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C H A N C E



ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE

January to March 2019

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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE: JANUARY TO MARCH 2019

Last quarter SAMR cleared over 100 mergers in China, one of which (KLA-Tencor/Orbotech) was cleared subject to behavioural conditions to address bundling and foreclosure concerns and issued a further four penalty decisions for failure to file. On the enforcement side, SAMR concluded its second collective dominance case against two domestic API suppliers, issuing fines totalling RMB 10 million (approximately USD 1.5 million) and also oversaw local investigations against two major players in the online food delivery sector – a sign of a hardening attitude towards China's booming tech sector.

Another development from China last quarter was the publication of draft regulations covering anti-competitive agreements; abuse of dominance and abuse of administrative power, of which the most notable feature was the inclusion of safe harbours for horizontal and vertical agreements (15% and 25% market share respectively), other than for certain specific categories of agreement identified in the draft regulations (covering such things as price-fixing, market sharing, resale price maintenance etc). These drafts are expected to be finalised in May.

Outside China, there is continuing interest in e-commerce with Japan looking into the trade practices of digital platforms and India introducing new foreign investment rules imposing restrictions on the ownership and operation of e-commerce platforms. On the merger control side, Malaysia is reportedly aiming to introduce a merger control regime as early as this year and the Philippines recently applied a modest increase to its filing thresholds. On the enforcement side, Singapore issued a USD 1.1 million fine against a number of hotel owners and managers for exchanging sensitive information (confirming an earlier provisional decision); Hong Kong commenced an investigation into an alliance of container terminal operators; Malaysia issued its first ever bid rigging decision with a proposed fine equivalent to approximately USD 470,000; Indonesia also targeted bid-rigging with a fine equivalent to approximately USD 250,000 imposed on three construction companies; and it was reported that Japan will shortly issue its largest ever cartel fine of approximately JPY 60 billion (over USD 500 million).

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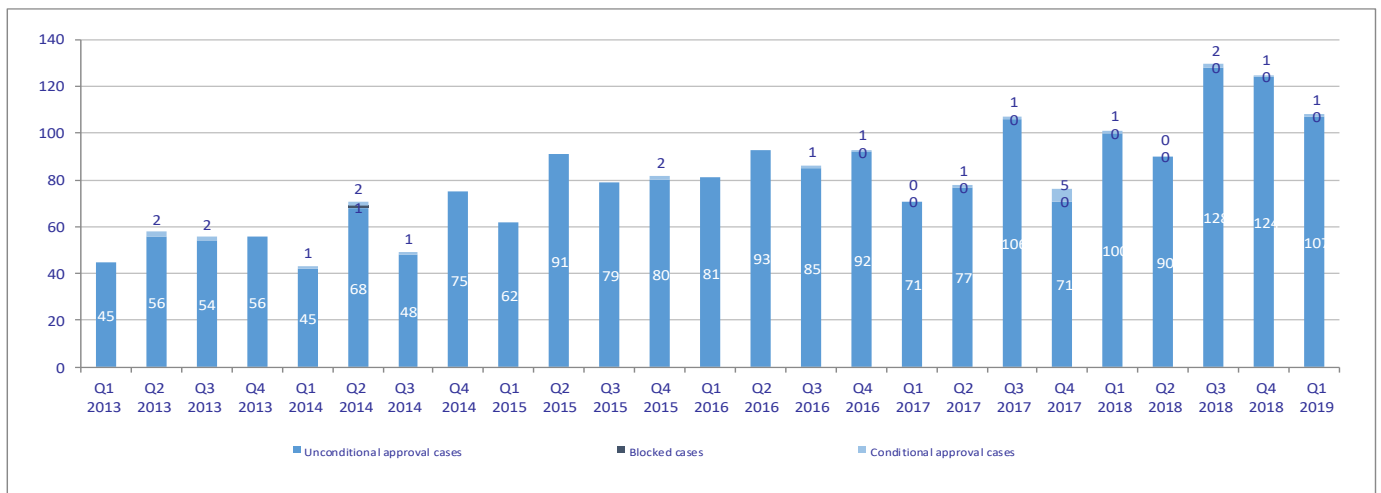


MERGER CONTROL

How many cases have there been?

SAMR issued 108 merger decisions in the first quarter of 2019, an increase of 7% compared to the first quarter of 2018, with 107 reviewed cases in this quarter unconditionally cleared and one case conditionally approved. Further, around 84 cases were notified under the simplified procedure in this quarter, which represents 77.8% of the total reviewed cases.

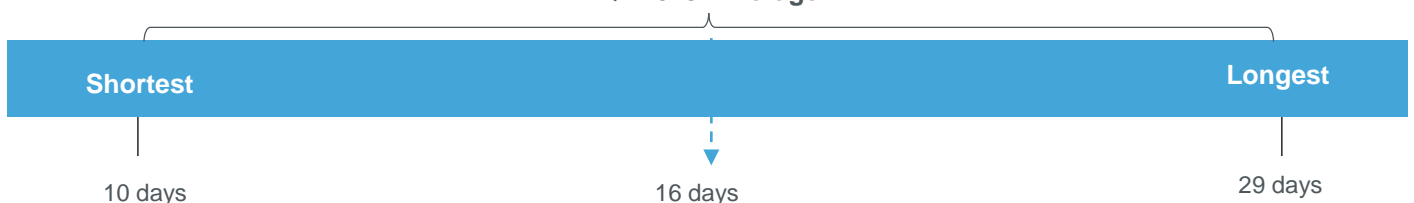
Merger control trends – Q1 2013 – Q1 2019



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

Q1 2019: Average

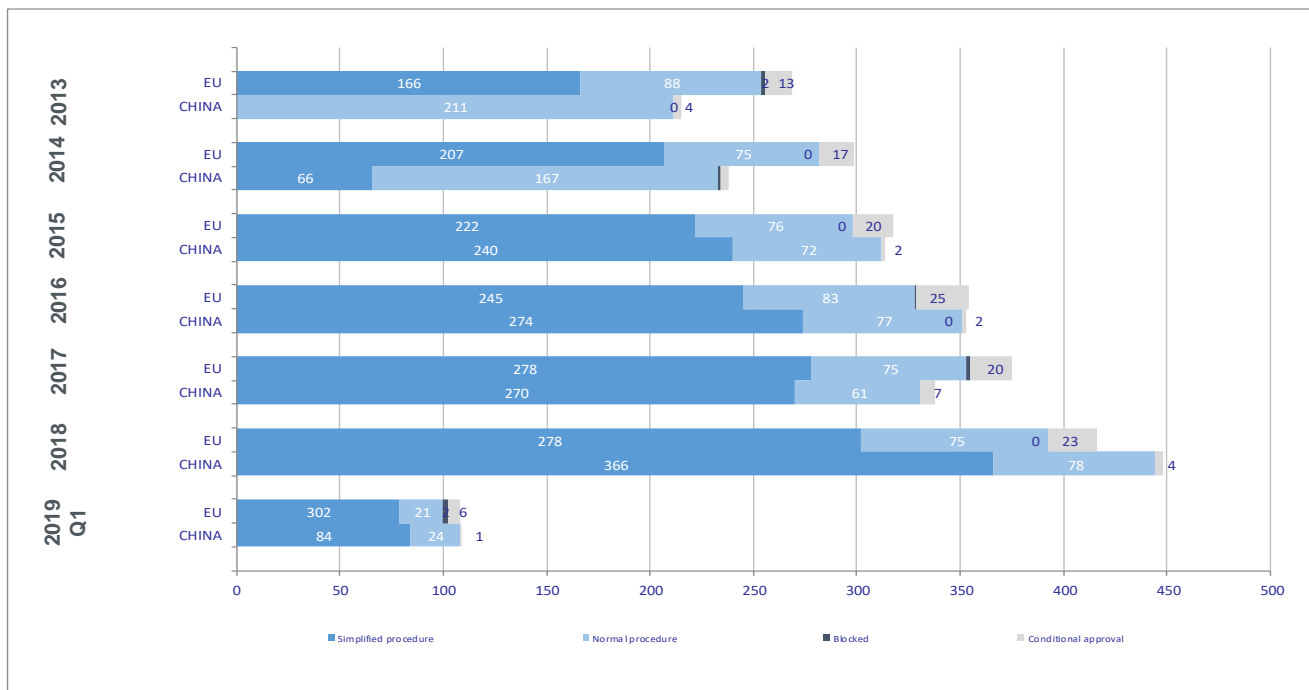




MERGER CONTROL

How does China compare internationally?

Comparison with EU – 2013 – 2019



SAMR publishes four new failure-to-file fines

SAMR published the following four failure-to-file decisions in this quarter, the investigations of which did not lead to any finding of competition concerns. More details on the infringing parties and fines are provided below.

- On 7 January 2019, it was published that Cowell Health was fined RMB 400,000 (USD 58,394) for failing to notify its acquisition of 100% stake in Henan Baijia Haoyisheng.
- On 14 February 2019, it was published that Jiangsu Dewei was fined RMB 300,000 (USD 44,664) for the failure to notify its acquisition of 60% stake in Jiangsu Heshili New Materials.
- On 25 February 2019, it was published that Inly Media was fined RMB 200,000 (USD 29,757) for the failure to notify its acquisition of 60% stake in Inad Advertising.
- On 26 February 2019, it was published that Overseas Hong Kong Investment was fined RMB 300,000 (USD 44,664) for the failure to notify its acquisition of 50% stake in Weifang Sime Darby Liquid Terminal.



MERGER CONTROL

SAMR conditionally approves KLA-Tencor's acquisition of Orbotech

On 13 February 2019, SAMR conditionally approved the proposed acquisition of Orbotech Ltd. ("**Orbotech**") by the US acquirer KLA-Tencor Corporation ("**KLA-Tencor**", together with Orbotech, the "Parties") (the "**Transaction**"). The Parties' businesses have the following vertical and adjacent relationships within the broader market for semiconductor equipment – (a) upstream market for process control equipment (KLA-Tencor); (b) the downstream market for semiconductor deposition and etch equipment (Orbotech) and (c) either of the products mentioned in (a) and (b) above may be directly demanded by firms that manufacture and/or assemble semiconductor components. SAMR considers the relevant geographic market for the semiconductor equipment concerned worldwide, taking into account the fact that China has a high import ratio (80%) in this sector. SAMR's competitive analysis concluded that KLA-Tencor's dominance in the upstream market for process control equipment in China and worldwide would enable the combined entity to eliminate or restrict competition in the downstream market for semiconductor deposition and etch equipment by the following means – (i) foreclosing customers other than Orbotech; (ii) tying the Orbotech's products when selling KLA-Tencor's products to firms manufacturing and/or assembling semiconductor components and (iii) acting as a conduit to sharing information of Orbotech's competitors with Orbotech.

To address the competition concerns identified, SAMR has accepted the behavioural commitments offered by KLA-Tencor, including: (i) make available process control equipment and related services to deposition and/or etch equipment manufacturers in the Chinese market on fair, reasonable, and non-discriminatory terms; (ii) not conduct tie-in sales of process control equipment and deposition and/or etch equipment supplied to the Chinese market when not justified and not impose other unreasonable trading conditions; and (iii) take measures to ensure that Orbotech will not obtain the competitively sensitive information of the deposition and/or etch equipment manufacturers in the Chinese market. Outside China, the Transaction has been unconditionally cleared in the US, South Korea, Taiwan, Japan, Israel, Germany and Austria. China came as the last jurisdiction where clearance was secured after a 233 day review which involved a "voluntary" withdrawal and re-file given the expiration of the legally prescribed review period. There was wide speculation that the process and outcome had been influenced by trade tensions between China and the US.



ANTITRUST INVESTIGATIONS

SAMR fines two API suppliers for abuse of collective dominance

On 18 January 2019, SAMR published its penalty decision against two chlorpheniramine maleate ("**CM**") active pharmaceutical ingredients ("**APIs**") suppliers Hunan Er-Kang ("**Er-Kang**") and Henan Jiushi ("**Jiushi**") for abuse of dominance, imposing a total fine of RMB 10.04 million (USD 1.48 million). CM is an API used to produce a wide range of commonly used cold and anti-allergy medicines. Er-Kang is the sole authorized agent to import CM into China and Jiushi is the largest manufacturer of CM in China. SAMR opened its investigation in July 2018 and found the two companies were collectively dominant in the market for CM APIs in China on the basis of their combined market share and additional factors including, inter alia, the ability to control the market, barriers to entry/expansion and the reliance of downstream players.

With respect to specific conduct, SAMR found that the two suppliers had abused their collective dominance by the following means: (i) Excessive pricing - Er-Kang sold CM APIs at unfairly high prices (three to four times Er-Kang's average cost of purchasing CM APIs from the manufacturers); (ii) Refusal to supply - Er-Kang and Jiushi refused to supply CM APIs by making up excuses or imposing unacceptable conditions; and (iii) Tying - Er-Kang and Jiushi conditioned the purchasing of CM APIs on the purchasing of medical supplements (such as starch capsules and medicinal cane sugar) which were not directly related to the use of CM APIs. The abusive conduct was found to have significantly distorted competition in the CM APIs' downstream drug manufacturing markets and have harmed the interests of end-consumers. Consequently, SAMR imposed fines of RMB 8.48 million (USD 1.25 million) and RMB 1.56 million (USD 0.23 million) on Er-Kang and Jiushi, respectively, accounting for 8% and 4% of their revenue in 2017. In addition to the fines, SAMR recovered illegal gains of RMB 2.39 million (USD 0.35 million) from Er-Kang due to its leading role in the collective abusive conduct. No illegal gains were recovered from Jiushi due to its supporting role.

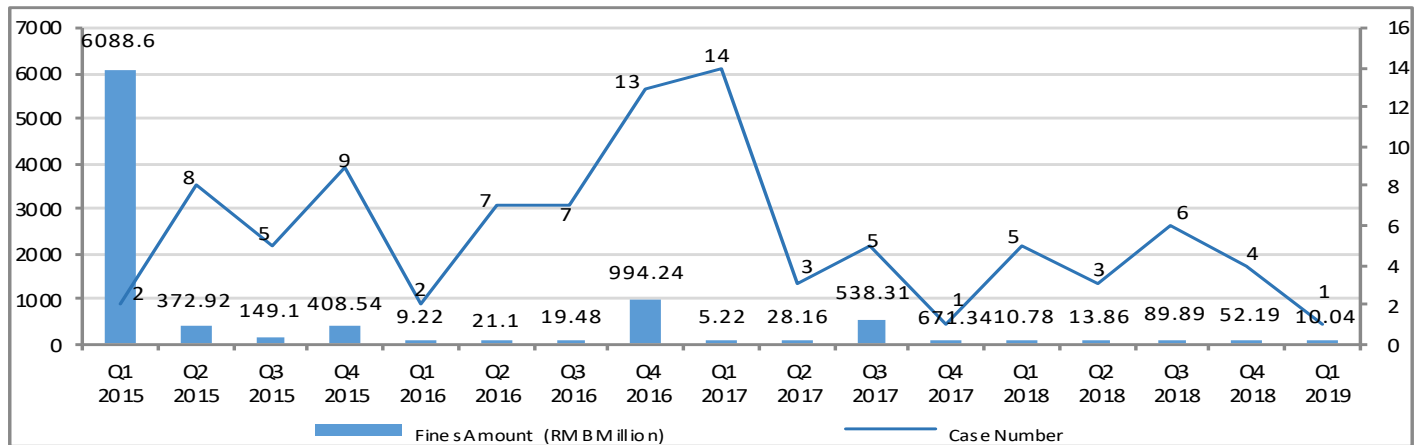
Local AMRs investigate major Chinese online food delivery platforms for alleged abuses

Meituan and Ele.me are two major players in the Chinese online food delivery sector. These two players have been investigated by various local counterparts of SAMR ("**Local AMRs**") for improper business practices that may contravene the Anti-Unfair Competition Law ("**AUCL**") or the E-commerce Law, mainly related to the exclusivity requirement imposed on sellers by these platform operators. It is reported that the relevant local AMRs are in the process of establishing a finding of Meituan's dominant position, which could lead to a further finding of infringement under the Anti-Monopoly Law ("**AML**").

Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/ Co-operation
Pharmaceuticals SAMR	18 January 2019	Abuse of collective dominance (Excessive pricing/refusal to supply/tying)	10,036.7	1,557.3	8,479.4	4%/8%	Yes

ANTITRUST INVESTIGATIONS

Enforcement trends* – Q1 2015 to Q1 2019



*Note: From Q1 2015 to Q1 2018, figures include both NDRC and SAIC; from Q2 2018, figures are for SAMR.

Other news

SAMR publishes draft versions of three important antitrust regulations for consultation

In January 2019, SAMR published the draft version of three important antitrust regulations with respect to anti-competitive agreements, abuse of dominance and abuse of administrative power. The consultation periods have ended, and the finalized versions are reportedly to be released in May at the annual competition policy forum. This signals a key step of policy consolidation following the antitrust agency consolidation that took place in China in 2018.

Key highlights within the drafts are summarized as follows:

- **The draft regulation on anti-competitive agreements:** (i) provincial AMRs are authorized to handle certain investigations; (ii) anti-competitive agreements under Articles 13 and 14 of the AML are no longer categorized into price-related and non-price-related; and (iii) market share-based exemption thresholds are introduced as "safe-harbours" - 25% for vertical agreements and 15% for horizontal agreements.
- **The draft regulation on abuse of dominance:** (i) provincial AMRs are authorized to handle certain investigations; (ii) the meaning of "dominance" within Article 18 of the AML is clarified, in particular with respect to the concept of "collective dominance" and the factors that need to take into account when establishing dominance in relation to emerging internet sectors as well as IP related sectors; and (iii) clarifications are also provided for the meaning of "objective justifications" (which if established would exempt an abuse) and the catch-all clause "other conduct that could be deemed as abuse of dominance" under Article 17 of the AML.
- **The draft regulation on abuse of administrative power:** (i) provincial AMRs are authorized to handle certain investigations; (ii) Articles 32-37 under the AML are further clarified to facilitate the identification of abuses; and (iii) detailed procedural guidance on complaints, complaint verification, investigation, etc. is provided.

ANTITRUST INVESTIGATIONS

Other news (continued)

Members of the New AMC Expert Advisory Board are appointed

On 20 March 2019, SAMR announced that its appointment of the 17 members of the new Expert Advisory Board of the State Council's Anti-Monopoly Commission (the "**Board**"). The Board is now led by Mr. Lang Sheng, a former deputy director of the Legislative Affairs Commission of the National People's Congress Standing Committee. Other Board members include Mr. Zhang Handong, the former Inspector of the Price Supervision and Anti-Unfair Competition Bureau of SAMR and the former Director General of the Price Supervision and Antimonopoly Bureau of the NDRC; Mr. Zhao Xiaoguang, the former deputy head of the State Post Bureau of China; Mr. Zhu Li, a senior judge of the Intellectual Property Court of Supreme People's Court of China; as well as legal scholars who have contributed to the development of the Chinese antitrust law and practices. The Board's first plenary meeting was held on the same date of this announcement.

SAMR publishes 2018 report for the implementation of the Fair Competition Review System

On 15 January 2019, SAMR issued a report on the implementation of the Fair Competition Review System (the "**FCRS**") in 2018 (the "**2018 Report**"). According to the 2018 Report, all departments under the State Council, all provincial governments, 98% of the municipal governments and 85% of the county-level governments have implemented the FCRS as of the end of 2018. Fair competition review has been conducted in relation to 310,000 documents, representing an increase of 154% from 2017, with more than 1,700 documents corrected. SAMR in the next stage will aim to issue ancillary rules clarifying exceptions and liabilities to further progress the implementation of the FCRS across China.



● Hong Kong

HKCC conducts investigation into "Hong Kong Seaport Alliance"

On 10 January 2019, the Hong Kong Competition Commission ("**HKCC**") commenced a formal investigation into the "Hong Kong Seaport Alliance". It was reported in the media that on 8 January 2019 Hongkong International Terminals Limited, Modern Terminals Limited, COSCO-HIT Terminals (Hong Kong) Limited, and Asia Container Terminals Limited entered into a joint operating agreement, pursuant to which the four container terminal operators will jointly operate and manage their 23 berths across 8 terminals. The HKCC is investigating whether the Agreement may contravene the first conduct rule.

HKCC consults on the application of the first conduct rule to a pharmaceutical sale survey

On 31 January 2019, the Hong Kong Association of the Pharmaceutical Industry (the "**Association**") applied under section 9 of the Competition Ordinance (Cap 619) ("**CO**"), seeking a decision from the HKCC confirming that the first conduct rule does not apply to the giving effect of a proposed pharmaceutical sales survey by virtue of the exclusion in section 1 (Agreements enhancing overall economic efficiency) of Schedule 1 to the CO. To carry out the proposed survey, the Association will ask its pharmaceutical company members to provide data relating to their sales in Hong Kong on a voluntary basis each quarter. The data collected from participating companies will comprise sales data by value and by pharmaceutical product within the relevant quarter of the year. Such data will be processed by the Association to produce a report available for purchase. In accordance with section 10 of the CO, the Commission called for submissions of representation from interested parties by 29 March 2019.

● Japan

JFTC starts to look into online mall and app stores

The JFTC started a survey of trade practices by digital platforms in January 2019. As part of the survey, on 27 February 2019 the JFTC started a public hearing procedure regarding trade practices by app store operators and online mall operators.

In particular, the JFTC is investigating whether online mall operators such as Amazon have forced vendors at online malls to bear the cost of promotional campaigns.

JFTC is going to impose a record cartel fine

It was reported on 6 March 2019 that the JFTC was planning to impose fines on 8 companies and the total amount of fines for such 8 companies would be approx. JPY 60 billion, which would be a new record amount in a single case.

New amendment regarding fine calculation is to be introduced

The Cabinet of Japan approved an amendment to the Anti-Monopoly Act, which allows fines to be adjusted based on the level of cooperation with the JFTC's investigation. The Cabinet also decides to create a new ordinance or guidelines stating that attorney-client privilege should be introduced to the JFTC's investigation into cartel activities. Such draft bill has been submitted to the National Diet.

JFTC dawn raids generic pharma firms

On 22 January 2019, the JFTC dawn raided generic drug manufacturers Nippon Chemiphar Co., Ltd and Koa Isei Co., Ltd due to an alleged cartel.



- **South Korea**

KFTC announces 2019 enforcement plan

On 7 March 2019, the Korea Fair Trade Commission announced its enforcement plan for 2019. The plan includes policy initiatives regarding the relationship between companies with unequal bargaining power, an industrial ecosystem that promotes innovation-based competition, the protection of consumer rights and the creation of a fair economy.

- **Philippines**

Philippine competition agency adjusts merger filing thresholds

The Philippine Competition Commission ("**PCC**") has adjusted the thresholds for compulsory notifications of mergers and acquisitions. The PCC raised the thresholds from PHP 5bn (USD 96m) to PHP 5.6bn (USD 107m) for the size of person ("**SoP**") and from PHP 2bn (USD 38m) to PHP 2.2bn (USD 42m) for the size of transaction ("**SoT**"). SoP refers to the value of assets or revenues of the ultimate parent entity of at least one of the parties, while SoT refers to the value of assets or revenues of the acquired entity. This marks the second threshold adjustment since the Philippine Competition Act was passed in 2015. The revised thresholds will apply to deals with definitive agreements executed on or after 1 March 2019.

PCC introduces leniency program

On 18 January 2019, Philippine's cartel leniency program became effective, whereby the first-in applicant will be granted full immunity and the second will receive a reduction in the fine. Under the leniency program, an entity that is a former or current participant to a cartel may apply for leniency by means of voluntarily disclosing information regarding the cartel which is not already known to the authority. If the entity is granted leniency, its officers, directors, trustees, partners, employees and agents who came forward and cooperated with the PCC may also be granted leniency. Entities cannot jointly apply for leniency.

Although the PCC has not instigated enforcement action in respect of cartels to date, the introduction of the leniency program signals the PCC's intention to actively prosecute cartel violations.

Grab Philippines fined for providing inadequate information to the PCC

On 25 January 2019, the PCC imposed a PHP 6.5m (USD 130,000) fine on Grab Philippines for submitting "deficient, inconsistent and incorrect data" as part of its voluntary commitments. The PCC noted that it and the third-party monitor were unable to effectively review and enforce the proposed commitments for a first quarter review due to the "absence of correct, sufficient, consistent and timely data" by Grab. The ride-hailing company had earlier offered to voluntarily adhere to a set of price and service-quality commitments in order to proceed with the acquisition of its biggest competitor Uber Technologies, Inc. in the ride hailing market in the Philippines.



Malaysia ●

Malaysia aims to launch merger control regime by end of 2019

Malaysia's Competition Commission ("**MyCC**") is aiming to implement a merger control regime by the end of this year, the authority's chair has said recently. The urgency to implement a merger control regime comes in the wake of Grab's acquisition of Uber's food delivery and ride-hailing operations in Southeast Asia. MyCC is still receiving complaints about the deal, but does not have the ability to prevent the merger. It is still unclear whether the proposed regime will be a pre or post-notification system.

Malaysia imposes the first fine on bid-rigging firms

On 4 March 2019, MyCC issued a proposed decision in relation to bid-rigging – its first such decision. Eight companies in an unknown sector were fined a total of approximately USD470,000 for colluding in response to tender requests by the country's only public arts university. During the tender process, the companies shared each other's requests for quotations and tender proposal information, manipulated tender prices and prepared tender documents for each other. As part of the collusive conduct, it was agreed among the companies that the winner of the tender would share its profits with the losing companies.

Singapore ●

CCCS issues fine of USD 1.1m against four hotels for exchanging commercially sensitive information

On 30 January 2019, the Competition and Consumer Commission of Singapore ("**CCCS**") issued a fine of SGD 1.5 million (USD 1.1 million) against the owners/managers of four hotels for exchanging commercially sensitive information in connection with the provision of hotel room accommodation in Singapore to corporate customers. The information shared between the sales representatives of competing hotels included their agreed corporate room rates negotiated on a confidential basis and future price-related strategies. This is the first decision in which CCCS held that principal-agency relationship could give rise to a single economic entity in which both the hotel owner as the principal and hotel manager as the agent were held jointly and severally liable for the infringement and the financial penalties imposed.

Indonesia ●

Three construction companies and five individuals fined for bid-rigging in Indonesia

On 10 January 2019, Indonesia's Commission for the Supervision of Business Competition ("**KPPU**") fined three construction companies, Mellindo Bhakti Persadatama, Jaya Wijaya and Margo Umega, a total of 3.6 billion rupiahs (approx. USD 250,000) for participating in a bid-rigging conspiracy for the re-construction, preservation and routine maintenance of a bridge in the country's Central Kalimantan province. Mellindo Bhakti Persadatama and Jaya Wijaya, and Margo Umega, are also prohibited from participating in any tenders financed by the state government in any region of Indonesia for two years and one year, respectively.

The KPPU also sanctioned five individuals from the Public Works Department, which invited tenders for the construction project, with two individuals prohibited from participating in any state-funded tenders for two years, while the other three prohibited for a period of one year.



● Australia

ACCC will focus on consumer guarantees and anti-competitive practices in 2019

The Australian Competition and Consumer Commission (“**ACCC**”) released its 2019 enforcement priorities in February, which, amongst others, include the following:

- Conduct that may contravene the misuse of market power and the concerted practices provisions;
- Anti-competitive conduct and competition issues in the financial services sector, including issues with respect to foreign exchange services;
- Consumer and competition issues in relation to pricing of essential services, in particular those in energy and telecommunications;
- The collection and use of consumer data by digital platforms, with a focus on the transparency of data practices and the adequacy of disclosure to consumers;
- Competition and fair trading issues in the agriculture sector, with a focus on unfair contract terms; and
- Anti-competitive conduct and unfair business practices impacting competition in commercial construction market.

In addition to the above, the ACCC will continue to focus on its enduring priorities, namely: cartel conduct; anti-competitive conduct; product safety; vulnerable and disadvantaged consumers; and conduct impacting Indigenous Australians.

The Federal Court of Australia fines Cryosite AUD\$1.05 million for cartel conduct before completion of a disposal

On 13 February 2019, the Federal Court ordered Cryosite Limited (“**Cryosite**”) to pay AUD\$1.05 million (USD 750,000) in penalties for engaging in cartel conduct when it signed an agreement in June 2017 to sell the assets of its private cord blood and tissue banking business to Cell Care Australia Pty Ltd (“**Cell Care**”), with a clause requiring Cryosite to refer all customer enquiries to Cell Care before the sale was completed, and when it subsequently gave effect to that provision. Cryosite and Cell Care are both private suppliers of cord blood and tissue banking services in Australia. As such, before the competition of the proposed disposal, implementing the infringing provision would lead to a restriction of Cryosite's supply of cord blood and tissue banking services with an allocation of potential customers with Cell Care.

India



India reforms investment regime for e-commerce platforms

India's amended foreign direct investment policy allows foreign ownership of market-place e-commerce platforms, but prohibits foreign investment in inventory-based models (where the goods and services provided to consumers are owned by the platform). The amendment prohibits any company owned or controlled by a person resident outside India from owning or controlling the goods it sells on its online marketplace, which includes the inventory of sellers who make over 25% of their sales through that online marketplace. Additionally, market-place platforms cannot require sellers to sell products exclusively through its platform; cannot directly or indirectly influence the sales price of goods sold through the platform; and must provide services such as fulfilment and logistics on fair and non-discriminatory terms.

These changes came into effect on 1 February 2019, following local sellers' accusation that Amazon and Flipkart (which combined hold more than a 60% share on India's online sales market) have abused their dominance in the Indian e-commerce sector.

Battery companies and their officials fined for fixing prices of dry cell batteries

In May 2016, the Competition Commission of India ("CCI") was notified by Panasonic Corporation in its leniency application of a cartel between Panasonic India and Godrej to fix prices and maintain price parity in relation to the sale of dry cell batteries in India from 2012 to 2014. The CCI found that Panasonic India and Godrej exchanged commercially sensitive information in order to main price parity for dry cell batteries. The CCI imposed on Panasonic India and Godrej a penalty of approximately USD4.36 million and USD120,000, respectively (with the Godrej fine being substantially smaller as it is a small player). However, Panasonic India and its official were offered a full immunity given its effective leniency application. Godrej's officials by contrast were penalised 10% of their average income for the three preceding financial years to the conduct.

CCI raids commodities trading companies

In March 2019, the CCI dawn raided India's Edelweiss Group and the Indian offices of Glencore and Export Trading Group. Edelweiss Group, an Indian investment and financial services company, was targeted as they previously had a commodities business. The raids form part of a probe into an alleged cartel that fixed the prices of pulses – such as dal and chickpeas – from 2015 onwards, when a drought caused a nationwide shortage of the crops. This comes two years after the Indian Ministry of Finance reportedly found that the parties had colluded to artificially inflate dal prices in the midst of a drought. It appears that the CCI is more willing to conduct dawn raids after it is granted with the power to seize documents in a search and use them in its investigation by an earlier decision of India's Supreme Court.

CCI probes Google over alleged Android abuse

CCI is reportedly examining allegations that Google abused its Android mobile operating system to block its competitors. The investigation appears to be at a preliminary stage and is similar to the one faced by Google in Europe, where the European Commission found that Google imposed illegal restrictions on Android device makers and mobile network operators since 2011 to leverage its dominance in mobile app-store with a view to entrenching its dominant position in mobile search.

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