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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE

October to December 2020

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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE: OCTOBER TO DECEMBER 2020

The key development last quarter was the publication in China of draft antitrust guidelines for the platform economy. Many other jurisdictions are also considering how to refine or extend antitrust enforcement in the technology sector, but what makes China significant is that it has up to date largely tolerated the growth of significant internet businesses and that the introduction of these draft guidelines coincides with a number of enforcement actions and an immediate and significant impact on the share price of Chinese technology stocks. The draft guidelines cover a range of issues, but key points include exclusive dealing (in particular the "one from two" policy which require suppliers not to use competing platforms), refusal to supply and a tougher approach to mergers.

In other China news, there was a fall in merger activity, but continued enforcement of gun-jumping with a further six failure to file decisions (including three against technology companies); interim merger guidelines which, amongst other things, allow SAMR to authorise provincial level agencies to conduct merger reviews; further guidance and enforcement in relation to active pharmaceutical ingredients; updated foreign investment rules; and a Supreme Court judgment confirming that antitrust disputes are arbitrable in China.

Outside mainland China, Hong Kong brought its first abuse of market power case; settled an investigation into the joint operation of four terminals within Hong Kong's port; and issued the first director disqualification order; Singapore consulted on changes to its competition guidelines aimed primarily at enhancing enforcement in digital markets; Japan brought two bid-rigging cases; and in Australia, Epic Games filed proceedings against Apple relating to Apple's refusal to allow app developers to provide app stores to iOS users; Google's proposed remedies for its acquisition of Fitbit were rejected (but that acquisition has subsequently closed anyway); Facebook is facing court proceedings for misleading consumers in relation to a data protection app; and criminal proceedings were brought against a supplier of active pharmaceutical ingredients in relation to alleged cartel conduct.

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SPECIAL COVERAGE: CHINA ENFORCEMENT AGAINST PLATFORM GIANTS

One day before the Singles' Day (11 November 2020) shopping spree, China published the Draft Antitrust Guidelines for Platform Economy ("Guidelines") for public consultation which was closed on 30 November 2020. The Guidelines caused a stir in stock exchanges where Chinese techs' share prices plunged with around USD 250 billion vaporized on the next day. While relevant stakeholders and legal practitioners were second-guessing whether the authority would really implement the Guidelines to clamp down on those Chinese platform giants, a series of enforcement activities have come in the limelight including three failure-to-file fines against Alibaba, a subsidiary of Tencent and another online delivery group as well as a formal investigation against Alibaba's exclusive conduct, namely the notorious "one from two" practices.

In the meanwhile, in this quarter "antitrust", as a legal concept, has attracted unprecedentedly rocketing attention from the society in China, after Central Government in various occasions, e.g., over the Central Economic Work Conference jointly held by the Central Committee of the Communist Party and the State Council on 18 December 2020, have highlighted the significance of antitrust law's role in combating disordered expansion of financial capital and safeguarding healthy competition. In addition, revising the existing AML alongside with other antitrust-related work streams have been set as one of the key priorities of the nation in the new year.

More details about the abovementioned developments are also provided below.

I. Draft Antitrust Guidelines for Platform Economy

The Guidelines, irrespective of being in its consultation stage, have sent a clear signal to the market that the antitrust regulator in China intends to put an end to its tolerating attitudes towards the presence of powerful big techs in China as well as their potential abuse of market power to the detriment of consumer welfare and long-term innovation and healthy development of market economy. On a more detailed level, the Guidelines have responded to many hot issues which are most concerning platform users and end consumers. This quarterly update has summarized the notable aspects of the Guidelines as follows:

- **Market definition, approach and role confirmed**

  The Guidelines highlights that network effects across platforms should be taken into account when defining relevant product markets in cases that involve platforms. Besides, differences in the role of market definition in different types of antitrust cases are fully recognized. In particular, in relation to enforcement against abusive conduct, the Guidelines provides flexibility by allowing the absence of market definition in case of practical difficulties.

- **Data and algorithm, nowhere to hide**

  The Guidelines sets a clear tone that both horizontal and vertical anti-competitive agreements facilitated by the use of data and algorithm are prohibited. It is explicitly provided under the Guidelines that horizontal collusion and vertical price fixing via data, algorithm or technological means are equally considered to be anti-competitive agreements as in traditional forms of agreements. In addition, the Guidelines also empowers future enforcement by accepting indirect evidence provided that it is logically consistent when direct evidence is not available.

- **MFN and Hub-and-Spoke, extra attention placed**

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Notably, the Guidelines recognizes the anti-competitive effects of setting most-favoured nation ("MFN") clauses in vertical agreements and engaging in hub-and-spoke practice to facilitate horizontal anti-competitive agreements among competitors (with competitors on "spoke" side and platforms acting as "hub"). Note that both MFN and hub-and-spoke have been frequently assessed by competition authorities in Europe and the US in their enforcement relating to digital platform companies.

- **Market dominance, market share far less weighed in**

  The Guidelines fully recognizes the necessity to consider other factors than market shares when determining whether a platform has market dominance. Taking into account characteristics of platform economy, such factors include transaction value and volume, user number, hit volume, duration, scale economy, etc., as provided in the Guidelines.

- **Exclusionary conduct, tricks exposed**

  Predatory pricing

  As with cases in traditional sectors, the key in assessing predatory pricing remains the determination of "costs". The Guidelines in this regard provides that costs of platforms should include all associated markets' costs if there are multi-sided markets involved. Besides, regarding "justifications" that should be available under law to exempt predatory pricing in certain circumstances, the Guidelines gives guidance by way of specific examples, such as promotion for new products during a sufficiently limited period of time. This is considered to have reflected the more common presence of selling-below-costs in platform economy.

  Refusal to supply

  In relation to the means to implement refusal to supply, the Guidelines explicitly recognizes that setting restraints or hurdles through platform rules, data or algorithm constitutes refusal to supply. Moreover, the concept of essential facility is introduced in the Guidelines with respect to both platform and data. To determine whether a given platform or certain data qualifies as essential facilities, the Guidelines presents a balanced approach by on the one hand considering indispensability of such platform/data from the view of rivals, and on the other hand considering the impact on the data/platform owners (as they would be obliged to open access to rivals if their data/platform constitute essential facilities).

  Exclusive dealing

  The "one or the other" phenomenon is expressly included as the no.1 item on the list of exclusive dealing examples provided by the Guidelines. Further, the Guidelines also elaborates on the specific means to lock in users, e.g., penalty and incentives linked with search priority, technical barriers, volume support, etc.

  Tying and imposing other unreasonable conditions

  Forcing to collect user data is clearly recognized by the Guidelines as a form of imposing unreasonable trading condition, which would potentially be deemed to abuse market dominance.

SPECIAL COVERAGE: CHINA ENFORCEMENT AGAINST PLATFORM GIANTS

Discrimination

The Guidelines in this regard has a clear focus on the heavily-condemned "big data discrimination" practice of platforms. Within the four means to carry out discriminatory treatment provided, the Guidelines refers to data and algorithms three times to describe how platforms could rely on data and algorithms to implement discriminatory treatment based on purchasing abilities, payment habits, preferences, etc., of customers.

- **Turnover calculation, hard to fall below thresholds**

  On top of general rules for the purpose of calculating turnover, the Guidelines distinguish whether a platform itself participates as a user on the platform or not. When a platform is not a user, service fees and other revenues need to be included when calculating turnover, whereas when a platform also acts as a user, transaction value needs to add up on service fees and other revenues. Note however that it is not clarified in the Guidelines which revenues should be taken into account as "other revenues", and this in practice might create a challenge for both market players and State Administration for Market Regulation ("SAMR") .

- **VIE structures, no longer off the hook**

  The Guidelines has settled the long debate over VIE structures by including VIE cases as part of the Chinese merger control review.

- **Killer acquisitions (among others), "special" treatment awarded**

  The Guidelines recognizes the potential harm on competition arising from some types of mergers that do not meet the existing filing thresholds. Among such mergers, the Guidelines specifically shows willingness to catch (i) killer acquisitions, through which established players seek to acquire rising start-ups which in most cases do not cross the filing threshold; and (ii) acquisitions between parties that have revenues (loss-making not uncommon) disproportionate to their market power due to the implementation of low price strategy at a certain period of time.

II. Failure-to-file fines on platform giants

On 14 December 2020, SAMR published failure-to-file decisions in three cases which involve VIE structures: (i) Alibaba was fined RMB 500,000 (USD 76,450) for its failure to notify its 2017 acquisition of control in Intime Retail (Group) Company Limited, which runs department stores and shopping malls in China; (ii) Tencent's subsidiary China Literature Limited was fined RMB 500,000 (USD 76,450) for its failure to notify its 2018 acquisition of 100% interest in New Classics Media Limited, which is active in media and entertainment industry; and (iii) Hive-Box was fined RMB 500,000 (USD 76,450) for its failure to notify its 2020 acquisition of 100% interest in China Post Smart Delivery Technology Co., Ltd, which supplies intelligent express mail box and express terminal delivery services.

Regardless of absent competition concerns, the three transactions have been imposed upon the highest fines (RMB 500,000) as legally prescribed. This should officially mark an end of the period when notifiable deals with VIE elements could escape antitrust scrutiny in China.

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III. Investigation against Alibaba's exclusive conduct launched

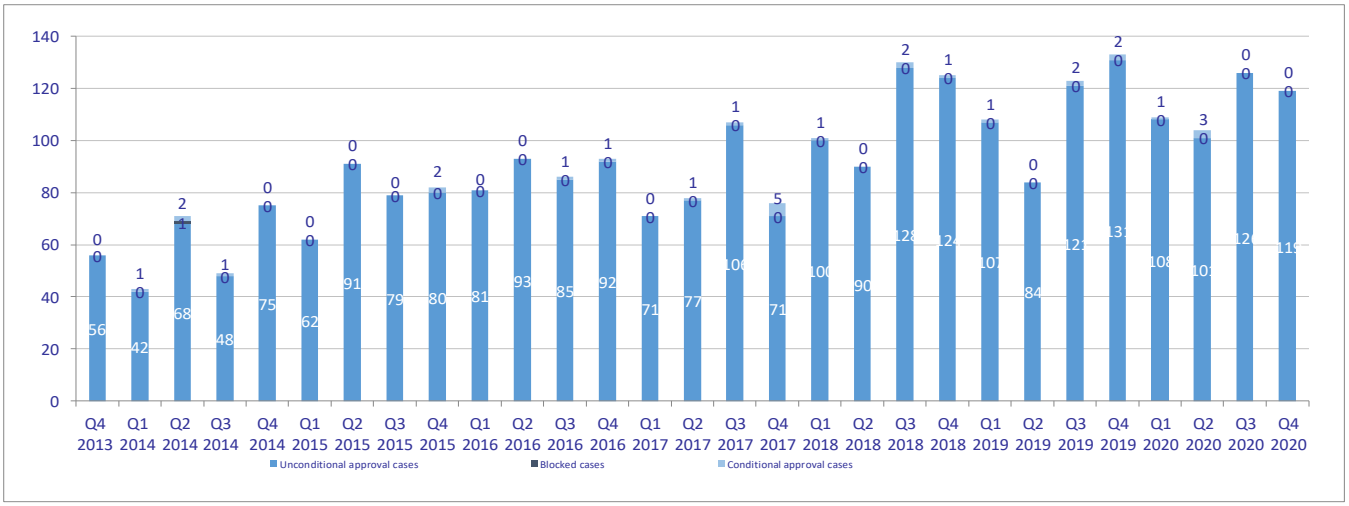
On 24 December 2020, SAMR announced that it has formally launched an investigation against the exclusive practice of Alibaba Group. Such exclusive conduct by Chinese tech giants is also dubbed "choose one from two" in Mandarin. So far no details have been released in relation to SAMR's investigation. A spokesperson of Zhejiang Administration for Market Regulation ("Zhejiang AMR") also confirmed that the Headquarters of Alibaba Group was raided on 24 December 2020.

MERGER CONTROL

How many cases have there been?

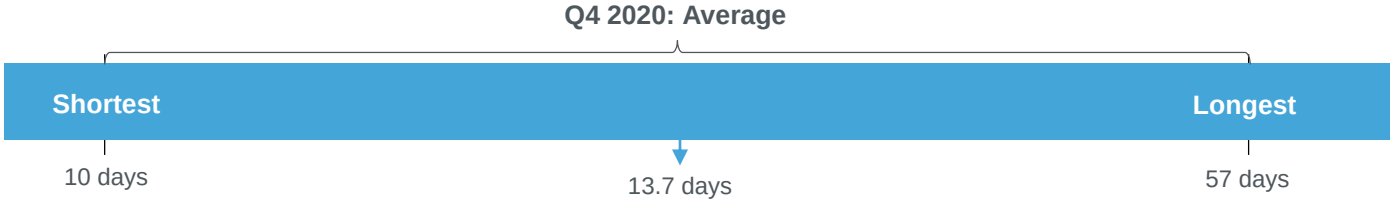
There were in total 119 merger decisions released in the fourth quarter of 2020, a decrease of 10.53% compared to the fourth quarter of 2019, and all the cases were unconditionally cleared. Around 99 cases were notified under the simplified procedure in this quarter, which represents 83.19% of the total reviewed cases.

Merger control trends – Q4 2013 – Q4 2020



Simplified procedure: How quick is the review period?

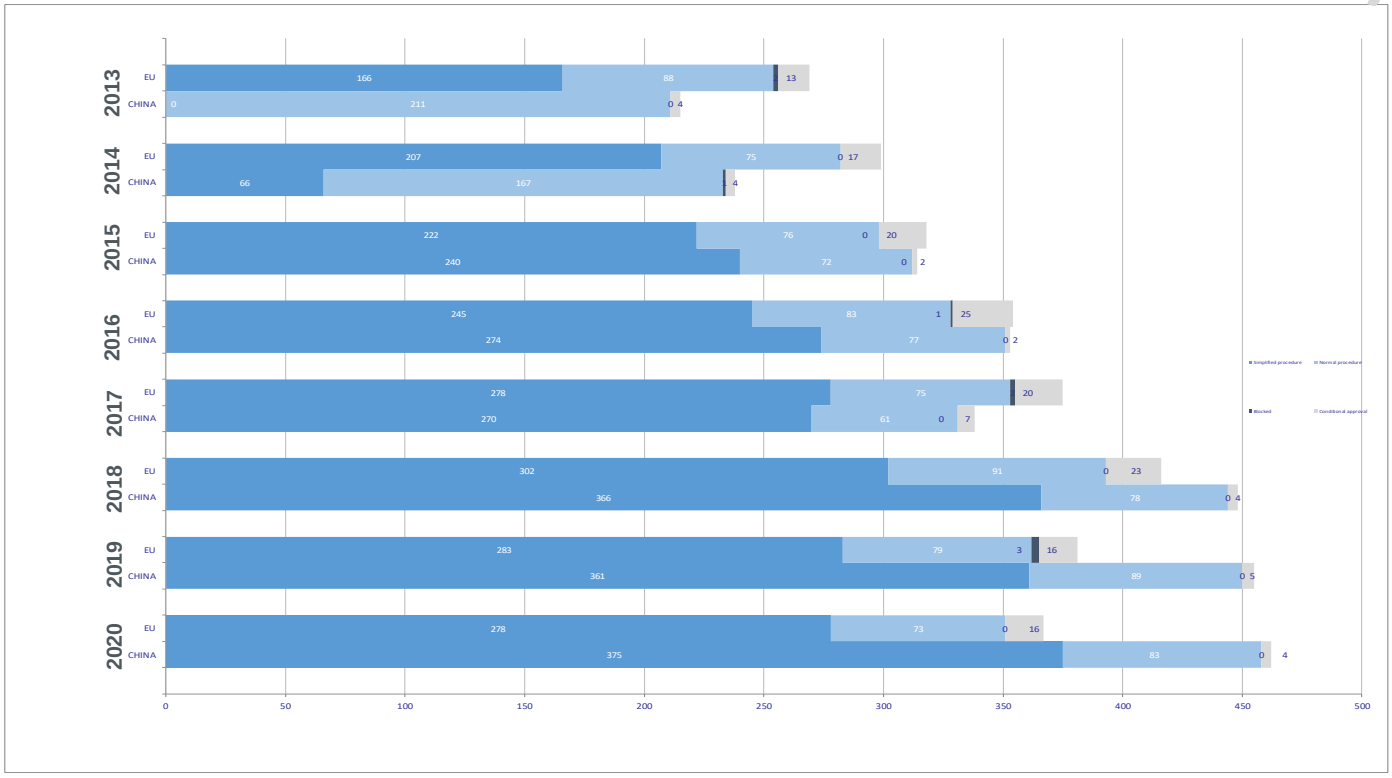
Quarter	Average review period	Simplified procedure (%)	Cases exceeding 30 days
Q1 2016	27 days	74.1%	2
Q2 2016	26 days	82.8%	10
Q3 2016	25 days	75.6%	0
Q4 2016	25 days	77.4%	4
Q1 2017	25 days	81.7%	5
Q2 2017	23 days	66.7%	2
Q3 2017	20 days	82.2%	1
Q4 2017	21 days	76.3%	0
Q1 2018	19 days	92.1%	1
Q2 2018	18 days	81.1%	1
Q3 2018	16 days	76.9%	0
Q4 2018	17 days	80.0%	3
Q1 2019	16 days	77.8%	0
Q2 2019	17 days	85.7%	0
Q3 2019	19 days	78.9%	1
Q4 2019	14 days	81.2%	0
Q1 2020	14 days	87.16%	1
Q2 2020	13.7 days	86.54%	0
Q3 2020	14.4 days	72.22%	3
Q4 2020	13.7 days	83.19%	1



MERGER CONTROL

How does China compare internationally?

Comparison with EU – 2013 – 2020



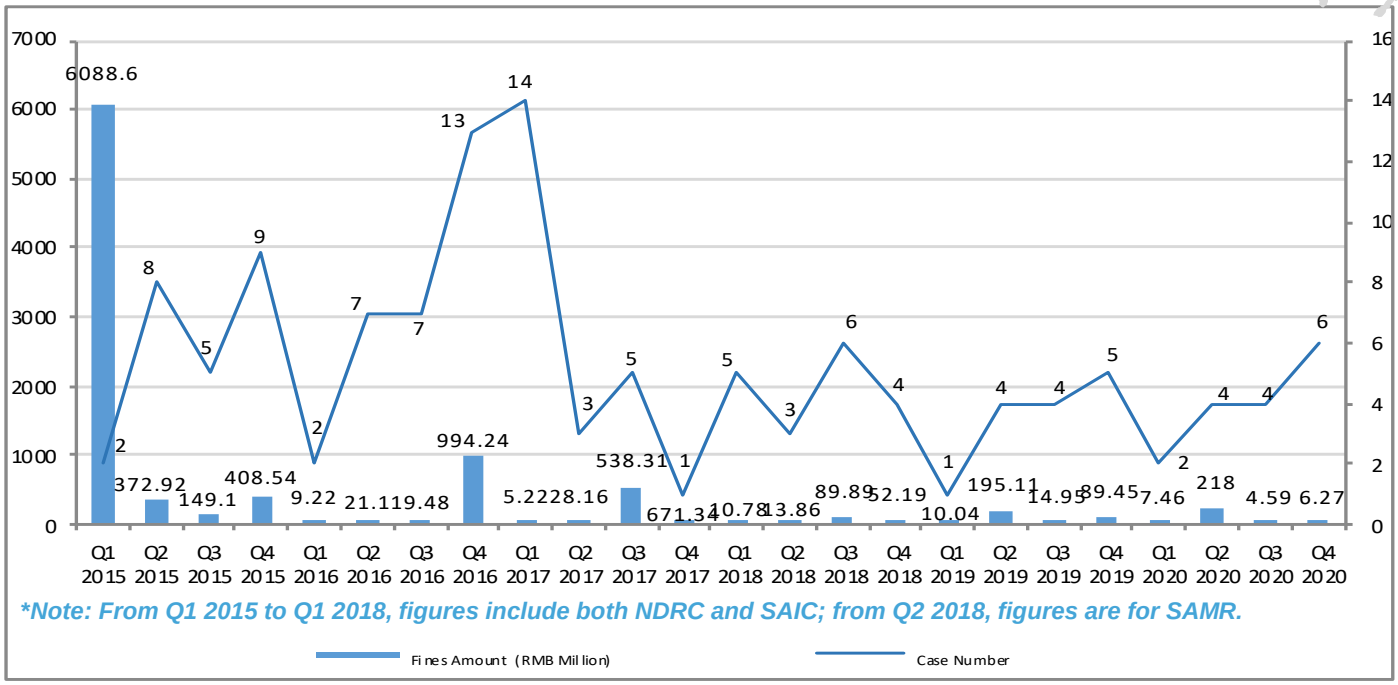
Other "failure-to-file" fines in this quarter

Apart from the three VIE cases in the platform economy sector, SAMR also published the following failure-to-file decisions in this quarter. None of these transactions were found to give rise to any anti-competitive effects:

- On 3 September 2020, Zhejiang Construction Investment Group Co., Ltd. was fined RMB 350,000 (USD 53,515) for the failure to notify its acquisition of 29.83% interest in Dohia Group Co., Ltd. in 2019.
- On 23 October 2020, ANE Fast Logistics (Hong Kong) Limited was fined RMB 300,000 (USD 45,870) for the failure to notify its acquisition of 100% interest in Changshan Zongkha Transportation Supply Chain Management Co., Ltd. in 2018.
- On 6 November 2020, Jiangsu Yueda Investment Co., Ltd. and Beijing Changjiu Logistics Co., Ltd. were each fined RMB 300,000 (USD 45,870) for the failure to notify the formation of a joint venture in 2019.

ANTITRUST INVESTIGATIONS

Enforcement trends* – Q1 2015 to Q4 2020



Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
Used car trade Ningxia AMR	22 October 2020	Price fixing and market dividing	154	0	15	4%	Yes
Used car trade Zhejiang AMR	5 November 2020	Price fixing	990	82	464	2%-5%	Yes
Cremation service supply Zhejiang AMR	9 November 2020	Abuse of dominance	651	N/A	N/A	6%	No
Bromhexine hydrochloride API Zhejiang AMR	17 November 2020	Abuse of dominance	2,242	N/A	N/A	3%	Yes
Driver training service Anhui AMR	25 November 2020	Price fixing	415	40	252	2%	Yes
Public tap water supply Jiangsu AMR	16 December 2020	Abuse of dominance	1,821	N/A	N/A	4%	N/A

Ningxia AMR fines eleven used car dealers for price-fixing

On 14 October 2020, Ningxia Administration for Market Regulation ("Ningxia AMR") issued penalty decisions imposing a collective fine of RMB 154,439 (USD 23,118) on and confiscating illicit gains of RMB 1,173,526 (USD 179,667) from 11 used car dealers in Shizuishan City, Ningxia Hui Autonomous Region ("Shizuishan") for price-fixing.

ANTITRUST INVESTIGATIONS

Ningxia AMR found that the 11 competing used car dealers had a market share of 100% in the used car trading market in Shizuishan. From September 2009 to June 2019, the 11 dealers orally agreed to fix used car service fee and appraisal fee, and agreed to split the profit evenly. Specifically, they decided to jointly operate their businesses via centralized offices and applied unified financial management to ensure that each company would charge the agreed fixed price. During the joint operation period, the profits were evenly distributed in cash to all the companies on a monthly basis. One of the 11 dealers involved in this case was forced to join the agreement; it proactively reported and provided evidences on the price-fixing practice. In the circumstances, Ningxia AMR ordered such whistle-blower to discontinue the illegal conduct but exempted it from penalty. For the other 10 companies, Ningxia AMR took into account that they had cooperated in the investigations and made timely rectifications, and imposed on each of them a fine equivalent to 4% of their respective total sales in 2018.

Zhejiang AMR fines five used car dealers for price-fixing

On 2 November 2020, Zhejiang AMR issued its penalty decisions to impose RMB 989,909.43 (USD 149,078) on and confiscate illicit gains of RMB 4,548,247 (USD 696,336) from five used car dealers in Huzhou City, Zhejiang Province ("Huzhou"), for price-fixing.

Zhejiang AMR found that in February 2011, four used car dealers reached an agreement on the service fee for trading of local used cars under the leadership of Huzhou Jiangnan Used Car Trading Market Co., Ltd. ("Huzhou Jiangnan"). The four companies even submitted a report in March 2011 to the then Huzhou Administration of Commerce and Grains on the unified pricing standards and implemented the standards from 1 April 2011. In 2014, another used car dealer, Changxing Linghang Used Car Trading Service ("Changxing Linghang"), was incorporated in Huzhou and adopted the agreed standards from May 2016. As the five dealers are the only qualified used car dealers in Huzhou, the service fee for trading of local used car can only be charged at the level agreed between them. Zhejiang AMR thus held that the five companies' conduct amounted to a price-fixing agreement which harmed the competition. Huzhou Jiangnan received a heavier fine (5% of 2019 sales) for its role as the ringleader; Changxing Linghang received a more lenient fine (2% of 2019 sales) for its relatively short period of participation; and the remaining three companies each received a fine equivalent to 4% of their 2019 sales.

Zhejiang AMR fines Jiangshan Funeral Home for abuse of market dominance

On 22 October 2020, Zhejiang AMR imposed a fine of RMB 651,222 (USD 98,404) on and confiscated illicit gains of RMB 86,624 (USD 13,262) from Jiangshan Funeral Home ("JFH") for abuse of market dominance.

Regulations in Zhejiang mandated cremation as the only way to dispose of a corpse. Given that JFH is the only provider of cremation service in Jiangshan City, JFH was deemed to dominate the market for cremation services in Jiangshan City. Before a corpse gets cremated at JFH, bereaved family always buy a cremation urn to keep the ashes. All undertakings with a requisite business license can sell cremation urns ("Urn-selling undertakings") pursuant to local regulations, and they are also entrusted by clients to book cremation services from JFH. Zhejiang AMR found that from 2007 to December 2019, JFH required the Urn-selling Undertakings to purchase another urn from JFH in addition to the one bereaved family bought from the Urn-selling Undertakings, or else JFH would deny the provision of punctual cremation service. Zhejiang AMR held that JFH's conduct resulted in extra expenses to the bereaved families and restricted the families' right of free choice. Considering the long duration of the illegal conduct (around 12 years) and

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JFH's failure to proactively rectify the conduct, Zhejiang AMR refused the JFH's request for a lighter penalty, and imposed a fine constituting 6% of JFH's total revenues in 2019.

Zhejiang AMR fines Wanbangde for abuse of dominance

On 3 November 2020, Wanbangde Pharmaceutical Group Co., Ltd. ("Wanbangde") was fined RMB 2,773,958.69 (USD 424,693.07) by Zhejiang AMR for abuse of dominance.

Bromhexine hydrochloride is mainly used as a mucolytic to treat acute and chronic bronchitis and other illnesses and can be prepared in the form of pills or injections. Given that the bromhexine hydrochloride Active Pharmaceutical Ingredient ("API") cannot be taken by patients directly and cannot be replaced by other APIs in the preparations, Zhejiang AMR defined the relevant product market as the market for bromhexine hydrochloride API. The geographic market is defined as China. Zhejiang AMR further found that the bromhexine hydrochloride API market in China is highly concentrated; Wanbangde accounted for 90.99%, 95.38% and 98.57% of the market share in China in 2015, 2016 and 2017 respectively and had a dominant position. From 2015 to 2020, Wanbangde imposed unreasonable trading conditions on the drug manufacturer, Guangzhou Yipinhong Pharmaceutical ("Guangzhou Yipinhong"), by requiring that all the injectable bromhexine hydrochloride it produced be sold solely by Wanbangde. Specifically, Wanbangde was appointed the national general agent for Guangzhou Yipinhong; without the written permission from Wanbangde, Guangzhou Yipinhong was not allowed to sell the product by itself or through any third party; Wanbangde was also entitled to specify the provincial distributors of the product. Zhejiang AMR therefore concluded that Wanbangde had abused its market dominance. In view of the facts that Wanbangde actively cooperated in the investigation and that the illegal acts lasted for a relatively short period of time, Zhejiang AMR confiscated illegal gain of RMB 232,205.11 (USD 35,550.60) and impose a penalty of RMB 224,753.58 (USD 34,409.77), which was equivalent to 3% of Wanbangde's 2019 annual turnover.

Anhui AMR fines four driving schools for price-fixing

On 2 November 2020, four driving schools in Dingyuan County, Anhui Province ("Dingyuan"), were fined by Anhui Administration for Market Regulation ("Anhui AMR") for price-fixing.

The four driver training service providers provided driver training services in Dingyuan. On 19 February 2019, the four companies held a joint meeting, whereby they agreed, among others matters, (i) to hike the driver training fees; and (ii) that each of the four companies should pay a security deposit of RMB 30,000 and in the event of a violation of their agreement, a sum of RMB 10,000 would be transferred from the violating party to the reporting party. After signing the meeting minutes, the four driver schools began charging the fixed prices as agreed. Notably, considering that the driver training industry has been severely affected by Covid-19, Anhui AMR appreciated that the four driving schools were operating in difficult conditions and rendered a more lenient penalty of RMB 693,888.05 (USD 106,303.64) in total, consisting of confiscation of illegal gains of RMB 441,964.61 (USD 67,708.97) and fines of RMB 251,923.44 (USD 38,594.67), which is equivalent to 2% of their 2018 annual turnovers.

Jiangsu AMR fines NWG Gaochun for abuse of dominance

On 30 November 2020, Nanjing Water Group Gaochun Ltd., Co. ("NWG Gaochun") was fined RMB 1,820,856.6 (USD 278,955.23) by Jiangsu Administration for Market Regulation ("Jiangsu AMR") for abuse of dominance.

ANTITRUST INVESTIGATIONS AND OTHER NEWS IN CHINA

As NWG Gaochun is the only provider of urban public tap water supply services in Gaochun District, it was deemed dominant in that market in Gaochun District. Jiangsu AMR found that NWG Gaochun have restricted real estate companies to exclusively deal with its designated companies at two different stages of the water supply projects ("Projects"): (i) from 2014 to 2017, in the design, supervision and construction stage of the Projects, NWG Gaochun designated Nanjing Water Supply and Drainage Engineering Design Institute ("Institute") and Nanjing Jianyou Inspection Co., Ltd. ("Jianyou") as the companies responsible for the design and supervision work;. to facilitate contract-signing, NWG Gaoshun directly provided the contract templates of the Institute and Jianyou to the real estate companies for the latter to sign; (ii) since 2015, NWG Gaochun designated another company as the construction service provider of the Projects. The real estate companies could not make their own choice of construction service providers or engineering materials. Jiangsu AMR found that the conduct of NWG Gaoshun could not be justified for safety reasons; the transactions between the local real estate companies and the service providers in the Projects should have been based on the principles of voluntariness, equality and fairness, without interference by NWG Gaochun. Jiangsu AMR thus found that NWG Gaoshun had abused its market dominance by imposing unreasonable trading conditions and imposed a fine of 4% of NWG Goachun's 2016 annual turnover, totalling RMB 1,820,856.6 (USD 278,226.89).

Other news

SAMR publishes Antitrust Guidelines on APIs for public comments

On 13 October 2020, SAMR published the Antitrust Guidelines on APIs for public comments. This is the first set of antitrust guidelines in China focusing on APIs. The guidelines have shed light upon, among others, (i) the approach to define product and geographical markets relating to APIs (e.g. the broader APIs industry should normally be further segmented into the API manufacturing market and the API distribution market); and (ii) specific anti-competitive agreements and abusive conduct that are prohibited in relation to APIs. Up to now, there have been more than ten antitrust cases regarding APIs and this set of guidelines has further reflected China's enduring antitrust enforcement priority towards the pharmaceutical industry.

SAMR publishes Interim Provisions on Review of Concentrations of Undertakings

On 23 October 2020, SAMR published the Interim Provisions on the Review of Concentrations of Undertakings ("Interim Provisions"), which came into effect on 1 December 2020. The Interim Provisions are primarily aimed to consolidate existing merger control rules, which could be found in separate regulations or rules, into one place. Notably, the Interim Provisions provide that SAMR can authorize provincial-level competition authorities to review merger control notifications. In addition, the Interim Provisions also shorten the statutory period in failure-to-file investigations, with the length of preliminary investigation reduced from 60 days to 30 days and the period of in-depth investigation reduced from 180 days to 120 days.

Shanghai AMR releases local competition compliance norms for businesses

On 19 November 2020, Shanghai Administration for Market Regulation released a Shanghai Guidelines for Competition Compliance of Undertakings ("Shanghai Competition Guidance"). Key guidance includes: (i) system-building: undertakings should establish a competition compliance management system throughout the whole process of decision-making, execution and supervision for competition compliance, with clear

OTHER NEWS IN CHINA

stipulation of responsibilities for the decision-making team, the management team and the supervision team as well as the duties of the competition compliance department and responsible persons; (ii) organization: undertakings should establish a competition compliance system involving identification and assessment of key competition risks and prepare competition compliance plans with a focus on key areas, key activities, and key personnel in order to prevent compliance risks; (iii) reward and punishment systems: undertakings are advised to formulate proper reward and punishment systems to ensure implementation of compliance policies and strengthen information-based management of competition compliance. The Shanghai Competition Guidance will come into effect on 1 March 2021.

Beijing High Court holds in-camera examination for the first "choose-one-from-two" litigation

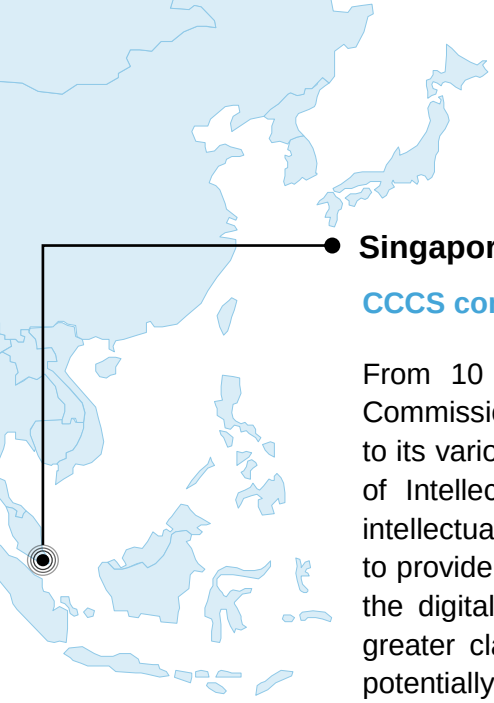
From 24 November to 26 November 2020, the Beijing Municipal High People's Court ("Beijing High Court") organized a non-public cross-examination for the abuse of dominance lawsuit between JD.com and Tmall/Alibaba. The case commenced on 28 November 2017, when JD.com filed a lawsuit with the Beijing High Court against Tmall/Alibaba for abuse of market dominance. It was alleged that Alibaba abused its dominant position in the B2C online retail platform market in mainland China by its "choose-one-from-two" practice (e.g. forbidding apparel and houseware vendors from participating in JD.com's "6.18" shopping day and "11.11" shopping promotional events). In respect of the defendants' jurisdictional challenge, China's Supreme People's Court ("Supreme Court") ruled on 7 October 2019 that the Beijing High Court had jurisdiction over the case. More recently, the Beijing High Court organized a non-public cross-examination for the case. It would be interesting to see how the case interplays with the ongoing investigation by SAMR into Alibaba.

China releases New Measures on Security Review of Foreign Investment

On 19 December 2020, the Ministry of Commerce and National Development and Reform Commission jointly promulgated the Measures on Security Review of Foreign Investment ("Security Review Measures"), which will become effective on 18 January, 2021. The highlights in the Security Review Measures include (i) expansion of the types of foreign investments subject to security review to include greenfield investments, securities transactions, etc.; (ii) establishing a special working mechanism office to be in charge of the security review; (iii) expanding the covered sectors, e.g. "important" information technology and Internet/online products and services, "important" financial services; (iv) simplifying the procedures and clarifying the timelines for the security review, e.g. removing the prior requirements that certain cases (where there is significant divergence within review panel) need to be reported to the State Council; (v) explicitly specifying the consequences of non-compliance with the security review, including the divesture of equity interests or assets or otherwise reversing the impact on national security.

The Supreme Court rules that abuse of market dominance dispute is arbitrable

On 24 December 2020, the Supreme Court released its retrial verdict in relation to Shanxi Changlin Co., Ltd. ("Shanxi Changlin")'s allegation that Shell China Co. Ltd. ("Shell") has abused its dominant position. Shanxi Changli is one of Shell's distributors, and within the distribution agreement between the parties there is an arbitration clause pursuant to Article 2 of the Chinese Arbitration Law. In view of the above, the Supreme Court held that the concerned dispute regarding abuse of market dominance should be resolved in accordance with the arbitration clause. This is the first time that the Supreme Court has ruled that an antitrust dispute is arbitrable.



Singapore

CCCS consults on proposed changes on competition guidelines

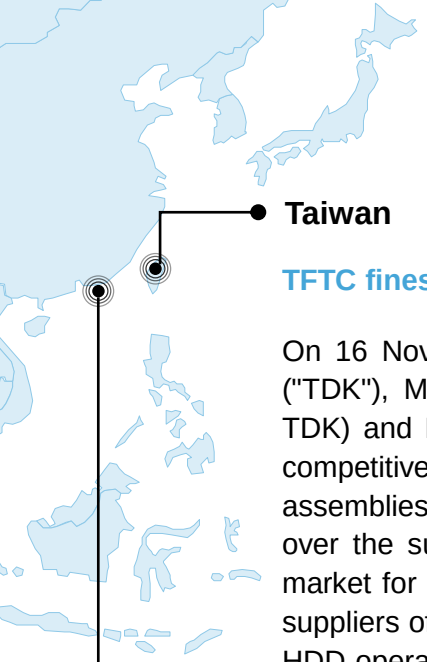
From 10 September 2020 to 8 October 2020, the Competition and Consumer Commission of Singapore ("CCCS") sought public feedback on its proposed changes to its various guidelines, including updating (i) the CCCS Guidelines on the Treatment of Intellectual Property Rights to provide more clarity on the interface between intellectual property and competition law; (ii) the CCCS Guidelines on Market Definition to provide greater clarity on issues related to market definition that may be relevant in the digital era; (iii) the CCCS Guidelines on the Section 47 Prohibition to provide greater clarity on issues relating to the assessment of market power and types of potentially abusive conduct in the digital era; (iv) the CCCS Guidelines on Enforcement to give effect to legislative amendments to the Competition Act (Cap. 50B) relating to commitments and remedies and reflect CCCS's current practices on substantive and procedural matters in assessing commitments and remedies; (v) the CCCS Guidelines on Substantive Assessment of Mergers to better guide businesses, consumers, and competition practitioners on issues relating to assessment of mergers; and (vi) the CCCS Guidelines on Merger Procedures to enhance and clarify the process of merger filing notifications to CCCS, and reflect CCCS's current practices on merger filings.

CCCS penalises contractors for bid-rigging

On 14 December 2020, CCCS issued an Infringement Decision against three businesses for their bid-rigging conduct relating to tenders called for the provision of maintenance services for swimming pools, spas, fountains and other water features in condominiums and hotels in Singapore. The bid-rigging activities took place from 2008 to 2017. Two of the businesses were leniency applicants, who received penalties in the sums of SGD 41,541 (USD 31,542.4) and SGD 68,793 (USD 52,235). As for the remaining business, financial penalties in the sum of SGD 308,680 (USD 234,383) was imposed.

IMDA launches a second consultation on the draft Code of Practice for Competition in the Provision of Telecommunication and Media Services

From 5 January 2021 to 2 March 2021, Infocomm Media Development Authority ("IMDA") invites public feedbacks on the draft Code of Practice for Competition in the Provision of Telecommunication and Media Services ("Code") to address the responses received in the first public consultation published on 20 February 2019. Some of the IMDA's key decisions on the consulted policy positions include: (i) proposal to harmonise certain provisions that are similar in the statutory framework for telecommunication and media markets; (ii) adopting a common 50% market share threshold for the presumption of significant market power for both media and telecommunication markets; (iii) proposal to adopt a "Market-by Market" assessment approach for dominant classification in the telecommunication markets. IMDA did not propose any changes to the Code on developments in the digital economy but sought feedback on how these developments might affect the telecommunication and media markets and whether the existing regulatory frameworks could be dynamically applied within the context of the larger economic shifts and the broader regulatory environment going forward.



Taiwan

TFTC fines TDK and NHK for HDD suspension assembly cartel

On 16 November 2020, Taiwan's Fair Trade Commission ("TFTC") fined TDK Corporation ("TDK"), Magnecomp Precision Technology Public ("MPT", a Thailand-based subsidiary of TDK) and NHK Spring ("NHK") TWD 600 million (USD 21.2 million) in total for exchanging competitively sensitive information and fixing the price of hard disk drives ("HDD") suspension assemblies. HDD suspension assembly is a component of an HDD that positions the slider over the surface of a rapidly spinning disk, and is supplied to HDD operators. The global market for HDD suspension assembly is very concentrated. As of 2016 there were only four suppliers of HDD suspension assembly: TDK (including MPT), NHK, Hutchinson, and Suncall. HDD operators often made price inquiries with TDK and NHK before placing orders, and TDK and NHK took the opportunity to exchange pricing and production volume information with each other in order to align prices vis-à-vis HDD operators. Besides, TDK and NHK also colluded to form strategies in the face of rivals that offer lower-priced products on the market. The same cartel was also penalized in Japan in 2018 and in the US in 2019.

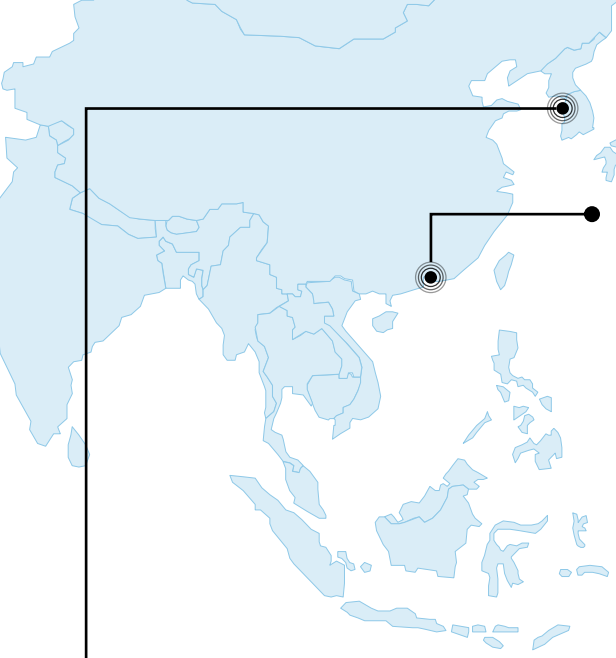
Hong Kong

HKCC accepts commitments from Hong Kong Seaport Alliance

On 30 October 2020, the Competition Commission ("HKCC") announced the acceptance of commitments offered by four terminal operators, in relation to the Hong Kong Seaport Alliance (the "Alliance"). The Alliance is a joint venture between the four terminal operators, whereby they jointly operate and manage berths across eight terminals at Kwai Tsing port in Hong Kong. The Commission was concerned that the Alliance could result in increase in prices or decrease in service levels for the parties' customers, or withholding of "overflow" services from the remaining operator, which is not a party to the Alliance. The Commission also had concerns around the potential anti-competitive information flows between the Alliance and its competitors in the Mainland as a result of cross-directorships held by one of the parties. The parties have committed to cap their service charges and maintain service levels, maintain overflow arrangements with their competitor and avoid the cross directorship with specific competitors in the Mainland. The parties have also added in the commitments an explicit reference to the plans and mechanisms they adopted to ensure customers receive a fair share of the efficiencies anticipated by the Alliance.

Tribunal makes its first disqualification order

On 30 October 2020, the Competition Tribunal ("Tribunal") made its first disqualification order against a director. In this case, decoration contractors allocated customers and coordinated pricing in relation to the provision of renovation services at a public housing estate. The Respondents admitted to the contravention of the First Conduct Rule. The Tribunal noted that the director in question had not directly known or contributed to the contravention, he was aged 74 and had limited reading ability. Taking in account the mitigating factors that the director admitted liability right from the beginning and the proceedings had been delayed due to Covid-19 and other procedural issues, the Tribunal made a disqualification order for the period of 1 year 10 months.



Hong Kong

Competition Tribunal approves agreed pecuniary penalties

In one of the first two cases decided by the Tribunal in May 2019, it was held that four of the Respondents had contravened the First Conduct Rule for engaging in bid-rigging in connection with Young Women's Christian Association's tender for the supply and installation of a Nutanix server system. Following the main judgment, the Tribunal approved on 16 December 2020 the pecuniary penalties as agreed between the HKCC and three of the Respondents, which ranged from HK$ 1.86 to HK$ 2.7 million (USD 240,000 to USD 348,000).

HKCC commences its first case on abuse of substantial market power

On 21 December 2020, the HKCC commenced proceedings against Linde HKO Limited ("Linde HKO") and Linde GmbH 1 (collectively referred to as "Linde"), for abusing Linde's substantial degree of market power in the medical gases supply market in Hong Kong to the detriment of competition in the downstream medical gas pipeline system ("MGPS") maintenance market. HKCC is also pursuing the General Manager of the relevant division of Linde HKO for his active involvement in the contravention. HKCC alleges that between October 2015 and January 2018, Linde ceased or limited the supply of medical gases to the only other potential MGPS maintenance service provider for public hospitals. Further, it is alleged that by leveraging its de facto monopoly position in the medical gases supply market into the downstream MGPS maintenance market, Linde engaged in various exclusionary acts.

South Korea

KFTC fines on Naver for abuse of market dominance

On 6 October 2020, Korea Fair Trade Commission ("KFTC") imposed a fine of KRW 26.7 billion (USD 23 million) on Naver for abuse of market dominance, by manipulation of search algorithms to favour its own shopping and video services, by displaying their own services on the top of search results, while lowering the rankings of products sold by competitors.

National Assembly of South Korea passes the bill to amend Korean Fair Trade Law

On 9 December 2020, the National Assembly of South Korea passed a bill to amend the Korean Fair Trade Law. The amended law includes, (i) the increase of fines for cartel cases (the maximum amount of fines is increased from 10% to 20% of the relevant sales revenue); and (ii) information exchange is added to the definition of cartel.

KFTC conditionally approves the acquisition of shares in Woowa Brothers by Delivery Hero

On 28 December 2020, the KFTC has approved the acquisition of shares in Woowa Brothers by Germany-based Delivery Hero, on the condition of the disposal of Delivery Hero's Korean subsidiary, Delivery Hero Korea LLC Yogiyo, to a third party within six months. Woowa Brothers owns Baedal Minjok (Baemin), which is the largest food delivery service provider in South Korea, and Yogiyo, operated by Delivery Hero, is the second largest food delivery service provider in South Korea. Therefore, this means that Delivery Hero will purchase the largest player, but it needs to sell its own second largest player instead. Delivery Hero submitted the filing with the KFTC in December 2019 and the KFTC had been reviewing the case.

Study Group on Competition Policy for Data Markets has been established

The Japan Fair Trade Commission ("JFTC") announced on 13 November 2020 that its research centre has established the Study Group on Competition Policy for Data Markets. This study group consists of experts such as professors and discusses competition policy for data markets, such as data portability, interoperability and issues relating to digital platform operators.

Three major pharmaceutical wholesalers in Japan are alleged for bid-rigging

On 9 December 2020, the JFTC filed a criminal complaint with the prosecutor general against Alfresa, Suzuken and Toho Pharmaceutical, which are major pharmaceutical wholesalers in Japan, regarding the alleged bid-rigging of pharmaceutical products. The JFTC conducted on-site inspections of these three companies on 27 November 2019.

Amended rules relating to the reports submitted to JFTC without seals of companies become effective

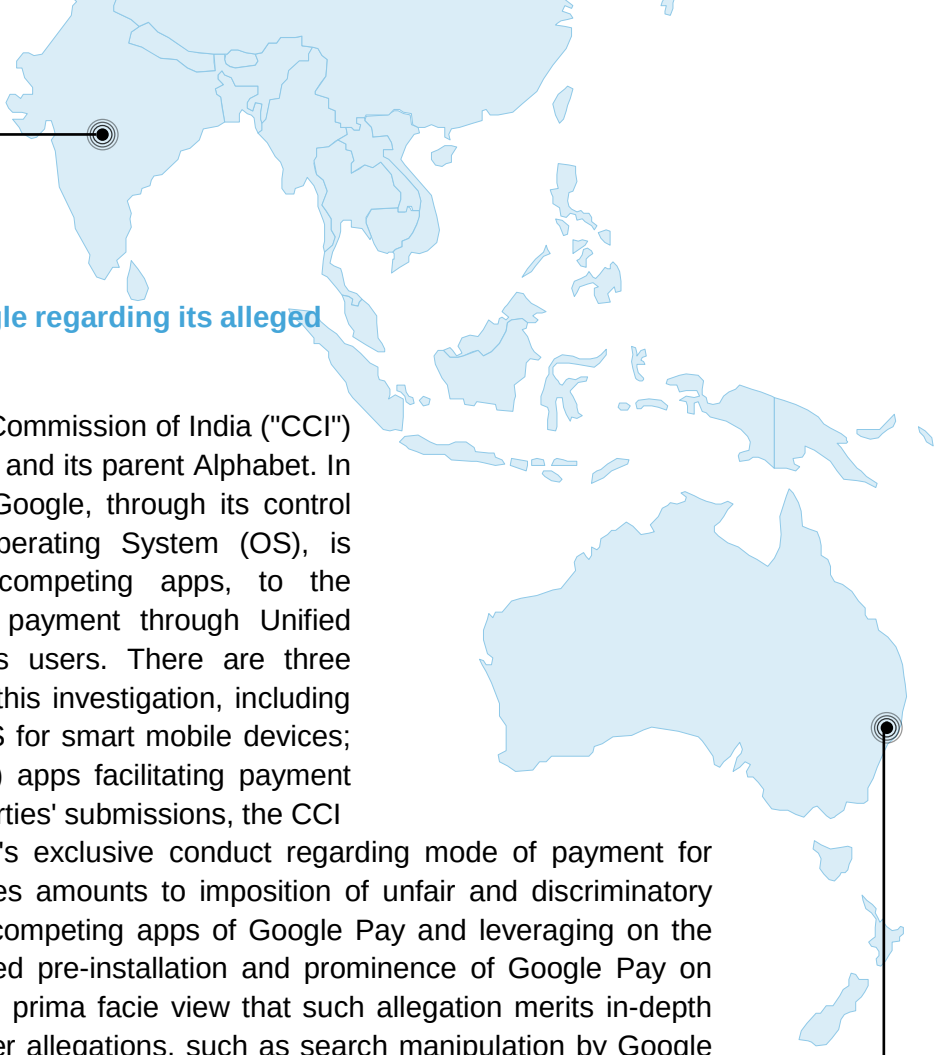
On 21 December 2020, the JFTC announced changes in its rules relating to acceptance of reports to be submitted to the JFTC without seals of companies. Under such new rules, instead of having seals of companies, companies need to submit evidences to verify the accuracy of reports to be submitted to the JFTC. The new rules have become effective on 25 December 2020.

JFTC issues cease and desist orders against four magnetic levitation train project contractors for bid-rigging

On 22 December 2020, the JFTC issued cease and desist orders against four contractors, Kajima, Obayashi, Shimizu and Taisei, regarding the alleged bid-rigging relating to the magnetic levitation train project by Central Japan Railway, and imposed fines on Obayashi and Shimizu of a total of JPY 4.3 billion (USD 41 million). The JFTC filed a criminal complaint with the prosecutor general against these four contractors on 23 March 2018, and the Tokyo District Court imposed criminal fines on Obayashi and Shimizu on 22 October 2018. The criminal court procedure regarding Kajima and Taisei is still ongoing.

JFTC releases a final report on a market survey on trade practices of start-up companies

On 27 November 2020, the JFTC published a final report on a market survey on trade practices of start-up companies. The JFTC received nearly 15,000 responses to its questionnaires from start-up companies and conducted hearings of more than 100 start-up companies. The final report indicates that approximately 17% of start-up companies encountered unreasonable requests from business partners or investors (such as free transfer of IP rights), and such unreasonable requests were found particularly in relation to non-disclosure agreements, proof of concept agreements, joint R&D agreements and licence agreements. On 23 December 2020, the JFTC issued a draft of "Guidelines on the business collaboration with start-up companies" focusing on the above four types of agreements, and commenced a public comment procedure on these guidelines.



India

India orders antitrust probe into Google regarding its alleged favouring of Google Pay

On 9 November 2020, the Competition Commission of India ("CCI") ordered an investigation against Google and its parent Alphabet. In a nutshell, the informant alleged that Google, through its control over the Play Store and Android Operating System (OS), is favouring Google Pay over other competing apps, to the disadvantage of the apps facilitating payment through Unified Payment Interface ("UPI"), as well as users. There are three relevant product markets concerned in this investigation, including the markets for (i) licensable mobile OS for smart mobile devices; (ii) app stores for Android OS; and (iii) apps facilitating payment through UPI. Having considered both parties' submissions, the CCI is of the prima facie view that Google's exclusive conduct regarding mode of payment for purchase of Apps and In-App purchases amounts to imposition of unfair and discriminatory condition, denial of market access for competing apps of Google Pay and leveraging on the part of Google. In relation to the alleged pre-installation and prominence of Google Pay on Android smartphones, the CCI is of the prima facie view that such allegation merits in-depth investigation. As for the informant's other allegations, such as search manipulation by Google in favour of Google Pay or prominent placement of Google Pay on the Play Store, the CCI is not inclined to order investigation given lack of sufficient grounds.

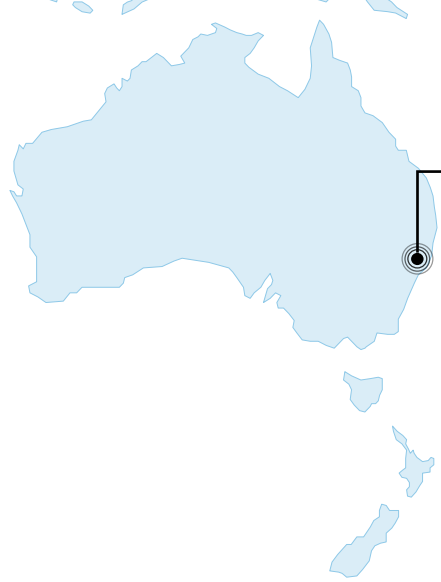
Australia

Legal proceedings commenced over alleged market sharing cartel in the overhead crane industry

On 19 October 2020, the Australian Competition and Consumer Commission ("ACCC") commenced civil proceedings in the Federal Court against overhead crane company NQCranes Pty Ltd ("NQCranes"), alleging it engaged in cartel conduct. The ACCC alleges that NQCranes entered into a signed agreement with a competitor in the overhead crane market in August 2016, which allegedly included a cartel provision to share the market by not targeting each other's customers for overhead crane parts and servicing in Brisbane and Newcastle. The ACCC alleges that in meetings, phone calls and emails the companies sought to enter an agreement of "mutual benefit" to both parties, and that the non-targeting of each other's customers in Brisbane and Newcastle was a key part of that agreement. The ACCC is seeking civil penalties, declarations and orders against NQCranes for the alleged conduct.

Epic files proceedings against Apple in Australia

Epic Games, Inc ("Epic") filed proceedings against Apple Inc and Apple Pty Limited (collectively, "Apple") in the Federal Court of Australia on 16 November 2020. Epic, the company behind the popular online video game Fortnite, is alleging, amongst other claims, that Apple misused its market power by preventing app developers from distributing app stores to iOS users, restraining app developers from distributing their apps to the broad base of iOS users other than through the App Store, and by preventing app developers from using a payment processing mechanism that isn't Apple's In-App Purchase system in relation to in-app content purchases. The Australian proceeding follows a similar lawsuit filed by Epic against Apple in the US on 13 August 2020.



Australia

Peters allegedly hindered or prevented competition in ice-cream supply

The ACCC instituted proceedings against Australasian Food Group Pty Ltd, trading as Peters Ice Cream ("Peters") on 20 November 2020, alleging it engaged in conduct which hindered or prevented competition for the supply of single-wrapped ice creams to petrol and convenience retailers. The ACCC alleges that between about November 2014 and December 2019, Peters engaged in exclusive dealing by entering into and giving effect to an agreement with PFD Food Services Pty Ltd ("PFD") to distribute its single-wrapped ice cream and frozen confectionary products to petrol and convenience retailers nationally. The agreement contained a condition that PFD could not distribute any competing ice cream products in certain locations around Australia.

The ACCC alleges that, for new entrants, PFD was the only distributor capable of distributing single-wrapped ice cream products to national petrol and convenience retailers on a commercially viable basis. Unlike PFD, other potential distributors did not have a national frozen food route to these retailers. The ACCC will also argue it was not commercially viable for new entrants to incur the cost of establishing their own distribution network to distribute single-wrapped ice creams nationally. The ACCC is seeking declarations, pecuniary penalties, a compliance program order and costs.

Criminal cartel charges laid against pharmaceutical ingredient company and its former export manager

On 1 December 2020, Alkaloids of Australia Pty Ltd ("Alkaloids of Australia") and its former export manager have each been charged with 33 criminal cartel offences, contrary to the Competition and Consumer Act 2010 (Cth), following a criminal investigation by the ACCC. The matters will be prosecuted by the Commonwealth Director of Public Prosecutions ("CDPP"). The ACCC alleges that Alkaloids of Australia and other overseas suppliers of the active pharmaceutical ingredient SNBB made and gave effect to arrangements to fix prices, restrict supply, allocate customers and/or geographical markets, and/or to rig bids for the supply of SNBB to international manufacturers of generic antispasmodic medications. The matter is listed in the Downing Centre Local Court on 19 January 2021.

ANZ, Citigroup and Deutsche Bank committed for trial in Federal Court on criminal cartel charges

On 8 December 2020, Australia and New Zealand Banking Group Ltd ("ANZ"), Citigroup Global Markets Australia Pty Limited ("Citigroup"), Deutsche Bank AG ("Deutsche Bank") and six senior banking executives were all been committed to the Federal Court of Australia for trial on criminal cartel charges. Citigroup, Deutsche Bank, ANZ and the executives were charged in June 2018 following an ACCC investigation. The prosecution is being conducted by the CDPP. The charges involve alleged cartel arrangements in 2015 relating to trading in ANZ shares held by Deutsche Bank and Citigroup. ANZ and each of the executives charged are alleged to have been knowingly concerned in some or all of the alleged conduct. The matter will be heard in the Federal Court at a later date.

Australia

ACCC alleges Facebook misled consumers when promoting app to "protect" users' data

On 16 December 2020, the ACCC instituted proceedings in the Federal Court against Facebook, Inc. and two of its subsidiaries for false, misleading or deceptive conduct when promoting Facebook's Onavo Protect mobile app to Australian consumers. The ACCC alleges that, between 1 February 2016 to October 2017, Facebook and its subsidiaries Facebook Israel Ltd and Onavo, Inc. misled Australian consumers by representing that the Onavo Protect app would keep users' personal activity data private, protected and secret, and that the data would not be used for any purpose other than providing Onavo Protect's products. In fact, the ACCC alleges, Onavo Protect collected, aggregated and used significant amounts of users' personal activity data for Facebook's commercial benefit. This included details about Onavo Protect users' internet and app activity, such as records of every app they accessed and the number of seconds each day they spent using those apps. This data was used to support Facebook's market research activities, including identifying potential future acquisition targets. The ACCC is seeking declarations and pecuniary penalties.

ACCC rejects Google behavioural undertakings for Fitbit acquisition

On 22 December 2020, the ACCC announced that it will not accept a long-term behavioural undertaking offered by Google that sought to address competition concerns about its proposed acquisition of wearables supplier and manufacturer Fitbit. Google sought to address the ACCC's competition concerns by offering a court enforceable undertaking that it would behave in certain ways towards rival wearable manufacturers, not use health data for advertising and, in some circumstances, allow competing businesses access to health and fitness data. However, the ACCC was not satisfied that a long term behavioural undertaking of this type could be effectively monitored and enforced in Australia, particularly in a complex and dynamic industry.

The proposed acquisition has received conditional clearance in Europe, but several other competition authorities, including the US Department of Justice, are yet to make a decision. The ACCC will continue to work closely with overseas agencies on this merger, and will continue its investigation into Google's proposed acquisition of Fitbit and has set a new decision date of 25 March 2021.

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