

FINANCIAL SERVICES ANTITRUST BULLETIN

Key Themes

In the second half of 2023 and early stages of 2024, competition authorities continued to closely scrutinise the financial services sector in multiple jurisdictions. This has reflected the macro-economic importance of the sector, as expressed in the UK's Future of Payments Report which stated that "the economy cannot grow without the payments infrastructure to support it".

This edition of the Clifford Chance Financial Services Antitrust Bulletin charts the following key themes derived from developments in Europe, North America and the Asia Pacific region:

- **BigTech under scrutiny** – Competition authorities and financial regulators continued examining the role of Big Tech in the financial sector, as the UK Financial Conduct Authority launched a call for input on data asymmetry between Big Tech and other financial services firms. In the US, the Consumer Financial Protection Bureau published a report assessing "Big Tech's role in contactless payments", and expressed particular concern that mobile device policies may create "roadblocks to a more open payments ecosystem". The European Commission also requested feedback on commitments offered by Apple concerning Apple Pay.
- **Insurance sector being considered** – Competition authorities in multiple jurisdictions have assessed competition in the insurance sector. In Japan, on-site inspections have been conducted by the Japan Fair Trade Commission against four major general insurance companies who allegedly concluded in setting premiums regarding certain types of insurance. The French Competition Authority also considered the insurance sector when it cleared several acquisitions and transactions within this area. At the same time, the UK Financial Conduct Authority wrote to insurers urging them to provide fair value to consumers under the Consumer Duty.
- **Sustainability in focus** – While the US House Judiciary Committee continued its review into the sufficiency of antitrust laws to address collusive agreements on ESG goals, the UN's Net-Zero Insurance Alliance policies were updated to address antitrust concerns, including to clarify that membership does not involve any coordinated competitive conduct.
- **Retail deposits** – The extent to which banks pass on increases in interest rates to savers has been looked at in a number of jurisdictions. The Australian Competition and Consumer Commission completed its inquiry into the extent of pass on of higher interest rates to deposit products while the UK Financial Conduct Authority published its report on the Cash Savings Market Review.

This regular bulletin is a digest of key antitrust developments in the financial services sector in the following regions:

- Asia Pacific
- Europe
- North America

This edition focuses on developments from the second half of 2023 and early stages of 2024 while including some more recent updates. If you would like to know more about the subjects covered, please refer to the list of contacts on page 15.

EUROPE

UK

Competition Appeal Tribunal Mastercard judgment

On 26 February 2024, the Competition Appeal Tribunal ("CAT") [determined](#) that the level of interchange fees on Mastercard credit card transactions between 1992 and 2009 had not been caused by the level of interchange fees in the European Economic Area ("EEA"). A 2007 decision of the European Commission had found that the EEA interchange fees infringed competition law. This comes as part of the broader collective proceedings in *Merricks v Mastercard*.

Payment Systems Regulator publishes interim report for its market review into cross-border interchange fees

On 19 December 2023, the Payment Systems Regulator ("PSR") [published](#) the interim report for its market review into cross-border interchange fees. This concerns cross-border interchange fees where a Mastercard or Visa debit or credit card issued in the European Economic Area ("EEA") is used for online retail transactions with UK businesses. The PSR proposed introducing a price cap on these interchange fee in two stages, subject to the PSR's final report and further consultation on remedies. The first stage would be an initial time-limited cap of 0.2% for UK-EEA consumer debit transactions and 0.3% for consumer credit transactions (where the transactions are made online at UK businesses). The second stage would be a lasting cap on these interchange fees in the future once further analysis has been carried out to establish an appropriate level. The PSR intends to publish its final report in the first quarter of 2024.

Joint Regulatory Oversight Committee sets out future UK open banking plans alongside PSR consultation on expanding variable recurring payments

On 18 December 2023, the Joint Regulatory Oversight Committee [published](#) an update on progress made since it outlined its open banking vision in April 2023. On the same day, the PSR [published](#) a Call for Views on proposals to expand Variable Recurring Payments to additional low-risk use cases. The PSR proposes: a multilateral agreement covering pricing, dispute resolution and liability; setting a central price based on a cost recovery model for the sending firm and mandating the participation in the multilateral agreement of the nine banks already subject to the Retail Banking Market Investigation Order. Firms may submit comments to the PSR on the Call for Views by 2 February 2024.

Bank of England and Competition and Markets Authority enter into Memorandum of Understanding

On 14 December 2023, the Bank of England and the Competition and Markets Authority ("CMA") [entered](#) into a Memorandum of Understanding. This sets out a framework for cooperation and information sharing between the two regulators. It also encourages meeting and communication between officials to discuss matters of mutual interest.

FCA fines three money transfer firms for breaking competition law

On 30 November 2023, the Financial Conduct Authority ("FCA"), [imposed](#) fines of over £150,000 on three money transfer firms after they admitted to fixing prices charged to consumers in Glasgow. The FCA found that, between 18 February 2017 and 31 May 2017, the firms coordinated on certain exchange rates offered to customers in Glasgow for converting UK pounds into Pakistan Rupees, when transferring money to Pakistan. They were also

found to have fixed the transaction fee charged to customers when making certain money transfers from the UK to Pakistan.

FCA launches Call for Input on data asymmetry between Big Tech and financial services firms

On 24 November, the FCA [launched](#) a Call for Input on potential competition impacts from the data asymmetry between Big Tech and firms in financial services in relation to data sharing mechanisms. The FCA considers that the data asymmetry arises because financial services firms are unable to access Big Tech firms' datasets which currently sit outside of data sharing initiatives, whereas financial services data could be accessed by Big Tech firms. This follows the FCA publishing a [Feedback Statement](#) on the potential competition impacts of "Big Tech" entry into retail financial services.

Future of Payments Review published

On 22 November, the Future Payments Review, authored by Joe Garner was [published](#). While the report highlighted positive aspects of the UK payments landscape, it considered that it did not have a coherent vision or principles. It therefore recommended that the Government develops a national payments vision and strategy with the primary aim of simplifying the payments landscape over time. It also emphasised that the current commercial arrangements do not create the conditions for Open Banking to thrive in a healthy way.

CAT announces settlement in Euronet v Mastercard

On 16 October 2023, the Competition Appeal Tribunal ("**CAT**") published orders [dismissing](#) the damages claims brought against Mastercard Incorporated (and others) and Visa Europe Ltd (and others) by companies within the Euronet group. The claims were in respect of alleged infringements of Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") and / or equivalent domestic law provisions of Poland, Greece and the Czech Republic. The claimants have agreed confidential terms of settlement with Mastercard and the trial listed to commence on 16 October was vacated.

FCA responds to CMA sustainability guidance

On 12 October 2023, the Financial Conduct Authority ("**FCA**") [responded](#) to the CMA's recent environmental sustainability guidance on the application of Chapter I of the Competition Act 1998. The guidance set out how rules aimed at preventing anticompetitive agreements, and exemptions therefrom, should be applied to agreements aimed at sustainability objectives. In the FCA's response, it states that it will have regard for the guidance in the application of its concurrent competition powers, and notes also its efforts in sustainability since the FCA set out its ESG [strategy](#) in November 2021.

FCA writes to insurers calling on them to ensure that they provide fair value to customers

On 20 September 2023, the FCA wrote to CEOs in [retail insurance](#), [wholesale insurance](#), [life insurance](#) and [funeral plans](#) calling on them to ensure that they provide fair value to customers, emphasising their responsibilities under the Consumer Duty. The FCA also identified specific concerns regarding whether Guaranteed Asset Protection ("**GAP**") products are providing fair value to customers. GAP insurance is an add-on to motor insurance. It covers the difference between a vehicle's purchase price and its current market value.

CMA revokes Directions given to Santander on PPI

On 15 September 2023, the Competition and Markets Authority ("**CMA**") [revoked](#) the Directions given to Santander as part of the [Payment Protection Insurance Market Investigations Order 2011](#) (the "**Order**"). The Order required

that all customers receive an annual reminder from their provider setting out the cost of their payment protection insurance. The Directions were revoked as Santander has completed all the required actions and has exited the PPI market.

FCA publishes Update Report on Wholesale Data Market Study

On 31 August 2023, the FCA [published](#) its Update Report for the Wholesale Data Market Study. The Update Report included emerging themes concerning benchmarks, credit ratings data and market data vendor services. The FCA will explore further: whether customers can and do switch between suppliers; the characteristics of contracts and licensing terms of suppliers; and what options are available to improve competition if the FCA identifies harms. The FCA proposed not to refer any of the markets in scope of the study to the CMA through a market investigation reference.

CMA reviewing concurrency arrangements, including with FCA and PSR

On 24 August 2023, the CMA [announced](#) that it was reviewing the concurrency framework in which responsibility for the promotion of competition in regulated sectors is shared between the sector regulators and the CMA. This includes the concurrency arrangements with the FCA and the PSR. The CMA intends to report on its conclusions in Spring 2024.

FCA sets out 14-point action plan on cash savings

On 31 July 2023, the FCA [published](#) a 14-point action plan to ensure banks and building societies are passing on interest rate rises to savers appropriately, communicating with customers effectively and offering appropriate savings rates. This includes actions which the FCA intends to take and its expectations of firms.

The FCA also [published](#) its report on the Cash Savings Market Review. This followed the FCA [summoning](#) chief executives of NatWest, Barclays, HSBC and Lloyds to discuss the pricing of cash savings, and the communication of rates to customers. Nikhil Rathi, Chief Executive of the FCA, [wrote](#) in April 2023 to Harriett Baldwin MP, Chair of the Treasury Select Committee, on competition in the retail banking market. The FCA, together with the Information Commissioner's Office, also [wrote](#) to UK Finance and the Building Societies Association clarifying that savings providers can inform their customers of the best rates available to them, even where they have objected to direct marketing.

Antitrust class action concerning car financing charges

On 21 July 2023, claims were filed at the CAT alleging that a "network of anticompetitive agreements" between car finance providers and car dealers led to higher interest rates being charged to consumers. The claims are being brought as opt-out collective actions against Lloyds Banking Group (through Black Horse Ltd), MotoNovo Finance and Santander UK.

European Commission

Commission invites comments on commitments by Apple on contactless payments

On 19 January 2024, the European Commission [invited](#) comments on commitments offered by Apple to address competition concerns over access to Near-Field Communication technology used to make contactless payments with mobile devices in stores. The commitments would enable third-party mobile wallet and payment services providers to access near field communication ("NFC") functionality on iPhones free of charge, without having to use Apple Pay or Apple Wallet.

Commission publishes decision to approve UBS / Credit Suisse merger

On 13 September 2023, the Commission published its [decision](#) to approve the UBS/Credit Suisse merger. The Commission had already allowed UBS to take measures which would secure the financial integrity of Credit Suisse prior to approving the merger.

Both parties are global multinational investment banks and financial services companies. The Commission determined that UBS and Credit Suisse overlapped in three markets – investment banking, asset management and wealth management. The merged entity's market share would be less than 20% in each of these markets. The Commission also considered each market to be highly fragmented and competitive. It noted that, on average, respondents ranked all three markets 4 out of 5 in terms of competitiveness and, in the asset management realm, UBS estimated that there are at least 10 other larger competitors (based on the value of their assets under management). Accordingly, the Commission concluded that the merged entity will continue to face competitive pressure post-transaction and that the transaction would not raise any competition concerns.

European Commission imposes fine on Rabobank for cartel with Deutsche Bank

On 22 November 2023, the Commission [imposed](#) a fine of EUR 26.6 million on Rabobank for participating in a cartel, which involved exchanging commercially sensitive information and coordinating its trading and pricing strategies with Deutsche Bank. Deutsche Bank was not fined as it had reported the cartel to the Commission, granting it full immunity under the leniency programme and allowing it to avoid a fine of almost EUR 156 million.

The Commission's investigation concluded that between 2006 and 2016 traders at both banks had colluded to fix prices in relation to their handling of Euro-denominated SSA bonds (Supra-Sovereign, Foreign Sovereign, Sub-Sovereign/Agency bonds) and Government Guaranteed bonds traded in the EEA. The traders' prohibited conduct included the exchange of information regarding prices, volumes, future trading positions and the identity of counterparties in relation to these instruments, among other things. This culminated in the traders issuing warnings when the other bank's indicative price on Bloomberg AiQ was considered to be too low or too high, which provided compelling evidence of a cartel, alongside the traders' Bloomberg emails, instant messages and online chatrooms.

Commission accepts Member States request to review the proposed acquisition of Nasdaq Power by the European Energy Exchange (EEX)

On 21 August 2023, the Commission [accepted](#) the request of Denmark, Finland, Sweden and Norway to review the proposed acquisition of Nasdaq Power by EEX. The transaction will transfer open positions in Nasdaq's Nordic, French, and German power futures as well as European carbon emission allowance futures. This will have a potentially significant effect on Nordic energy markets, where Nasdaq and EEX are the only two providers of exchange trading and subsequent settlement services for Nordic power contracts. The current energy crisis is central to the Commission's decision to investigate the acquisition. It views the trading of futures as key to maintaining stable energy prices given that futures facilitate the use of long-term energy contracts with set, and therefore predictable, prices.

The transaction is not notifiable in any Member State. Accordingly, the Commission used its power to call in the transaction due to its potentially substantial effect on competition in the internal market even though the turnover thresholds which would typically trigger a filing have not been met. This is the Commission's latest acceptance of such a referral request in a

series of call-ins, which started with the review of the proposed Illumina/GRAIL transaction.

France

French Competition Authority clears insurance acquisitions

On 23 November 2023, the French Competition Authority ("**French CA**") [cleared](#) the affiliation of SGAM AGPM Groupe and SGAM Klesia Assurances to the newly-created mutual insurance group AGPM Klesia, in the insurance sector. On 14 December 2023, the French CA [authorised](#) the Apicil group's acquisition of sole control over Territoria mutuelle, a company active in the health and welfare insurance sectors.

French Competition Authority's recommendations on draft decree

On 13 October 2023, the French CA published its [opinion](#) on [Decree no. 2023-916](#) adopted on 3 October 2023 relating to various services provided in connection with the register of security interests over movable property and amending certain provisions of the French Commercial Code. The decree relates to the establishment of a unified register for security interests over movable property, thereby streamlining and modernising existing legal provisions. This centralised system simplifies the rules governing security interests and provides a comprehensive overview of securities held by debtors seeking credit.

Upon consultation by the French government, the French CA issued an opinion on the draft decree on 27 July 2023. Its evaluation primarily focused on Articles 1 and 2 of the draft decree, which address fee structures for services offered by commercial court registrars. The French CA deemed that the changes proposed in the draft decree were unlikely to negatively impact the overall profitability of the commercial court registrar profession. Any revenue loss could potentially be offset by additional income generated through newly acquired competencies, such as handling mortgages for ships since 1 January 2022 and agricultural warrants since 1 January 2023.

To enhance the clarity of the draft decree, the French CA had issued four key recommendations. While recommendations 1, 3, and 4 were successfully integrated into the final decree, its second recommendation - aimed at clarifying total suspension terms - was not taken into account.

French Competition Authority clears insurance acquisitions

On 26 September 2023, the French CA [authorised](#) the acquisition of the Vilavi Group by HLD Europe. The Vilavi Group is active in the brokerage of insurance and credit products, and HLD Europe is a private industrial investor. The French CA concluded that the transaction would not harm competition in the relevant markets.

In addition, on 3 July 2023, the French CA [cleared](#) the acquisition of the Adenes Group, which is active in the insurance and associated services sector, by Chequers partenaires, a capital investment fund. The French CA determined that the transaction is not likely to harm competition.

Italy

Competition approvals secured in financial services mergers

On 30 January 2024, the Italian Competition Authority ("**ICA**") [cleared](#) Anima Holding S.p.A.'s acquisition of exclusive control over Kairos Partners SGR S.p.A. The ICA found that the transaction would not threaten competition within the investment fund management sector.

On 10 January and 6 February 2024, respectively, the ICA approved FSI SGR S.p.A.'s acquisition of (i) exclusive control over [Bancomat S.p.A.](#), which is a debit card systems operator, and (ii) [BBC Sinergia's](#) POS terminal management and card personalisation business. The ICA concluded that both transactions would not have a significant negative impact on competition in Italy's financial and payment services markets.

On 2 October 2023, the ICA [cleared](#) Banco BPM S.p.A.'s acquisition of Vera Vita S.p.A. and Vera Assicurazioni S.p.A. Banco BPM is active in Italian retail banking, and the acquired companies are active in life and non-life insurance. The ICA concluded that the transaction was not expected to significantly affect competition.

On 1 August 2023, the ICA [cleared](#) the acquisition of sole control over BCC Assicurazioni and BCC Vita by ICCREA Banca, parent company of a cooperative banking group consisting of 118 cooperative credit banks, from Società Cattolica di Assicurazione.

Netherlands

ACM investigation into Dutch savings market

The Dutch markets and consumer authority ("ACM") [will investigate](#) the operation of the Dutch savings market and the effectiveness of competition within it. The Ministry of Finance had previously asked the ACM whether there is reason to investigate the savings market and saving interest rates in the Netherlands, since these lag behind the interest rates of the European Central Bank ("ECB"). The ACM has now announced that it sees sufficient reason for the investigation. In particular, the ACM is concerned by indications that Dutch consumers benefit only to a limited extent from increased interest rates on the European market, and switch in only small numbers to foreign banks offering higher rates. The ACM expects to publish results before summer 2024.

Poland

CJEU ruling on consumer rights of Polish borrowers

On 14 December 2023, the Court of Justice of the European Union ("CJEU") [confirmed](#), in response to inquiries from the Polish courts, that it is not lawful for banks to extend the procedure for pursuing claims by a consumer in the hope that the consumer's claim becomes time-barred while the bank's claim remains due. The CJEU also ruled against the practice of banks prolonging negotiations to exploit limitation periods, which potentially deprives consumers of interest payments. This follows a CJEU judgement of 7 December 2023, which affirmed that borrowers do not need to submit a formal statement to the court to benefit from consumer protection.

CJEU judgment on banks and borrowers in Poland

On 21 September 2023, the CJEU [ruled](#) that a court may find a contractual provision unfair on the basis that it is identical to a provision entered in the register of abusive clauses.

The Polish court was adjudicating a case regarding the unduly charged indexed mortgage loan instalments. However, the court asked the CJEU to rule on whether, based on EU law, it may be concluded that the wording of an untailored contractual provision is unfair if an identical provision has already been the object of proceedings and has been entered in the register of abusive clauses.

The CJEU confirmed that the obligation to inform customers in plain language about the risks and features of their contracts applies to every consumer, regardless of his or her state of knowledge, and that a contractual condition cannot be considered unfair to some consumers and concurrently fair to others. This was notwithstanding the fact that a borrower in this case was educated and worked in finance.

The CJEU also confirmed that if a loan agreement contains unfair terms, the court must invalidate the agreement, contrary to the claim that such an agreement could continue after changing the conditions.

Bocian Pożyczki fined more than PLN 15 million - decision of the President of the OCCP

The President of the Office of Competition and Consumer Protection ("OCCP") found two [violations](#) of the collective interests of consumers to have been committed by the company Everest Finanse SA, operating under the name of Bocian Pożyczki.

First, the company circumvented the statutory limits on non-interest consumer loan costs by offering, in parallel to the consumer loans it brokered, consumer leaseback agreements for household appliances and consumer electronics equipment. Costs of leaseback agreements were significantly higher than those of loans. As a consequence, consumers had to pay back excessively high instalments. Second, consumers were not properly informed what financing they were receiving and what costs were involved.

Everest Finanse SA was fined more than PLN 15 million. The company must also publish the decision on its social media and provide information about the decision to affected consumers. The company may appeal the decision to the court.

Spain

Annulment of CNMC fine for derivatives cartel

On 11 January 2024, the Spanish National Court [ruled in favour](#) of Santander, Caixabank, BBVA and Sabadell, annulling fines totalling EUR 91 million which were imposed by the Spanish National Markets and Competition Commission ("CNMC") in 2018. The fines were imposed for alleged participation in a cartel in the derivatives sector. The CNMC had found that the participants offered interest rate derivative products under different conditions than those agreed with customers. However, the court found that the CNMC did not provide sufficient evidence to prove the existence of a "single and continuous infringement", which is what the banks had been accused of participating in between 2006 and 2016. Instead, the court found that the CNMC had only demonstrated anti-competitive behaviour on certain specific occasions.

CNMC clears the acquisition of Targobank España by Abanca

On 11 September 2023, the CNMC granted phase I clearance to the purchase of Targobank España by Abanca. The transaction is expected to close in 2024 and will significantly increase Abanca's financial capacity, as it will be managing a business volume of over 112 million euros and a loan portfolio of almost 50 million euros.

CNMC clears acquisition of UniversalPay by the joint venture Comercia Global Payments

On 9 August 2023, the CNMC cleared the acquisition of UniversalPay (which belonged to Evo Payments) by Comercia Global Payment. The transaction involves a change from sole control by Global Payments over UniversalPay to the joint control of Global Payments and Caixabank through Comercia Global Payments. UniversalPay will now be merged with Comercia Global Payments;

an 80% stake will be held by Global Payments and the remaining 20% will stay in the hands of the bank.

CNMC sanctions Bureau Van Dijk (BvD) and Informa D&B for anti-competitive practices

On 10 July 2023, the CNMC [imposed](#) a fine exceeding EUR 3.5 million on Bureau Van Dijk Publicaciones Electrónicas S.A. ("**BVD**"), its parent company Moody's Corporation, and Informa D&B S.A.U. ("**Informa**"), together with Compañía Española de Seguros de Crédito a la Exportación S.A., Cía de Seguros y Reaseguros ("**SME**").

The businesses agreed on [customer sharing and pricing](#) for the marketing of several business information databases. Both companies took advantage of the leniency programme, meaning that BvD was exempted from paying the fine whilst Informa benefited from a 30% reduction (7.8% of the company's total turnover).

NORTH AMERICA

US

Bank regulator proposes changes to merger review

On 29 January 2024, the Office of the Comptroller of the Currency ("**OCC**") announced a [proposal](#) to amend its rules for business combinations of national banks and federal savings associations. The proposals, intended to "better reflect the OCC's view that a business combination is a significant corporate transaction" would modify the OCC's implementing regulation of the Bank Merger Act in order to remove provisions providing for expedited review and automatic approval of certain bank merger applications. The OCC also proposed to add a policy statement summarising the principles it uses when reviewing proposed bank merger transactions, in order to increase transparency about its process and provide "clarity and guidance" to interested parties. The policy statement would identify certain attributes of a proposed merger that would be "consistent with timely approval" such as the parties' combined assets falling below a certain threshold or the acquirer having a healthy financial condition, as well as attributes that raise supervisory or regulatory concerns potentially requiring resolutions, such as the acquirer being a global systemically important banking organisation or facing an open or pending enforcement action.

US federal judge allows Apple Pay monopolisation suit to go forward, highlighting increased focus on contactless payment practices

On 27 September 2023, a federal judge [denied](#) in part a motion by Apple Inc. to dismiss a private lawsuit brought by credit unions alleging that Apple had monopolised the market for "tap-and-pay mobile wallets" for the iPhone, iPad, and Apple Watch, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Plaintiffs alleged Apple leveraged its power in mobile device markets in order to monopolise a relevant market for mobile wallets on iOS devices that supported tap-and-pay by limiting the access of third-party digital wallet applications on iOS devices to Apple's NFC technology. According to plaintiffs, the lack of competition for mobile wallets on iOS devices enabled Apple to charge payment card issuers supracompetitive fees "that no other mobile wallet ventures to impose"; plaintiffs accordingly brought suit on behalf of a putative class of issuers of payment cards.

The judge disagreed with Apple's argument that the alleged aftermarket for "tap-and-pay iOS mobile wallets" was implausible. The judge granted, however, Apple's motion to dismiss the plaintiffs' claims that Apple had illegally "tied" Apple Pay to the purchase of its mobile devices, because "iOS

device consumers are not required to use Apple Pay and because Apple Pay is free to consumers."

The ruling followed a [report](#) by the US Consumer Financial Protection Bureau ("CFPB") assessing "Big Tech's role in contactless payments." The report stated that mobile device restrictions like Apple's restriction of access to NFC technology can "inhibit choice and innovation in consumer payments" and might inhibit "emerging services that enable consumers to make point-of-sale transactions using their bank accounts directly." In [remarks](#) accompanying the release of the report, CFPB Director Rohit Chopra situated the analysis within the CFPB's broader "inquiry" into how "Big Tech companies have crept into the payments ecosystem" and expressed concern that the mobile device policies at issue "may create potential roadblocks to a more open payments ecosystem in the U.S."

Federal appeals panel allows certification of consumer and ATM operator classes in antitrust case against ATM network operators

In a decision issued 25 July 2023, a three-judge panel of the United States Circuit Court of Appeals for the District of Columbia affirmed a district court's decision to certify three classes of plaintiffs in a lawsuit challenging the ATM fee rules of Mastercard and Visa under the antitrust laws. The challenged rules prohibit ATM operators participating in the networks of Mastercard or Visa from charging cardholders lower access fees for transactions routed over other ATM networks than they charge for transactions over a Mastercard or Visa network, even where the other network charges the ATM operator less than Mastercard or Visa.

In opposing class certification on appeal, the defendants argued that the plaintiffs had not met their burden to show that questions of law or fact common to the class predominated over questions affecting only individual members, given that too many class members would not have been injured by the challenged conduct. The panel [disagreed](#), upholding the trial court's conclusion that plaintiffs had provided "reasonable, wholesale methodologies, tethered to [their] respective theories of liability, showing that all class members suffered injury." The D.C. Circuit denied a subsequent request by Mastercard and Visa that the D.C. Circuit rehear their case en banc.

Federal court allows lawsuit alleging antitrust violations over securities identification to go forward

On 14 July 2023, a New York federal district court [denied in part and granted in part](#) a lawsuit alleging a violation of the antitrust laws related to the use of Committee on Uniform Securities Identification Procedures ("CUSIPs"). The CUSIP identifier is a uniform numbering system used to facilitate the use of electronic trading systems by assigning a nine-digit number to a specific U.S. security based on its issuer and its instrument type.

The plaintiffs alleged that the defendants, including CUSIP Global Services (the issuer of CUSIP identifiers) and S&P Global, had imposed clauses in their agreements with data vendors allowing the vendors to provide CUSIP numbers only to financial firms who had obtained a license from the defendants. The court held that the plaintiffs had plausibly alleged that the defendants' contracting policy had foreclosed potential competing sources of data, stating that according to the plaintiffs' complaint, "[t]he economic reality in the CUSIP use market is the result of defendants' restrictive distributorship model, which vastly expands defendants' control over the entire market, regardless of with whom plaintiffs deal." However, the court granted the defendants' motion to dismiss a claim that they had engaged in an illegal group boycott by requiring third-party data vendors to only provide data to entities that had purchased a license from the defendants. The court also denied the plaintiffs' request for a declaratory judgment that CUSIP numbers are neither copyrighted nor copyrightable, finding that, notwithstanding that the case could be characterized as "an antitrust case masquerading as a

copyright case" or vice versa, the issue was irrelevant because the defendants had never owned any copyright in CUSIP numbers.

Congressional inquiry into collusive ESG initiatives

On 6 July 2023, the [US House Judiciary Committee](#) expanded its ongoing "inquiry into the sufficiency of existing antitrust laws to address collusive agreements to promote and adopt progressive environmental, social, and governance (ESG) goals" by issuing additional requests for documents and information from several entities it stated were involved with ESG initiatives. In letters sent to BlackRock, Vanguard, State Street, the Glasgow Financial Alliance for Net Zero ("**GFANZ**") and the Net Zero Asset Managers initiative ("**NZAM**"), the Committee requested all documents and communications over the past four years relating to each recipient's "decarbonization and net zero emissions targets and commitments" and how those targets and commitments "affect output, price, or the choices available to consumers and investors, including but not limited to the markets for fossil fuels such as coal, gas, and oil". The letters mentioned several means by which asset managers might have advanced ESG goals, including "setting investment policies", "making investment decisions" and "sponsoring, supporting, opposing, or voting for directors and stockholder proposals". In a press release accompanying the letters, the Committee said it was investigating the recipients' "apparently coordinated agreement to 'decarbonize' assets under management and reduce emissions to net zero—with potentially harmful effects on Americans' freedom and economic well-being".

ASIA PACIFIC

Australia

Australian Competition Tribunal authorises ANZ bank's proposed acquisition of Suncorp bank

In February 2024, the Australian Competition Tribunal ("**ACT**") [overturned](#) the decision of the Australian Competition and Consumer Commission ("**ACCC**") to block ANZ's acquisition of Suncorp. The ACCC had not been satisfied that the transaction was not likely to substantially lessen competition in the markets for home loans, banking services and agribusiness products. It also was not convinced that the likely public benefits of the transaction outweighed the public detriments. However, the ACT considered, *inter alia*, that the transaction would not meaningfully impact the likelihood of coordination or tacit collusion between major banks in Australia. The ACT also found that the efficiencies resulting from the transaction were tangible, and outweighed any detriments arising from any reduction in competition. Whilst the ACCC has indicated it will not appeal the decision, it may use the case to bolster calls to enhance its ability to oppose transactions that enhance a firm's market power.

Retail baking deposits inquiry 2023

An inquiry conducted by the ACCC into retail deposit products offered by authorised deposit-taking institution concluded in December 2023. The inquiry found that the market for deposits is opaque, and that banks use strategic pricing which creates complexity and makes it difficult for consumers to compare products. In its [final report](#), the ACCC recommended, *inter alia*, that there should be continued monitoring of prices in the market, that consumers should be alerted if about to breach bonus rate interest conditions, and that banks should tell consumers directly when they change interest rates, and prompt them to consider switching for a better rate.

Authorisation for Australian Banking Association Limited and member banks to discuss and develop anti-scams initiatives

In July 2023, the Australian government allocated \$58 million in funding to the ACCC for the establishment of a National Anti-Scam Centre ("NASC") over the next 2 years. The Australian government is also planning an industry-wide code of conduct.

In its own response to this, in July 2023, the Australian Banking Association Ltd ("ABA") and its 20 member banks sought ACCC authorisation to enable discussions for the purpose of developing industry initiatives and standards to prevent, detect, disrupt and respond to scams affecting individual and small business customers.

On 13 October 2023, the ACCC published its draft decision (with conditions) proposing to grant the authorisation. The ACCC found that the proposed conduct was likely to result in some public benefits in the form of a more cohesive and effective industry approach to scam mitigation initiatives, and expedited prevention of avoidable scam losses, in the interim period prior to the Australian Government's code of conduct. To address potential public detriments arising from coordination among members, the ACCC imposed reporting requirements and the mandated presence of competition lawyers at meetings between authorised parties.

The ACCC is set to make its final determination in November 2023.

China

Ordinance on Supervision of Non-banking Payment Institutions retaining succinct antitrust clauses

On 17 December 2023, the Chinese State Council released the [final version](#) of the Ordinance of Non-banking Payment Institutions after a two-year deliberation since the first draft was published. Whilst the draft ordinance had included a set of clauses designed to grant broad antitrust powers to the Central Bank of China ("PBOC"), the final version saw such clauses reduced to a standard antitrust reference provision, stipulating that PBOC has the obligation to transfer evidence of "monopolistic or unfair competition conduct" to the Chinese antitrust authorities.

Shanghai IP Court dismisses abuse of dominance case against Ant and Alibaba regarding online payment services

On 13 October 2023, the Shanghai Intellectual Property Court [dismissed](#) a case against the Chinese e-commerce giant Alibaba group and its online payment service provider Ant group (which is 33% owned by Alibaba group) for an alleged abuse of dominance. The individual claimant, Zhen Li, filed a complaint in 2021, alleging that the Ant group and the e-commerce platforms of the Alibaba group (i.e., Tmall and Taobao) limited consumers' choice in online payment services as Alipay (Ant group's payment service) is the sole payment service available in Tmall and Taobao. The defendants allegedly engaged in exclusive dealing, illegal tying, and imposition of unreasonable trading terms. The claimant also cited the penalty decision of the State Administration for Market Regulation against Alibaba group in 2021 to prove that the Alibaba group possesses market power in the domestic market for online retail platform services. The Shanghai Intellectual Property Court, however, ruled that online payment services are an inherent part of online retail platforms. As online payment services are not marketable financial

services independent from online retail platforms, the allegations of exclusive dealing and tying did not stand. The Shanghai Intellectual Property Court further held that Tmall's and Taobao's choice of Alipay's online payment services was justifiable, partly given that they are affiliated companies, and there had been no evidence showing that they refused to provide access to other third-party payment service providers.

Japan

Japan Fair Trade Commission raids major Japanese general insurance companies

On 19 December 2023, the Japan Fair Trade Commission ("JFTC") conducted [on-site inspections](#) against four major Japanese insurance companies (Tokio Marine & Nichido Fire insurance, Sompo Japan Insurance, Mitsui Sumitomo Insurance, and Aioi Nissay Dowa Insurance). This followed allegations that the companies had colluded in setting premiums for liability insurance and earthquake and fire insurance for companies. These four companies are suspected of sharing information and then offering target companies high premiums. Japan's Financial Services Agency ("JFSA") had issued a reporting and collection order against these four companies in June 2023, and the JFTC commenced its investigation in August 2023.

Life Insurance Association revises 'Guide to Fair Trade'

On 12 September 2023, it was reported that the Life Insurance Association of Japan had revised its "Guide to Fair Trade" – voluntary guidelines established in 1996. As background to this, on 19 June 2023, it was reported that the Financial Services Agency ("JFSA") had issued a reporting and collection order against four major Japanese insurance companies for allegedly colluding in setting fire insurance premiums for companies. The revised guidelines clearly state that the Japanese Antimonopoly Act applies to joint insurance contracts for companies, and that determining minimum insurance premiums through discussions with other companies in the same industry would constitute a cartel.

GLOBAL

UN Environment Programme issues statement on the Net-Zero Insurance Alliance to address antitrust concerns

On 5 July 2023, the UN Environment Programme issued a [statement](#) updating the policies of the Net-Zero Insurance Alliance ("NZIA"). It emphasised that each company that chooses to be a member of the NZIA unilaterally and independently decides on the steps on its path towards net zero. It asserted that NZIA membership does not involve any coordinated competitive conduct or exchanges of competitively sensitive information. Going forward, NZIA members will have no obligation to set or publish targets. The NZIA Target-Setting Protocol will serve as a voluntary best practice guide.

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