC considered that it was the competent authority to review a merger between Nokia and Alcatel Lucent, since it considered the matter involved the manufacture sector, not the telecommunications sector. Therefore, it requested the FTI to refer the file back to it. However, one specialized court determined that the FTI was the competent authority to review the merger.

Further, the legal framework provides that the FTI and the FECC can carry out market studies in order to review competition within them. Thus, the authorities have developed the said studies.

Frolov: The current landscape for antitrust enforcement in Estonia is fragmented. All anti-competitive agreements are criminalized, i.e. subject to a criminal investigation and criminal fines of up to 10% of turnover. There are no fining guidelines. The authority enjoys broad investigative powers, including rights for phone-tapping and other types of surveillance in most cartel cases such as price-fixing or market sharing between competitors. Leniency is available for both horizontal and vertical collusion, e.g. for suspected resale price maintenance. The Estonian Competition Authority itself has no power to impose fines for anti-competitive collusion (it has for abuse of dominance) – all collusion cases are prosecuted by the Public Prosecutors Office and fines (if any) imposed by the court. The level of fines is low by EU standards. The level of private enforcement is low, but increasing.

3. What areas of litigation currently rank highest on competition and antitrust regulators agenda?

Uğur: Although private antitrust litigation has been applicable in Turkey for more than 20 years, there are not many precedents. This is mostly because injured parties are unaware of the compensation opportunity. Nevertheless, increasing number of platforms to discuss private antitrust litigation in Turkey contributes to the development of the subject.

Recently, the time period to claim compensation due to anti-competitive behaviour and the requirement for a finalized TCA decision to bring legal action for damages were matters of dispute. The High Court of Appeal ruled that the liability for treble damages is up to eight years and the lapse of time starts from the date of issuing a complaint to the Competition Authority. The finalization of the TCA's decision is considered as a preliminary issue rather than a condition to bring legal action for damages.

Osborne: The Competition Bureau has four major cases currently before the Competition Tribunal or the courts. In the Toronto Real Estate Board case, the Bureau alleges that the real estate board's refusal to license historical real estate transaction data through a virtual office website constitutes an abuse of dominance. This case has been fully argued; a decision is expected sometime in 2016.

The Bureau is challenging the proposed merger of two gasoline (petrol) retailers, Parkland and Pioneer Energy. The Bureau says that the merger will reduce competition and raise gas prices in 14 local markets in Ontario and Manitoba.

In Aviscar Inc., the Bureau contends that car rental companies are misleading the public about their prices, because they add fees that increase the cost of a rental by up to 35% over the advertised price.

In Bell Canada, the Bureau claims that Bell and other wireless carriers allowed third parties to charge customers fees for digital content for fees that had not been adequately disclosed. Two carriers, Telus and Rogers, have settled by agreeing to refund charges to consumers.

Meridor: In recent years, the number of class action lawsuits filed under the RTPL has increased, and in particular, we notice that more and more class action lawsuits are filed against monopolies on the ground of abuse of monopoly power by charging excessive price. The question whether excessive price is considered an abuse of monopoly power in Israeli law has not been determined yet, however a few class actions that have given rise to this claim are awaiting certification approval decisions, and we anticipate this to question to be resolved in the next few months.

Maton: The Commission has initiated a number of high profile investigations into companies for breach of Article 102 – abuse of dominant position. In

2015 the Commission progressed to the next stage of their probes by releasing a statement of objections against Google and Qualcomm, the two companies that were being investigated.

This new investigative vigour into abuse of dominant position breaches is not only limited to probes by the Commission, with national competition authorities from across the globe no longer afraid to announce investigations into international corporations.

This recent rise in regulatory interest into Article 102 has naturally been complemented by an increase in the number of private enforcement claims filed against Google and Qualcomm. With claims filed by Foundem, Streetmap and Kelkoo against Google and Icera against Qulacomm, and the likelihood that more private claims will be filed following the outcome of the Commission's investigations.

Dunlop: Currently, merger and cartel enforcement are high priorities for US regulators. Recent healthcare reforms, stemming from the high and growing US spending on healthcare, has led to accelerated consolidation. The regulators, however, continually stress that healthcare markets also are subject to the antitrust laws and have opened investigations of, and brought actions against, several hospital, pharmaceutical company, and insurer mergers. The DOJ has continued to press forward with cartel enforcement: by the first half of fiscal year 2015, the DOJ had already collected more the $2.5 billion in fines. During 2015, DOJ also continued its investigation of alleged conspiracies in financial benchmarks (such as LIBOR) and foreign exchange markets, as well as various auto parts conspiracies.

Iurkovska: According to recent court rulings, the most frequently challenged AMCU's decisions relate to concerted practices, abuse of dominant position and unfair competition (misleading representation). However, appeal procedures against regulator are not successful as a rule. This is also due to the fact that in Ukraine the court has no authority to decide on purely competition issues: definition of market, amount of market shares, etc., and normally may rule only on procedural issues.

AMCU pays close attention to the petrol product market. Recently, AMCU adopted the decision on infringement of competition law (in the form of anticompetitive concerted actions) in automobile petrol market (petrol price-fixing). Fines were imposed on eight major petrol station chains (OKKO, WOG, Lukoil, etc.). The fine for each company amounted to approximately €2,700.

AMCU decision was challenged by several companies. The court dismissed the claims on the grounds that AMCU decision can be declared invalid if it conflicts applicable laws and/or was issued by the authority beyond its competence, or if it violates the rights and lawful interests of the undertaking which was not the case.

AMCU imposed a fine on the large local energy supplier (PJSC "*Poltavaoblenergo*") for abuse of dominant position (setting unreasonable demands for customers in the technical terms for connection to the local electric networks). The fine amounted to approximately €1,980,000.
The courts satisfied the claim and declared AMCU decision invalid. The reason for invalidation was that the court determined that in the past AMCU fined the company essentially for the same infringement, and no one can be held accountable twice for the same violation.

Oxenham: The South African competition authorities have indicated that cartel conduct remains a high priority. Consequently, there has been a substantial increase in the number of dawn raids carried out by the Commission over the past 18 months and subsequent prosecution of cartel conduct by the Commission before the Tribunal.

The Commission has, however, also indicated that it will be focusing on abuse of dominance conduct. In particular, the Commission is likely, in the next twelve months, to focus on dominant companies which obtained their dominance as a result of past state support.

Cardenas: Concerning the FECC, there are various areas where it shows interest. First of all, it has been conducting market studies in some sectors with a high impact in the national economy. For example, on December 2015, the FECC released a "Report on the Competition Conditions in the Agroalimentary Industry". The agroalimentary industry comprises all the goods and services related with agricultural products used for human consumption directly or after its elaboration after diverse processes in the food industry. This report will probably lead to one or more investigations in the markets therein, since it helps the authority identify market failures or barriers to essential inputs; and strengthen its efforts to identify and prosecute monopolistic practices. Further, the FECC has

shown interest in public procurement processes and on the transportation industry, investigating cases concerning both matters and fining economic agents on the latter. Finally, slots in Mexico City's International Airport are also an area of interest of the FECC. Currently, it is carrying out an investigation concerning slots' barriers. This investigation may result in specific recommendations of the FECC in case it determines the barriers may cause anticompetitive effects. Since the Federal Government in Mexico is constructing a new international airport in Mexico City, the recommendations in such investigation may impact the slots regulation of the new airport.

As for the FTI, it faces really concentrated industries. Therefore, its competition agenda mainly involves the two major participants in the telecommunications field: Grupo Televisa and Telmex. Thus, the FTI is following up the measures it determined to both economic agents, since in 2014 it determined they were dominant in their respective sectors; i.e. Grupo Televisa in broadcasting and Telmex in the telecommunications sector. Further, it has been investigating the existence of substantial market power in the pay TV market.

Frolov: Over the last couple of years, regulatory sectors, e.g. energy and utilities (like water and sewage), have been at the forefront of antitrust and regulatory enforcement by the Estonian Competition Authority. Market access to wholesale and retail of pharmaceuticals has also been and still is the focus of regulators – after the Estonian Supreme Court declared the statutory limits on the number of pharmacies as unconstitutional and the Parliament imposed new restrictions on ownership of pharmacies and banned integration between wholesalers and retailers, the Estonian Competition Authority has insisted on relaxing restrictions and opening the retail market. This is policy debate is set to continue. On the 'traditional' anti-trust front, enforcement in the area of abuse of dominance is clearly on the up, especially vis-à-vis pricing practices.

4. "Platform" regulation has received considerable interest of late following a number of EU Member States (notably Germany and France) expressing their frustration at how competition law would not be enough to tackle certain issues. In your opinion, is the current competition law sufficient to address the challenges raised by platforms?

Uğur: Technological progress is always one step ahead of regulation. The competition law jurisdictional backlog makes it timely to reach an effective solution to safely tackle technology oriented markets. Turkish practice is highly aligned with the EU and any wind of change towards platforms could trigger ex-officio actions of the TCA. Although there is not much at hand to predict how the TCA will deal with platforms over time to come, the past Biletix (Ticketmaster Turkey) investigation and the current booking.com investigation could be considered as signals that platforms will be much more dealt by the TCA in the following months.

Schnelle: The Google proceedings with the EU Commission in Brussels show that competition law is apt to tackle most of the challenges which are raised by platforms. However, the challenges raised by such platforms are not only of a competitive, nor even only of an economic nature and have to be tackled also by other areas of the law. With respect to competition law, basic questions such as market delineation still have to be answered with respect to the activities of such platforms. In any event, from my perspective, any activities of competition authorities have to be complemented by consumer protection regulations as well as data protection.

Iurkovska: Behind online platforms there are many different business models with their specific features. Such a complex area should be tackled from many sides and no doubt requires sector specific regulation, but which in all cases would not be cumbersome and precluding the sector to develop.

By analogy with telecoms, effective regulation has brought competition to telecoms markets and managed to stimulate investment and innovation. However, this should be done in a very careful and timely manner, weighing risks and benefits so that in pursuit of quick regulatory reaction not to harm incumbents and encourage new market entrants, primarily Pan-European service providers. I would agree with the position of CMA Chief Executive, Alex Chisholm that antitrust law and sectoral regulation must work in unison, but ex ante would be hardly appropriate in this sector at this stage. In Ukraine, for instance there is so far no competition regulation of the digital market.

Cardenas: The Mexican legal framework is broad enough in order to analyse and review any competition relat-

ed issue concerning platforms. Nonetheless, any matter that arises shall be carefully analysed to determine what authority is competent to review it: the FTI or the FECC. Accordingly, even though platforms themselves might be part of the "telecommunication sector", the case might involve effect in other markets.

Currently, there is no public notice that any of the competition authorities have initiated cases concerning new platforms. However, there is no doubt that they are fully aware of the relevance of the topic in terms of competition review in potential cases. Further, the FECC issued an opinion concerning Uber by which it considered such app favoured competition within the transportation market and advised not to regulate the service provided by Uber. Also, the FTI is also discussing matters related with net neutrality.

5. How has the appointment of Margrethe Vestager as the EU Antitrust Commissioner shifted the current landscape?

Uğur: Although Turkish competition rules are basically parallel to the EU competition rules, the appointment of the EU Antitrust Commissioner has no direct effect on Turkish competition landscape. However, general policy choices such as a wind of hawk application in the EU can possibly find a parallel way also in Turkey.

Maton: Prior to her appointment, EU President Juncker sent Vestager a "mission letter" briefing her to focus on getting to grips with the digital single market, energy policy, financial services and tax evasion.

Since her appointment as European Commissioner for Competition on 3 October 2014, the probe into Google's market position increased with the release of the Statement of Objections on Google in April 2015. The release of the Statement shows two things: first, that Vestager is following through on Juncker's recommendation to get to grip with the digital single market and second, that Vestager will not shy away from global, well-resourced and influential corporations that are very able to challenge any allegations or decisions made by the Commission.

The increased force behind investigations is however paired with greater willingness of the Commission to settle ahead of reaching a fining decision. This development poses issues for private enforcement lawyers engaging in follow on litigation, especially if no guilt is admitted in such settlement terms with the Commission.

Schnelle: The appointment of Ms. Vestager has shifted the landscape insofar as the EU Commission appears to be more active also in more day-to-day issues. This is essentially reflected in the sector inquiry on online trade. Further, it appears that the approach taken by the Commission is to a certain extent more thorough and more matter of fact.

Iurkovska: The appointment of a new EU Antitrust Commissioner has not directly affected the current landscape in Ukraine. However, her achievements over quite a short period of time were visible to us. In particular, undertaking proceedings against Gazprom, one of Europe's main gas suppliers, over allegations of breaking EU antitrust rules by putting in place artificial barriers to trade with eight European countries.

Her activities may prove useful to AMCU, as it also held investigation against Gazprom related to abuse of dominant position on the market of gas transportation and has recently announced on its completion.

Cardenas: Even though Mexico has its own competition legal framework and authorities, FTI and FECC always follow up and are informed of the latest international trends, hot topics and best practices. Accordingly, Europe is one of the most important jurisdictions in terms of competition key trends and best practices. Therefore, the appointment of Margrethe Vestager is relevant only in the extent that it has an impact in the European competition trends.

6. Have there been any noteworthy case studies or examples of new case law precedent?

Uğur: In a recent decision, the Board recommended an undertaking to cease providing its main service and its customers to stop purchasing the service, within the scope of Article 9(3) of the Competition Law. Pursuant to Article 9(3), the Competition Board may express its views on a conduct and provide recommendation on how the anticompetitive aspects of such conduct can be terminated, without launching a full-fledged investigation.

The company in subject provided media price pooling index services, which had not been scrutinized by any national competition authorities, despite the significant number of companies providing these services in the EU. The Board decided that the pooling of ad-

vertising space prices and the provision of comparisons of prices paid by a company and the average prices achieved, constituted a potential infringement of competition rules, although the individual prices were not shared between the advertisers and other transparency preventing standards were present.

As a result, the undertaking's activities were extremely restricted without a formal investigation. The administrative court recently issued a stay of execution order and the litigation process continues.

Meridor: In August 2015, the Supreme Court in Israel upheld a decision of the Jerusalem District Court, which imposed a jail sentence, community service and a fine of 450,000 NIS (~$115,000) on Mr. Efi Rosenhaus, the former CEO of Shufersal (Israel's largest food retail chain) (Hereafter: the "Shufersal" case). Rosenhaus was also barred from acting as a director in public companies for three years.

This decision broke ground in many aspects. This was the first case in which a person was sentenced to a jail sentence for the violation of an attempt (that failed) to reach (what the court found to be) a vertical agreement. Furthermore, this was the first conviction on a violation of condition for a merger – thus raising the bar in sentencing of antitrust offences in Israel.

Gildhoff: A hot topic with new case law (also involving the German Federal Constitutional Court) is the question of whether the acquirer of a target company which has infringed competition law in the past, can somehow "manage" this risk by restructuring itself and the target company. It is currently clear that German law still allows companies to evade potential fines by intelligently using a certain gap in the law. This will probably change in the future – also because EU competition law does not know such a gap.

Maton: With regard to private enforcement, the most noteworthy case law of 2015 was laid down in British Airways v Emerald Supplies Limited & Others [2015] EWCA Civ 1024. The Court of Appeal confirmed that economic torts require proof of an 'intention to injure' in line with the House of Lords opinion in OBG v Allen and Newson Holding Ltd v IMI plc, limiting the applicability of economic torts in pre-disclosure situations. This decision reflects a cautionary approach of the Court of Appeal towards the application of economic torts in private enforcement cases.

Furthermore, the Court upheld an absolute interpretation of the so called "Pergan protection", reducing claimants' ability to obtain far-reaching disclosure from defendant cartelists.

Dunlop: In February 2015, the District Court for the Eastern District of New York ruled in favour of the DOJ and 17 State Attorneys General, finding that the "anti-steering restrictions" in American Express' contracts with merchants (preventing them from encouraging customers to use alternative payment mechanisms) violated Section 1 of the Sherman Act. The decision is notable because the court found that American Express had market power in the "general purpose credit card" market, despite having only 26.4% of the installed base of credit cards in the US, and ignored the impact of debit cards. The decision is on appeal to the Second Circuit Court of Appeals.

Also in February, the US Supreme Court in North Carolina State Board of Dental Examiners v. FTC, 547 U.S. __, 135 S. Ct. 1101 (2015) limited the doctrine of immunity from the antitrust laws as "state action," holding that a state licensing board controlled by active market participants requires "active state supervision" to receive such immunity. Because licensing boards serve as gatekeepers to determine who can practice a profession and under what terms, the decision increased the exposure of regulatory boards to potential antitrust claims.

Iurkovska: In 2015, in fact there was only one big and loud investigation – cartel between retail chains of supermarkets (Silpo, Novus, Auchan, etc.). The fine amounted to approximately €7.5m. This was noteworthy because of the huge amount of fine which is not typical for Ukraine, and shall be considered as exception rather than tendency.

Oxenham: During November 2015, the Supreme Court of Appeal ("SCA") upheld an appeal which effectively confirmed that the Competition Tribunal's jurisdiction is limited to the Competition Commission's 'complaint referral' and that the Tribunal may not make a finding against a firm which is not a respondent in the complaint referral, despite the firm having successfully been granted immunity in terms of the Commission's Corporate Leniency Policy.

This is an important decision because firstly, it provides some clarity as to the role of a leniency applicant in subsequent proceedings, and secondly, the SCA held that a prerequisite to issuing a 'certificate' requires that there is

a finding that the respondent had engaged in prohibited conduct.

A claimant pursuing a civil claim for damages must first obtain a 'certificate' in order to proceed with a civil claim.

Cardenas: There have been several noteworthy case studies, for instance, the following:

In January 2015, the FTI fined some subsidiaries of Grupo MVS; Telmex; Telnor, and Echostar for failing to notify a merger prior to its execution before the former Federal Competition Commission. The FTI's ruling stated that several agreements signed by the parties in 2008 granted Telmex effective joint control over Dish, a satellite pay TV supplier, even though there was not an explicit merger. The main arguments of the FTI to arrive to the said conclusion were the following:

- The parties allocated resources to pursue the same purpose. For the FTI, Telmex provided resources to Dish throughout (i) a "Services Agreement", (ii) a "Distribution Agreement", and (iii) a "Lease Agreement".
- Such agreements generated a joint control by Telmex and Dish on the Dish business since (i) the agreements generated information mechanisms; (ii) the clauses contained therein generated incentives to Telmex to exercise a "Purchase Option" subject to a suspensory clause considered in the agreements.
- The merger was not notified in time.
- The merger generated pro-competitive effects in the pay TV market

The FTI's ruling is still not definitive, since it has been challenged through an amparo trial. However, this is a noteworthy case because the outcome of this amparo would set a standard to identify when a set of commercial agreements should be considered as "mergers" for the premerger review obligation.

On 25 June 2015, the FECC fined seven passenger transport enterprises of the state of Chiapas for being liable of the commission of absolute monopolistic practices.[1] The FECC stated that the offenders fixed prices and restricted the supply of their services on the Tuxtla-Comitan and Tuxtla-Tapachula routes from 2010 to 2014.

The FECC stated that the practice had effects in 13 localities of Chiapas, which are considered as places in extreme poverty. The damage caused by the practice was calculated in at least in $43,800,000 Mexican pesos (approximately, $2,556,917.69 USD).[2] However, the FECC's total fine imposed to the offenders was just $26,000,000 Mexican pesos (approximately, $1,517,805.02 USD). The FECC determined it was not possible to impose a higher fine, since it was estimated considering the offenders' financial capacity when the practice was committed, according with article 36 of the former Federal Law on Economic Competition.

Moreover, the FECC reduced OCC's fine since it considered that it was coerced to participate in the practice. Finally, the FECC's ruling also ordered the offenders to immediately cease the practice. Thus, AEXA promised to disseminate among its employees a handbook on best practices on competition matters.

On 9 October 2015, the FECC closed an investigation for absolute monopolistic practices concerning the cathode ray tubes markets that its predecessor, the Federal Competition Commission, began. Accordingly, the investigation involved an international cartel within such market. Nonetheless, the FECC closed it, since it had not enough evidence of the agreement between the economic agents involved. This shows that the FECC is finding it difficult to fine international cartels.

On 30 September 2015, the FTI announced that Grupo Televisa is not a dominant agent in any of the Pay TV markets in Mexico. Such resolution was the result of an investigation that began on September 2014 in accordance with the recently enacted Federal Telecommunications and Broadcasting Law (FTBL). According with the FTI's resolution, even though Grupo Televisa holds 62.2% of national market share in the Pay TV market, its competitors increased their joint market share in 2%, which was enough evidence to conclude that Grupo Televisa's competitors do not face restrictions to expand their operations.

The FTI resolution was highly commented and controverted by industry participants and academics on the following aspects:

- The Investigative Authority of the FTI built a complex analysis that determined Grupo Televisa is dominant in the paid television market in 2124 municipalities across de country. However, the FTI's Plenum dismissed the Investigative Authority's analysis and only

1 The fined enterprises were: i) Sociedad de Autotransporte de Pasaje Teopisca, San Cristóbal y Villa de las Rosas, ii) Autotransportes y Servicios Turísticos Balun Canan, iii) Organización de Transportistas Emiliano Zapata de los Altos de Chiapas, iv) Zuriel, v) Ómnibus Cristóbal Colón ("OCC"), vi) Autobuses Expreso Azul ("AEXA") and vii) Autobuses Valles de Cintalapa .

2 The exchange rate for all figures calculated in U.S. dollars is of $17.13 Mexican pesos per U.S. dollar.

considered the distribution of market shares to be a sufficient element in order to determine the absence of dominance.

- Markets with a local geographical dimension are usually assessed considering local market shares, not national market shares.
- Growth trends analysis usually consider long periods of time, not a few months.

It is worth mentioning that this case results in one of the most important precedents issued by the FTI, since it could change the future of the Pay TV Market because (i) it could avoid any imposition of asymmetric regulation to Grupo Televisa in the future, and (ii) it could avoid any punishment of the FTI against Grupo Televisa in case it commits relative monopolistic practices in the Pay TV market.

This resolution has been challenged under an amparo trial, thus it is not definitive.

The abovementioned case is just one of three investigations initiated under the FTBL where the FTI's Investigative Authority found that Grupo Televisa is a dominant agent in the paid TV markets. The second investigation was resolved on November 2015 by the FTI's Plenum under the same terms of the first one. The third investigation is still being assessed by the FTI's Plenum.

In May 2015, the FECC solved a merger notification procedure regarding the purchase by Grupo Bio Pappel (BP Group) of 100% of the share capital of Corporación Scribe, S.A.P.I. de C.V. (Scribe). The merger was approved conditioning BP Group for 10 years to abstain from requesting an antidumping procedure in the market of cut bond paper. The FECC determined such condition since BP Group and Scribe are two of the largest participants in the printing and writing paper market in Mexico and because it considered that, among other things, the imposition of antidumping duties would deter imports, limiting the supply of the relevant product in Mexico only to the national producers.

This resolution was controversial since antidumping procedures seek to provide a defence mechanism to local producers against unfair practices committed by foreign enterprises, so they can achieve equal grounds to compete. Therefore, antidumping procedures shall correct conditions that unbalance competition within a market. However, antidumping duties are not meant to unduly prohibit imports; they shall only correct distortions within a market. Thus, even with countervailing duties, imports continue to exist, allowing also the entry of new market players.

The Second Chamber of the Mexican Supreme Court of Justice of the Nation confirmed that the economic analysis conducted by competition authorities during their investigation, is valid indirect evidence in order to prove the existence of a cartel within a market. The Supreme Court arrived to this determination in the context of a fine imposed by the former Federal Competition Commission, where some companies were found liable of bid rigging in procedures conducted by the Mexican Social Security Institute. This is an important judicial precedent, since it broadens the possibilities for the competitions authorities to legally prove a cartel exists within a market.

7. What considerations do companies need to make to avoid abuse of dominance?

Uğur: Abuse of dominance can occur in different forms within the scope of Turkish Competition Law. An undertaking with a market share that exceeds 40% is a candidate for dominance. The abuse of dominance could arise in different forms, but covers basically exploitative, exclusionary and discriminatory practices.

Although there is not an exhaustive list, the Competition Board's precedents cover abuse of dominance cases mainly in forms of excessive or exploitative pricing, predatory pricing, price squeezes, loyalty-inducing rebate schemes, refusals to deal and access to essential facilities.
Companies that hold a market share above 40% should also note that the Block Exemption on Vertical Agreements does not cover them and vertical agreements restricting competition such as exclusive dealing, single branding and non-compete provisions should be analysed carefully.

Osborne: Companies that are "dominant" need to be mindful of abuse of dominance provisions in the jurisdictions in which they operate. In Canada, the Competition Bureau recognises a safe harbour under 35% market share, while the Competition Tribunal has held that dominance requires a market share over 50%, and the cases decided to date involved market shares above 80%.

Even dominant companies are allowed, indeed, expected, to compete aggres-

sively on the merits. They cross the line, however, when they adopt measures that have an intended predatory, exclusionary, or disciplinary effect on competitors.

In order to avoid crossing this line, dominant companies need to exercise caution when implementing any contractual terms or loyalty programs that are intended to cement customer relationships. They should document their legitimate business reasons for these measures. Dominant companies also need to be careful when responding to entry or expansion by competitors. For example, they should avoid responses that are predatory, exclusionary, or disciplinary, such as dropping prices below cost, or locking up available distribution channels.

Dominant companies also need to be careful when doing business with competitors. Margin squeezing is expressly enumerated in Canada's Competition Act as an anti-competitive act, and refusal to supply an essential facility would likely also be an anti-competitive act.

Gildhoff: Companies are, of course, only subject to the prohibition of abusing their dominant market position provided they have such a position. If they are indeed dominant on a specific market, companies should take this fact very seriously, as this entails an even stricter competition law regime to be adhered to. Case law in connection with the abuse of dominance provides many examples of certain unilateral practices caught by competition law that are not easily identified as potential infringements of competition law. This was, for example, the case in the pharmaceutical sector where even the dissemination of objective (albeit incomplete) information regarding competitors and their products might already qualify as an abuse of dominance.

Schnelle: In Germany, the essential issue is not so much to contest the existence of the dominant market position of a company. Unlike European law, German law has certain presumptions based on market shares for a dominant market position. These presumptions also cover oligopolistic structures. Based on these presumptions, undertakings falling under these presumptions have to rebut the presumptions, which is very often hard to achieve. Therefore, the basic approach for German companies actually or potentially being covered by the presumptions is to avoid any discrimination. German case law provides for quite an extensive list of examples where the treatment would be considered as discrimination but also where discriminating treatment would be justified by business reasons.

Iurkovska: If an undertaking already holds a dominant position in a relevant market, it is recommended, to refrain from carrying out actions considered as abusive on the determined territory (e.g. price fixing, application of different prices or other different conditions to equivalent agreements with undertakings, etc.). It is also recommended to monitor on a regular basis the market shares of undertaking on all markets where it conducts activity. This will impart additional comfort, since availability of the relevant market shares may facilitate adoption of accurate decisions related to conclusion of a certain agreement or other cooperation with the market players. Additionally, the awareness of the market shares may potentially reduce the risk of eventual violation of antitrust law.

In Ukraine, for instance, undertaking is considered holding a dominant position on the relevant market providing that:

- its market share exceeds 35% ;
- the aggregate market share of three undertakings at maximum on the same market exceeds 50%; or
- the aggregate market share of five undertakings at maximum on the same market exceeds 70%,
- unless such undertaking, fails to prove, inter alia, availability of substantial competition on the market.

Cardenas: Abuse of dominance is regarded as relative monopolistic practices in the Federal Law on Economic Competition. For abuses of dominance to be considered as violations to the Federal Law on Economic Competition, it is necessary to establish a test in order to analyse the undue displacement of other economic agents in the market. It is fair to say that Mexican competition authorities consider competition on the merits when they evaluate relative monopolistic practices. The criteria of the FECC so far focus on the displacement of a competitor. Nevertheless, it is possible for these criteria to be broadened in the future, in accordance to the international practices, and to cover any displacement of the market that may convey any harm to consumers. Thus, companies need to make sure that any conduct which may qualify as a relative monopolistic practice does not has as purpose or effect this undue displacement.

Moreover, companies need to docu-

ment and attest that their conducts produce efficiency gains greater than any possible damages in the market they may cause. These efficiency gains could be, for example, to induce specialization, to seize comparative advantages, to save costs, among others which render positive contributions to consumer welfare. Conducts carried on by companies which could constitute relative monopolistic practices need to be necessary and the achieved efficiency gains shall derive in gains in consumer welfare in order to be considered legal.

Frolov: Historically, the Estonian Competition Authority has taken a very strict approach to discounting by dominant firms. Its policy is based on a premise that discounts by a dominant firm must be based on 'objective economic factors' while 'non-cost-based' discounts are not generally allowed (although the authority has not outright precluded discounting based on 'objective' non-cost based factors). Thus, for all practical purposes, in Estonia there is a strong prejudice against discounts that are not based on actual cost savings and are, instead, related to the provision of a service by the customer of the dominant firm. The authority is keen to make sure that there is a (clear) correlation between the size of the discount and the size of the cost-saving, e.g. it tends not to accept discounts of €1 in case the (customer-specific) cost saving is €0.5.

8. How can a company conduct effective global antitrust and competition risk assessment and how important is the implementation of an effective compliance program?

Uğur: An anticompetitive behaviour may arise with a 'very smart' business decision and may surface with even a single email or handwritten note. Therefore, forming a strong competition culture in companies is indispensable as employees' behaviour is not always under the control of liable managers, just as the anticompetitive behaviour of a manager is not under the control of the shareholders. Competition compliance programs are a must in order to create a control mechanism in between those players.

In substance, the main reason for developing competition compliance programs must be the implementation of a strong and sustainable corporate competition culture. The manager who takes this issue as periodical window cleaning, tick the box matter or 'region wants it so' is destined to lose the game in competition law.

In 2013, TCA has published guidance for Competition Law Compliance Program which underlines almost the same framework of EU's Compliance Matters.

There are examples of merger cases where the TCA has accepted compliance program as a part of a commitment package. In this instance the Competition Board stipulates that a regular and efficient competition compliance program shall be implemented on a yearly basis for at least three years. Also, the compliance program shall involve all employees of the undertaking and a yearly report shall be submitted to the TCA regarding the implementation.

Therefore, the Competition Board's approach towards the importance of effective compliance programs is on the increase. Also, it is not a secret that the TCA is heavily investing in forensic IT capabilities and the next decade will be the IT fights.

First of all, the company must come up with a competitive map of the economic activity they are part of. Thereon, it will be possible to determine the strategic position of the company with regards to its relationship with current and potential competitors, suppliers and clients. Without this strategic map, the risk factors will not be determined in a sound manner. This can be easily explained with the difference in the needs of a company operating in a highly regulated market and another one operating in a more competitive market with no regulatory intervention. Take also the case where a company is situated in between two different markets (for example a ticketing company operating in between event managers and venue operators and selling products to consumers). All these market positions have their own competition law risks.

Further to that step, basic compliance needs of the company must be identified. Afterwards, typical steps of a compliance program have to be designed based on the outcome of this competitive map.

Osborne: The Competition Bureau has put renewed emphasis on compliance programs. Compliance programs can result in a lower fine in the case of criminal conduct, and have the potential to establish a "due diligence" defence under some of the Competition Act's civil provisions.

There are a few key factors that determine whether a compliance program

will be successful:

- Compliance starts at the top: senior management must be committed – and be seen to be committed – to complying with all laws that apply to the organisation. If the CEO delivers a speech on antitrust compliance in the morning, and spends the afternoon fixing prices with competitors, the program will fail.
- Risk assessment: a compliance program that is not based on a risk assessment will be a shot in the dark. Organisations need to assess where they risk violating antitrust/competition laws, and identify particular employees or groups of employees that pose the greatest risks. Multinational firms need to conduct this assessment in every jurisdiction where they do business. They also need to consider that in some cases, conduct in one jurisdiction may be considered a breach in another jurisdiction if it has an anti-competitive impact there.
- Clear, simple guidance: policies and procedures are important, but if they are over-long and filled with legal jargon, employees will not read them. The same goes for training: it must be pitched at a level that employees can understand and use. In addition to policies and training, there should be someone who can answer questions as they come up. Often this will be the chief compliance officer. In smaller organisations, questions may be referred to outside counsel.
- Follow up: the organisation needs to evaluate the program's effectiveness and learn from its mistakes. For example, questions posed by employees who face challenging situations may indicate where the program should be fine-tuned. Employees that violate the organisation's compliance policies must face consequences.

Meridor: One of the difficulties in refraining from breach of Antitrust Law is the fact that company's officers do not always know what kind of activity requires legal advice in antitrust law. Therefore, the implementation of an affective compliance program is very important. According to the IAA's guidelines, the implementation of an effective internal compliance program should provide the company's officers immunity from personal liability for criminal violations of the law.

Another way to refrain from anticompetitive conduct is to obtain a legal opinion about a specific activity. Such legal opinion may protect the corporation and its officers from criminal liability and possibly even from administrative responsibility.

Gildhoff: The implementation of an effective compliance programme can now clearly be regarded as mandatory in Germany. Even if, e.g., members of the board are not actively involved in an infringement of competition law, they might still be liable for the lack of or an ineffective compliance programme. Every effective compliance programme starts with the assessment of the risks an individual company faces in its day-to-day business. It would, however, be dangerous to draw the wrong conclusions from the remoteness of certain risks. If, e.g., a breach of competition law during the daily business of a company can be categorised as being "low", one has to remember that even one single incident might entail very high fines for the company involved.

Schnelle: There are no specific issues under German law to conduct effective global antitrust and competition risk assessment except for the fact that under the German co-determination system in employment law (existence of so-called works councils), there is a certain reluctance on the part of German undertakings to implement "cold" investigations into the data infrastructure and the IT network. Even though the existence of effective compliance programs has not yet been taken as a mitigating factor in assessing fines, there are statements from judges of the highest German court, the Federal Court of Justice, reflecting at least a tendency of this court that such programs would need to be taken into consideration in assessing the fines in the future.

Dunlop: With antitrust enforcement by both government regulators and private parties continuing to expand globally, developing a clear understanding of potential antitrust exposure and developing and implementing an effective compliance program is essential for all companies. Corporate penalties and the potential exposure of individual executives to harsh sentences in the US and elsewhere have heightened awareness of the need to understand and address risk. Companies should retain antitrust counsel to assist in analysing their potential exposure before problems arise, and obtain tailored guidance on interactions with their competitors and other parties, including any participation in trade association or standards-setting activities. Depending on the company and industry, additional tools such as antitrust audits, monitoring systems and hotlines for detection and reporting, employee discipline in response to offenses, contract review or email sampling can be utilised. Antitrust counsel

can assist with developing compliance programs and supporting and supplementing the company's own resources in implementing such programs. Regular, timely, and frank communication between the company and its antitrust counsel is the key to effective antitrust compliance.

Iurkovska: Implementation of the compliance program is indeed essential for large companies active in several jurisdictions and of special relevance for Ukraine in the context of extraterritorial effect of Ukrainian merger clearance, i.e. currently, foreign-to-foreign mergers may be subject to mandatory merger clearance in Ukraine even if they are not directly linked to Ukrainian market but at least one of the undertakings involved has a turnover of €1m in Ukraine (from April 2016 this threshold will be increased to €8m).

We usually prepare Competition Compliance Guidelines for our international clients to help avoid violation of antitrust law and ensure that their activities are conducted in accordance with Ukrainian laws. Such Guidelines are custom tailored according to the needs of the client and covers the areas of applicable to particular case. They always contain exact and practical recommendations to the management. The universal recommendations are to:

- appoint the person responsible for compliance with the antitrust law of Ukraine;
- bring the Guidelines to the attention of top management and other persons entitled to decide on strategic business related issues;
- follow recommendations and procedures stipulated by Guidelines;
- seek legal advice in case of doubt re how this or that situation may affect the group.

Cardenas: The FECC is carrying out important and more aggressive efforts to detect the commission of monopolistic practices and to detect barriers to competition. For example, the FECC is performing market studies on several sectors, like the one in the agroalimentary industry previously mentioned and on the financial industry. Therefore, the enterprises seem to be much more interested in avoiding violating the Federal Law on Economic Competition.

Accordingly, the FECC's guidelines that address the main aspects that an effective antitrust compliance program must consider these main recommendations:

- Generate a compliance program based on an assessment of risks
- Elaborate guides and policies
- Appoint a person in charge of compliance with the antitrust framework
- Make internal audits, and generate procedures for internal complaints
- Establish disciplinary measures
- Assess the effectiveness of the implementation of the compliance program
- Generate a corporative competition culture

Such recommendations considered international best practices.

Regarding the risk assessment, it is important to identify:[3]

- Features of the market that could enable the commission of monopolistic practices.
- Categories in which it can be argued that the company has market power (dominance).
- Departments in the enterprise that could be more susceptible to be involved in the commission of monopolistic practices.
- Persons in the enterprise that could be more susceptible to be involved in the commission of monopolistic practices.
- Specific practices that could generate risks, since they might cause the enterprise to be liable for the commission of monopolistic practices.
- Exchanges of information between the enterprise's employees and its competitors.
- Exclusionary conducts performed by the enterprises' employees against other economic agents.
- Whether strategic decisions in the enterprise are made unilaterally

3 The risk assessment aspects are adopted by the FECC, which, in turn, considered the ones issued by the Competition Bureau of Canada and the International Chamber of Commerce.

9. What advice can you offer to companies that find themselves subject to an antitrust raid?

Uğur: We witnessed more than a hundred dawn raids and it is a clear fact that without proper knowledge, the employees usually get afraid during dawn raids (unannounced onsite inspections) by the TCA and with the shock of the dawn raid they may often try to delete emails or other electronic communication, or hide documents. The Competition Board is authorised to apply administrative fine due to the attempt of destroying or hiding documents apart from whether or not the information/documents in subject would actually prove any anticompetitive conduct.

Therefore, during the dawn raids, co-

operation is the key. Passwords of computers and electronic systems should be provided and full access to rooms and cabinets should be granted. For this purpose, compliance programs and mock dawn raids for both management and the employees are very useful in order to avoid any misconduct. Every company has to have a Dawn Raid team with substitute persons and have to practice at least twice a year.

Osborne: An antitrust raid is a legal emergency. Companies should have plans in place for responding to such a raid. The rights and obligations of a company during a raid may differ from jurisdiction to jurisdiction. In Canada, a company that is subject to an antitrust raid should do the following, immediately:

- Obtain a copy of the search warrant and inspect it. The warrant establishes where the search team is permitted to search and what it is permitted to seize.
- Contact legal counsel with experience in antitrust/competition law matters. Ideally, the company will already have a relationship with a competition lawyer.
- Ask the search team to delay their search until legal counsel arrives. They do not have to do so, but may if a lawyer will arrive soon.
- Give the search team a boardroom or other place to work in.
- Tell employees:

- They must not obstruct the search, as this is a serious criminal offence. They should not interfere with the search or delete, destroy, or hide any documents or data, whether in hard copy or electronic. They should not even delete any irrelevant documents (such as personal emails).
- They should be polite to the search team, and cooperate in logistical matters (such as identifying where a particular person's office is located).
- They have no obligation to answer any questions on the merits of the matter, and should not do so without first obtaining legal advice. (However, companies cannot prevent employees from talking to the Competition Bureau, and it is an offence to discipline whistle-blowers.)
- They should keep the search confidential and not discuss it with family or friends.

- Implement a litigation hold across the company: suspend all document destruction routines, unplug shredders, etc.

Gildhoff: A company that finds itself subject to an antitrust raid should remain calm and rely on its guidelines and training for such situations – which have (hopefully) been provided in advance. The company should call an external team of antitrust lawyers to assist them during the raid. The company must also decide very quickly whether it is willing to, e.g. apply for leniency and how the cooperation with the antitrust authority should be conducted in general. In addition, it is also important to understand what exactly the authorities are looking for and whether they are performing the raid on the basis of EU and/or national law, as this might entail a different approach vis-à-vis the officers.

Schnelle: In, there is the clear need to cooperate with the authorities and to minimise the impact of the raid on the daily operations. In general, any larger undertaking should have preparations for such raids and should have guidelines how the employees, in particular the key employees, should behave in case of such raids.

It is necessary to immediately have counsel on place and have counsel coordinate the activities of the undertaking. Further, it is important to be able to assess which data and documents the authorities have seized. The most important step from the legal perspective is to assess the risks of being found in breach of antitrust rules and then to decide to formally cooperate with the authorities under the respective leniency notices.

Dunlop: Agencies are increasingly using coordinated visits or "raids" to uncover evidence of cartel conduct. Any business could be subject to a search warrant.

To prepare, companies should:

- designate a search warrant response team in advance, including a compliance officer and/or legal counsel to be notified immediately;
- ensure that employees are trained to respond properly to a search warrant; and
- maintain document retention and electronic information policies.

When facing a visit from the FBI in the US, companies should:

- be courteous, but firm;
- refer all requests for documents and interviews to compliance officer or legal counsel;
- know about the individual right to counsel and right to decline an informal interview;
- identify the lead investigator and, if possible, all law enforcement personnel and agencies, and get their cards and sign-ins;

- obtain a copy of the warrant and any supporting affidavit;
- clarify the ground rules;
- monitor and make a record of the search, but do not interfere; and
- document seizure of privileged documents and information.

Iurkovska: Unlike the European Commission, AMCU is not authorised to raid businesses in Ukraine. And the maximum pressure that AMCU can apply is a) to request information posing certain questions and giving a reasonable period to provide the answers and b) impose certain fines to undertakings that refuse to submit answers or submit them not in full or not in time.

Oxenham: Scrutinise the 'search warrant' and ensure that the date, premises and scope of the investigation is accurately contained therein.

Ensure inspectors are, at all times, 'shadowed' during the raid to ensure that the inspectors do not inspect or seize 'legally privileged' documents.

Lastly, it is useful to make notes and copies of all documents which have been seized during the raid.

It is, however, advisable that staff have received adequate training as to their rights and obligations in the event of a dawn raid occurring, prior to the actual dawn raid itself.

Cardenas: It is worth mentioning that the new competition legal framework provides stronger and broader attributions for the FECC and the FTI to conduct dawn raids. Further, antitrust raids or dawn raids have never been reviewed by the Judicial Power, so there are some unresolved legal caveats. Therefore, this might cause important risks for the companies being raided, since there is a lot of uncertainty involved in the scope and reach of the dawn raid.

- Then, in case a company finds itself subject to a dawn raid, first of all, it should look immediately for professional legal advice from an expert in competition law. Nonetheless, the company should consider these key performance guidelines:
- The raided company should consider that it is in its best interest to cooperate with the authority and it is advisable to do it up to the extent its rights are not violated.
- It is highly advisable for the company to create a team instructed to coordinate the raid and its employees. This will allow the company to have control of the raid and prevent the authority from going beyond its mandate.
- Employees from the company being raided need to be polite and remain calm during the raid.
- The company needs to keep record of everything that happens during the raid, like all the documents the competition authority reviews and all the questions it has.
- It is highly advisable that a lawyer expert in competition matters advises the company since the beginning of the raid and performs an audit of the information obtained by the authority in order to anticipate the outcome of the raid and to recommend measures that could mitigate any potential liability.

10. What action should a company take if it uncovers a potential antitrust/competition breach? Are companies encouraged to self-report any wrongdoing?

Uğur: Pursuant to the Regulation on Active Cooperation for Discovery of Cartels, a leniency program is available in order to encourage self-report. This program is only applicable for cartelists and not for other forms of competition law infringements. Therefore, companies involved in price fixing, territory-based and/or customer-based customer/supplier/market sharing, restricting output or placing quotas, and bid-rigging may consider to self-report, hand over evidence about the illegal cartel in which they participated and fully cooperate with the Competition Authority to benefit from total immunity or reduction of fine, depending on the application order.

Business practices that carry a potential to lead to an infringement are sometimes considered as the way the business is conventionally done, just because the corporate learning established such a routine. It may even be the case that a company becomes truthfully aware of the illegality of a business conduct when it leads to a proceeding. However, there is no excuse for some other conducts, implementation of which requires a certain level of consciousness on their illegality. This is exactly where competition law crosses with ethics. When this happens in the existence of a compliance program, it is up to the companies' ethics and compliance policy to detect whether this is a purely managerial initiative or a corporate mistake.

We observe that competition authorities are becoming more and more aware of the necessity in finding a balance in the division of criminal liability between corporations and their managers. However, one should not expect the competition authorities to

rate the effectiveness of a compliance program. The authorities will just focus on the facts, and it will not be difficult for them to detect how effectively a company implemented its compliance program. An effective compliance policy, nonetheless, is the key element to safeguard the fair balance between the expectations of the shareholders and the duties of the managers.

Osborne: Companies that uncover a potential antitrust/competition breach need to:

- Conduct an internal investigation to determine whether competition laws have been breached, the nature of the breach, and the jurisdictions affected by the breach.
- Consider whether to seek immunity or leniency, and in which jurisdictions.

Usually the decision about seeking immunity or leniency will be made before the internal investigation is complete. This is because competition authorities offer better deals to companies that are the first, or among the first, to self-report.

A number of factors must be considered in making the decision to self-report. In essence, the company must balance the benefits of self-reporting (lower fines) against the downsides, including the certainty of criminal convictions, fines and follow-on class action damage settlements, and the tremendous legal costs associated with self-reporting and then defending class actions. As a result, self-reporting is not always the best choice for a company.

Gildhoff: In theory, every breach of antitrust/competition law uncovered should be reported to the antitrust authorities, as the authorities usually consider such conduct as the only choice a company has. In practice, it might be advisable to consider the case carefully before reporting any potential wrongdoing to the authorities. An internal audit, including interviews with the relevant staff, could shed much more light on the potential wrongdoing and also help in clarifying facts, understanding the real risks and options and allowing to take a strategic decision on the basis of a profound assessment of the facts.

Schnelle: Reference is made in response to question 9.

Dunlop: If a company uncovers a potential antitrust breach, it is critical that it immediately conducts a full investigation to put itself in a position to take advantage of the DOJ leniency program, as well as potentially programs offered in other jurisdictions. Swift action is essential to obtain the benefit of these programs.

Iurkovska: Sometimes it is better to self-report and AMCU indeed encourages companies to do so.

In terms of merger clearances, AMCU has temporary decreased the fines for admission of guilt in conducting M&A deal in the past without AMCU merger clearance. Until mid-March 2016, a fine shall amount to approximately €780, and in the period from mid-March to mid-September 2016, a fine shall be approximately €3,900. After that, infringing undertakings will have to pay fines in full, starting from approximately €19,500 and up to 30% of turnover received as a result of infringement.

In terms of anticompetitive concerted practices, undertaking shall be relived from payment of fines if it voluntarily and prior to other parties to concerted practices reports the violation to AMCU and provides information which shall be essential for AMCU to take its decision on the case.
Self-reporting, however, does not release from claims for double damages.

Oxenham: Self-reporting is encouraged and will generally be a mitigating factor when an administrative penalty is calculated.

It would also be prudent to ensure that company staff undergo competition law training and implement a compliance program before any administrative penalty is imposed to demonstrate the company's efforts to ensure compliance with the relevant competition laws.

Companies should also take note of the Competition Commission's Corporate Leniency Policy which may immunise a company from the imposition of an administrative penalty, provided the company is the first to report the existence of a cartel to the Commission and provides sufficient evidence upon which the Commission is able to prosecute the other members of the cartel.

Cardenas: If companies uncover a potential competition breach, it is of vital importance to immediately contact an expert competition lawyer to assess the said conduct.

Under the competition legal framework, companies are encouraged to self-report absolute monopolistic practices by considering a leniency program, stated in the Federal Law on

Economic Competition where companies who confess on committing these practices might receive a reduced fine. The fine for the first company to self-report and apply to the leniency program is of only one minimum wage, $70.10 Mexican pesos (approximately $4.09 USD).

Frolov: It depends. Leniency is available, for both horizontal and vertical collusion, it is easy to apply for and effective. There have been multiple successful leniency filings. However, applying for leniency will most likely involve the commencement of criminal proceedings. If leniency is not warranted then quick and effective corrective action and/or remedies are recommended. Historically, the Estonian Competition Authority has taken a very pragmatic approach to potential competition law violations – if corrective measures are applied then it is usually willing to consider terminating the investigation without imposing fines and with or without making the commitments binding.

11. What do regulators look at when determining whether M&A activity is in breach of competition and antitrust laws? Do dealmakers generally find it difficult to obtain the necessary clearance in your jurisdiction?

Uğur: Merger control regime is regulated under the Competition Law, and Communiqué on Mergers and Acquisitions Requiring the Approval of the Competition Board. The TCA is responsible from reviewing and resolving merger control filings and it has also issued guidelines on the enforcement of Turkish merger control rules.

Similar to the EU, pre-merger notification to and approval from the Competition Board is required for concentrations that result in a change of control and exceed one of the two applicable turnover thresholds. Depending on the transaction parties' global turnover and/or turnover in Turkey a merger control filing in Turkey may be necessary.

Considering the fact that there are few cases where the Competition Board did not approve a merger control filing, one could allege that it is not difficult to obtain the necessary clearance. Nevertheless, it should be also noted that commitment mechanisms are frequently used under Turkish merger control regime in order to obtain approval from the Board.

The dealmakers are aware of the competition law consequences but still not very keen on having the competition lawyers have a seat from the very beginning of the transaction strategy making talks. Furthermore, conventional due diligences should also focus on hidden competition law risks to the extent the conditions allow. Gun jumping is has not created a precedent yet in Turkey but should also be included in the check list of potential risks. Finally, hostile takeovers in the form of public offerings were not covered by the law since the Turkish law strictly prohibited closing without clearance. Although managed by practice by the Turkish Competition Authority, such transactions should be carefully designed in terms of competition law liabilities.

Meridor: According to the RTPL a merger must be notified and approved prior to consummation. The threshold for filing a merger notification is one of these:

- A merger resulting in an increase of the merged companies' share market to more than half of the market; or
- A merger which the sales turnover of the merging companies exceeds the amount of 150 million NIS (~$38,000,000); or
- A merger in which at least one of the merging companies is a monopoly.

According to the law, the General Commissioner must examine whether the merge creates a reasonable concern of harm to competition or the public. The harm may be due to the price level of goods or services; the quality of property or services; or the quantity of assets or services. After this review, the General Commissioner may approve the merge; approve the merger under condition; or not to approve the merge at all.

Recently, the IAA has proposed to change the above arrangement, in a way that the test whether the merger affects the competition, will be made by the companies before submitting an application for a merger approval to the general commissioner (self-assessment).

Schnelle: The approach taken by the Federal Cartel Office to merger control proceedings is rather cooperative. The test is whether or not any concentration would significantly impede effective competition. The first and most important test is whether or not a dominant market position will be created or enhanced by a certain merger. Given the rather low thresholds for merger control and given that merger control is organised with the Federal Cartel Office in departments which are specialised for certain industries, any major deal maker is known to the Bun-

deskartellamt. When it may come to delineate as to the relevant geographic market, the Federal Cartel Office also considers the worldwide or the European Union market as relevant markets. However, the quote of prohibitions is higher than with the EU Commission.

Dunlop: Section 7 of the Clayton Act prohibits transactions that may substantially lessen competition or create a monopoly in any product or geographic market. The agencies generally interpret this to condemn consolidations that will lead to increased prices, reduced quality, reduced rates of product or service innovation or improvement, or in some circumstances reduced diversity of available products or services. Each transaction is judged on its merits and according to the evidence available. The regulators examine various sources and types of evidence, notably customer and competitor interviews and complaints and internal company documents and data, particularly win-loss data and documents discussing the transaction's motivations. Customer complaints or internal documents that indicate that the parties are particularly close competitors, or that there is an anticompetitive motive behind a transaction can be especially problematic when trying to obtain clearance.

Oxenham: In South Africa, the competition authorities evaluate mergers from two different 'angles'. Firstly, the authorities will consider the traditional tests to determine whether the merger is likely to lead to a substantial lessening of competition in the market. The authorities will consider, inter alia, the market concentration, the nature of the market and any barriers to entry, to evaluate whether the merger raises any horizontal or vertical concerns.

Secondly, and a somewhat novel feature to the Act, are the express public interest considerations which the competition authorities must consider when evaluating a merger. The most common public interest provision relied on is the impact of the transaction on employment. It is now extremely likely that a merger is approved subject to a moratorium on merger related retrenchments.

The Competition authorities are placing greater emphasis on public interest considerations which have at times added to the uncertainty relating to the timing and costs of potential mergers and have led to unfavourable outcomes in certain matters.

Cardenas: Concerning merger reviews by the FECC and the FTI, the Federal Law on Economic Competition Commission provides certain thresholds that determine when a merger should be cleared by such authorities in order to be legally closed by the parties involved. Thus, any closed M&A that surpasses the said thresholds that was not notified before the competition authorities will breach the competition framework.

Moreover, in case an M&A is dully notified before the FECC and the FTI, they should analyse whether the transaction harms competition within the market it will take place because if it does it will breach the Federal Law on Economic Competition. Therefore, in order to assess whether M&A activity may harm competition in a certain market, the competition authorities take into account at least the following factors:

- The number of participants and their shares in the relevant market;
- The degree of concentration of the relevant market;[4]
- The effects the concentration would have in the relevant market regarding other competitors and consumers, and
- The efficiencies which may derive from the concentration, particularly those which translate into consumer benefits.

In practice, how easy it is to obtain the necessary clearance depends on how likely it is for the merger to cause antitrust concerns. When evaluating a merger, the competition authorities need to evaluate whether it:

- May grant the undertakings substantial market power, which can allow them to block, diminish, harm or impede competition in the relevant market.
- Has or may have as purpose or effect to create barriers; to avoid the access to third parties to the relevant market, related markets, or essential inputs; or to displace other economic agents therein.
- Has the purpose or effect to substantially facilitate the undertakings the exercise monopolistic practices (including possible coordinated effects).

The Federal Law on Economic Competition establishes a fast-track procedure for merger notification. It is applicable for those mergers that are unlikely to have anticompetitive purposes or effects. However, since this procedure does not include a stage for

4 Measured by the Herfindahl-Hirschman Index

the FECC to require additional information from the one provided by the parties in the notification, only in case the FECC is not satisfied with the information submitted may it reject the notification. This means that the parties would be required to file again their notification under the standard procedure. As a result, there is a lot of legal uncertainty on this regard, so this procedure is not used very often, not even in cases which should be easy to analyse. Therefore, the companies under such circumstances are forced to bear unnecessary costs in order to prevent delays obtaining the necessary clearance of their transaction.

Frolov: The Estonian Competition Authority applies the 'significant impediment to effective competition' test – in each concentration it looks at structural changes in the market and competitive landscape. It does not apply the narrow 'dominance test' – mergers have been approved where the combined market share exceeds 40%, i.e. the assumption of dominance under Estonian law. However, the authority is keen to look at only the Estonian market and loth to define broader geographical markets, e.g. pan-Baltic markets. This may be an issue for pan-Baltic transactions. Otherwise, Phase I investigations and quick (three weeks on average) while Phase II investigations are rare – getting approval may take months. Thus it is recommended to conduct pre-transaction regulatory assessments and engage in pre-notification contacts with ECA for more complex deals.

12. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Uğur: Turkey currently uses "Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector" (Communiqué No: 2005/4) which is similar to European Commission's Regulation No: 1400/2002. The Turkish Competition Authority is working on a new Block Exemption Communiqué based on EU Commission's current Regulation numbered 1400/2002. Considering the positive effects of the Regulation numbered 1400/2002 on the motor vehicle sector in EU, it is expected that the new communiqué will be effective beginning 2016 and we hope that parallel to the regulation in EU for the purpose of harmonization.

Settlement practice, like leniency programs, has a great benefit for competition law regimes. Turkey has not yet adopted a settlement practice but an article providing for a settlement procedure is included in the proposed Draft Competition Law. Therefore, Turkey may apply a settlement procedure in some time.

Finally, a conscious application of competition law should lead to more private antitrust litigations. Accordingly, the Authority must find ways to encourage companies or consumers to seek for the damages they suffer.

Meridor: The most important challenge the IAA and courts face, is the further implementation of the Shufersal Decision. This decision changes the interpretation of the law regarding restrictive agreements (the equivalent of s. 101 TFEU Violations) from a per se environment, to a Rule of Reason one.

According §2(a), a restrictive arrangement is an arrangement in which at least one party "restricts itself" in a manner likely to prevent or reduce competition between it and the other parties to the arrangement or anyone else.

§2(b) sets out a presumption that certain kinds of restraints shall be deemed as restrictive arrangements. These include: arrangements relating to price, geographic allocation or customer markets, etc.

A restrictive arrangement according §2(a) or §2(b) is prohibited, unless it is approved in advance by Antitrust Tribunal, or exempted by the Director General from the necessity to be approved.
§2(b) was interpreted as a per se non disputable presumption. Any practice which fell under the four groups of restraints stipulated in that section was illegal per se.

However, as §2 does not distinguish between horizontal and vertical agreements – as a result, many vertical agreements, fall under the per se prohibition.

Recently in the Shufersal case, the court has acknowledged the fact that vertical arrangements can benefit competition. Therefor the court has decided that vertical arrangements are not suppose to be included under §2(b).

For the sake of regulatory certainty, it would be worthwhile to officially exclude vertical arrangements from the restriction.

Gildhoff: One of the key trends is the question of correctly applying competi-

tion law to undertakings using – or prohibiting others from using – the internet as a means of conducting their business. It is no coincidence that the European Commission recently launched its e-commerce sector inquiry in order to better understand this area and the specific competition law problems involved. The German antitrust authority (in connection with distribution systems) follows a very strict approach in this respect, making a delicate distinction between restrictions that are really required for, e.g., qualitative reasons and restrictions that simply are infringements of competition law.

Maton: Given the potential change in the legal landscape regarding collective actions which the CRA has introduced, law firms will be and are searching for the first test case to file at the CAT under the new regime of collective action.

In light of the 2016 deadline for implementation of the EU Damages Directive, it will prove crucial to observe how exactly different Member States will implement its recommendations. The Directive seeks to harmonise the rules across the E.U. in respect of such claims but many of its provisions will have a lesser impact on Member States such as Germany, the U.K. and the Netherlands that already boast well-developed competition law private damages action regimes.

There is likely to be a wave of ForEx claims in London given the progress of global investigations by regulatory authorities, including the FCA, into the offending banks and financial services providers and the impressive litigation results of several firms in the United States.

Schnelle: The Federal Cartel Office will continue its activities against discrimination of online trade. They will finalise their proceedings against so-called best-price clauses in hotel booking platforms. The law maker and the Federal Cartel Office are working on reforms concerning the proceedings in antitrust (cartel) cases before German courts. An appeal against the decision taken by the Federal Cartel Office imposing fines is brought to the Higher Regional Court Düsseldorf and from there, however, limited to a legal review, to the Federal Court of Justice. The rules in these proceedings are not tailor-made for antitrust cases but the rules are essentially the same as for road traffic misbehaviour. Therefore, one of the crucial issues would be a reform of the rules applying to the court proceedings in antitrust cases.

Dunlop: In the coming year, with a vibrant M&A market, we expect to see federal antitrust regulators continue to focus on mergers in the healthcare industry, as well as technology and energy sectors. In non-merger enforcement, pay-for-delay patent settlements and other "product lifecycle management" developments in the pharmaceutical industry will continue to be a focus for investigation by the FTC and state attorneys general. DOJ will continue its focus on cartel enforcement in the financial services and auto parts industries, with an emphasis on individual prosecutions in the wake of the Yates memo.

Iurkovska: The EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA) became effective on 1 January 2016. Positive changes are expected in terms of transparency and effectiveness of AMCU. Moreover, there are a number of documents that must be adopted in compliance with DCFTA which relate to further harmonisation of Ukrainian competition laws to the European.

Cardenas: As mentioned in the reply to question number 3, we think that a key trend we can have this year is the FECC focusing in performing market inquiries in connection to the transportation sector and to have an active participation – issuing opinions and exercising its new attributions to authorise cross participation in integrated energy activities – in the implementation of the new legal framework in the energy sector.

Moreover, as a result of market study on the agroalimentary industry, the FECC might initiate new investigations in markets within the sector.

Further, since there are two authorities in charge of regulating competition, the criteria and standards adopted by both might be different. Thus, that might generate legal uncertainty for economic agents. Moreover, the Departments within the FECC and the FTI have different criteria among them concerning the same matters. Therefore, it should be expected that at least inside the FECC and the FTI, homogenous standards are applied.

Finally, it is desirable for the specialised courts to be more critical on the FECC and the FTI's resolutions in case they consider one to be against the law or technically unfit. We think this can enrich and strengthen the competition debate in Mexico and can also upturn the technical and legal analysis therein.

Frolov: I see three key trends developing in Estonia.

- Firstly: increased enforcement in the area of dominance and unilateral action. Why? Markets have concentrated since the Great Recession, enforcement in this area has been picking up lately after a long period of focusing mainly on collusion, the authority has developed cost and profitability models in the regulatory arena which it may want to test in the competition law arena, fines have been increased significantly etc.
- Secondly: state aid compliance will receive more attention – mostly due to the very open discussion of the importance of state aid rules following the Commission's negative decision regarding Estonian national air carrier Estonian Air.
- Thirdly: the efficacy, predictability, flexibility and duration of cartel investigations will probably return to the agenda due to both internal and external factors, e.g. implementation of the Damages Directive, the Commission's consultation on the efficacy of NCA's in enforcing EU competition rules.