

**C L I F F O R D**  
**C H A N C E**



## **ANTITRUST IN CHINA AND ACROSS THE REGION**

QUARTERLY UPDATE

October to December 2019

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# ANTITRUST IN CHINA AND ACROSS THE REGION

## QUARTERLY UPDATE: OCTOBER TO DECEMBER 2019

A couple of notable developments in relation to Chinese merger control. First, a higher than unusual tally of nine gun-jumping decisions were taken last quarter, three of which related to acquisitions of a minority stake (<30%), including two cases involving a private equity investor. Secondly, last quarter also saw two conditional approvals, making a total of five cases in 2019 where remedies were imposed. Interestingly, one of these cases (Zhejiang Garden/Royal DSM) involved a non full function joint venture set up to produce an intermediate product, which was cleared on condition that the parties kept their downstream businesses separate and put firewalls in place to protect the flow of sensitive information.

In terms of enforcement, a total of five cases were published by various provincial branches of SAMR. These included most notably another resale price maintenance fine in the automobile sector, with Toyota China being fined approximately RMB 87 million (USD 12.5 million) for measures aimed at ensuring distributors of the Lexus followed the recommended retail price. Unusually, the decision expressly stated that this fine was calculated on the basis of the total turnover of Toyota China, not just the turnover from sales of the relevant Lexus models.

Outside mainland China, the Hong Kong Competition Commission rejected an application to exempt a pharmaceutical sales survey from the competition rules on efficiency grounds. In Japan, the JFTC continued its focus on the digital sector by publishing a proposal to regulate digital platforms, guidelines on data use and a report on trade practices. It also issued a recommendation to notify below-threshold mergers where the total consideration for the acquisition exceeds JPY 40 billion (USD 368 million) and where it might affect domestic consumers. In Australia, the ACCC brought a case against Google for misuse of personal data as well as taking its first enforcement act on a concerted practice following comments made on social media by two Sydney roofing contractors. Finally, Indonesia closed a loophole in its merger rules by extending the scope of merger control to cover asset deals as well as share deals.

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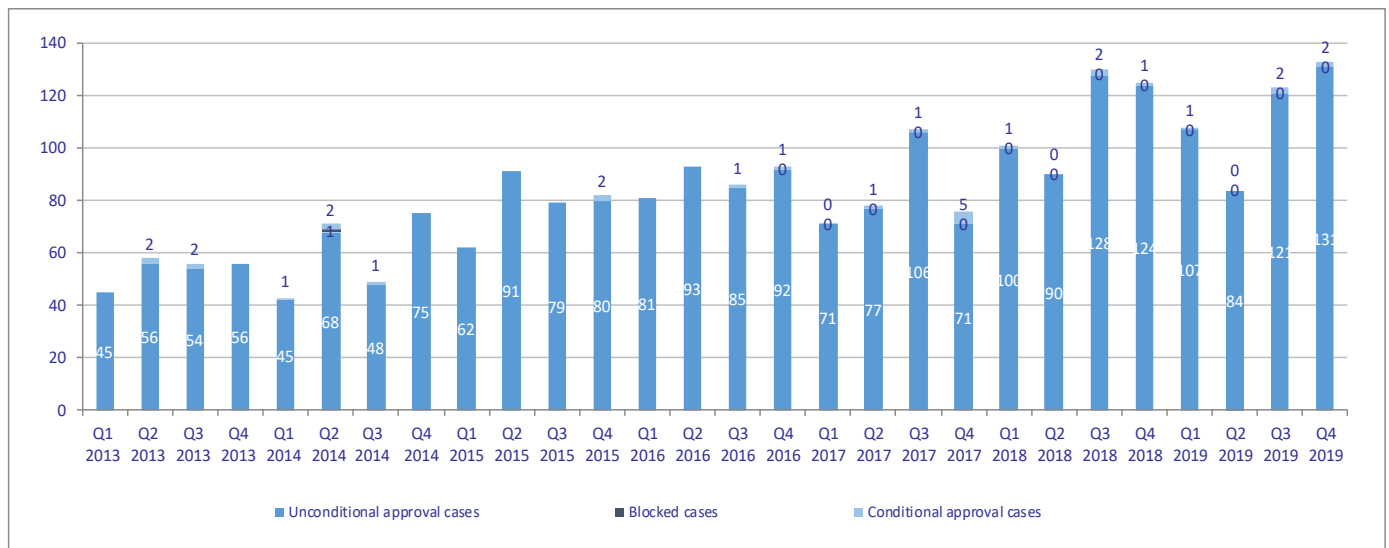


## MERGER CONTROL

How many cases have there been?

There were in total 133 merger decisions released in the fourth quarter of 2019, an increase of 6% compared to the fourth quarter of 2018, with 131 reviewed cases in this quarter unconditionally cleared and 2 cases conditionally approved. Around 108 cases were notified under the simplified procedure in this quarter, which represents 81.2% of the total reviewed cases.

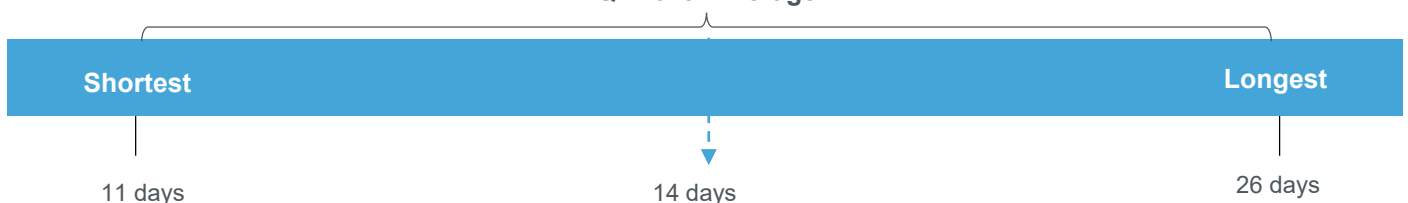
Merger control trends – Q1 2013 – Q4 2019



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
Q2 2019	17 days	85.7%	0
Q3 2019	19 days	78.9%	1
Q4 2019	14 days	81.2%	0

Q4 2019: Average

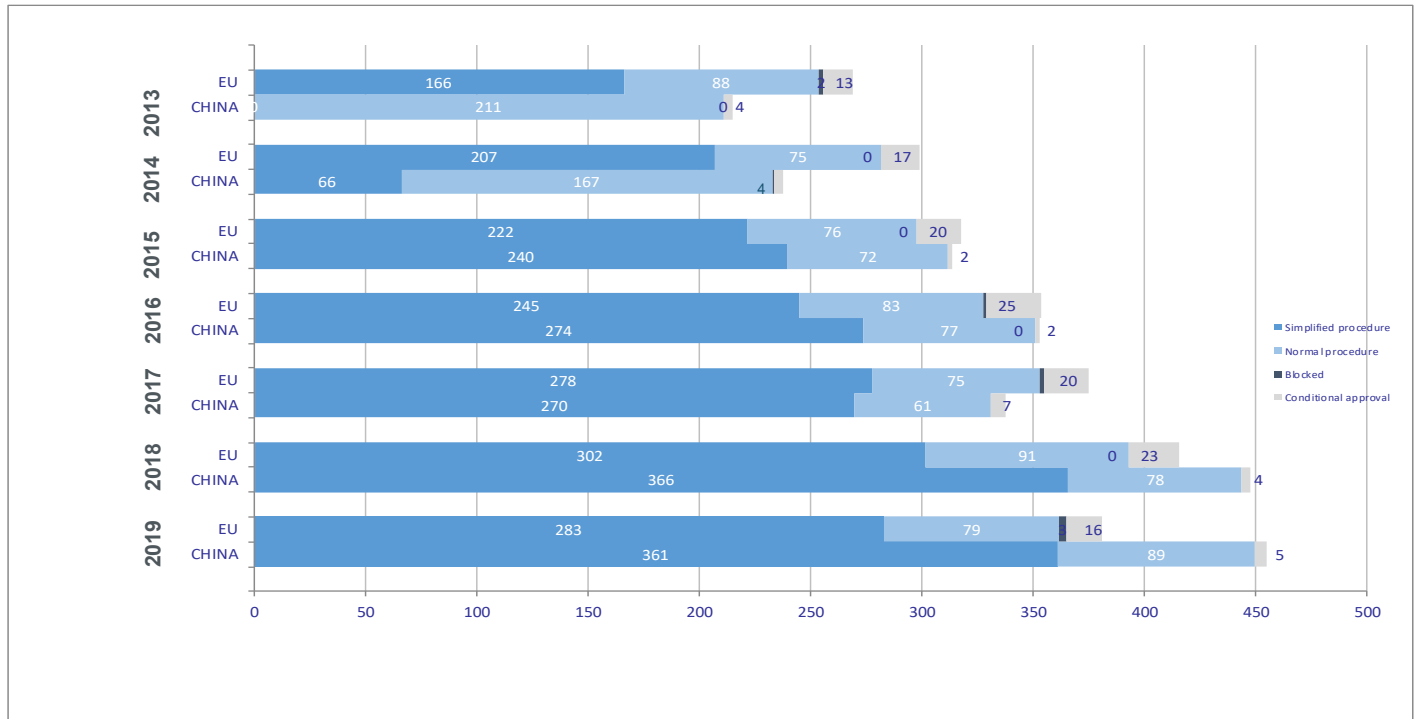




# MERGER CONTROL

How does China compare internationally?

## Comparison with EU – 2013 – 2019



## New record high - 9 failure-to-file decisions in a single quarter

SAMR imposed fines in 9 failure-to-file cases in this quarter, which marks new record high in terms of both the number of gun-jumping decisions taken in a single quarter (9) as well as in a single year (18) since the name-and-shame mechanism was implemented in 2014. Another notable aspect of this quarter is that SAMR penalized three minority acquisitions.

SAMR's investigation of the 9 infringements did not lead to any findings of competition concerns. Basic information of these cases is provided below:

- 1) New Hope Investment was fined RMB 400,000 (USD 57,501) for implementing its acquisition of a 23.6% stake in the Shenzhen-listed Xingyuan Environment. The acquisition was notified to SAMR and accepted on 9 April 2019; but was completed on 17 April 2019 before receiving the final clearance. This marks the first “genuine” gun-jumping fine in China, i.e. for implementing a notified concentration during merger control proceedings, as distinct from the failure to notify a transaction.
- 2) MBK Partners IV was fined RMB 350,000 (USD 49,277) for failing to notify its acquisition of a 23.53% stake in Shanghai Siyanli Industrial, which closed in January 2019 without being notified. This case, together with the New Hope Investment are two rare examples where a failure-to-file fine was imposed on a private equity investor.
- 3) Guangxi Liuzhou Iron and Steel Group was fined RMB 350,000 (USD 49,277) for failing to notify its acquisition of Guangxi Zhongjin Metal Technology, which was signed in January 2018 and completed in May 2018 when the relevant public register was updated.



## MERGER CONTROL

- 4) Tibet Dejin Enterprise Management was fined RMB 300,000 (USD 42,256) for failing to notify its acquisition of a 29.99% stake in Shanghai Huitong Energy, which closed in January 2019 without being notified to SAMR.
- 5) Suzhou Quanyi Health Pharmacy Chain ("**Quanyi**") was fined RMB 300,000 (USD 42,256) for failing to notify its acquisition of sole control in Suzhou Jianshengyuan Pharmaceutical Chain. Notably, Quanyi voluntarily reported the infringement to SAMR.
- 6) BAIC Motor, Hyundai Capital Services and Hyundai Motor Group (China) were each fined RMB 300,000 (USD 42,256) for failing to notify their JV deal which was completed through obtaining the JV's business license in January 2019. It is worth noting that BAIC Motor is a state-owned enterprise.
- 7) Pierburg Pump Technology and Shanghai Xingfu Motorcycle were each fined RMB 350,000 (USD 49,277) for failing to notify their JV deal, which closed in June 2013.
- 8) Guangzhou Port was fined RMB 300,000 (USD 42,256) for failing to notify its acquisition of Zhongshan Port and Shipping Group, which was completed in November 2018.
- 9) Liaoning Port Group was fined RMB 350,000 (USD 49,277) for failing to notify its acquisition of 100% stake in Dalian Port Corporation and Yingkou Port Group, which was completed in February 2018.

### **SAMR conditionally approves the ZGBH/DSM joint venture deal**

On 16 October 2019, SAMR approved the establishment of a joint venture (the "**JV**") between Zhejiang Garden Biochemical High-Tech ("**ZGBH**") and Royal DSM ("**DSM**") (the "**Transaction**"), subject to restrictive conditions. It is in particular worth noting that (i) the Transaction concerns a non-full-function joint venture, the formation of which would not be notifiable under EU competition law; and (ii) SAMR focused its review of the Transaction upon the competitive relationship between the JV's two parents, namely between ZGBH and DSM, and therefore regarded the Transaction as a merger between ZGBH and DSM.

ZGBH and DSM are both active in the markets for human-use vitamin D3 and animal-use vitamin D3. Further, with respect to vertical links, ZGBH supplies NF-grade lanolin cholesterol, an upstream input to the manufacturing of vitamin D3. As such, the relevant markets were defined as the worldwide markets for (i) human-use vitamin D3, (ii) animal-use vitamin D3 and (iii) NF-grade lanolin cholesterol. Note that the JV is to manufacture 7-Dehydrocholesterol ("**DHC**"), a key upstream intermediate to the manufacturing of vitamin D3, for the sole purpose of supplying such DHC to the JV parents. The JV will not have any autonomous or independent market-facing activities and therefore DHC was not considered as a relevant product market by SAMR.

The global and Chinese human-use and animal-use vitamin D3 markets are highly concentrated, with the top 5 players covering more than 90% of the market demand. DSM and ZGBH are among the largest three suppliers in these markets worldwide and in China, with a combined share of over 40%. In the upstream market for NF-grade lanolin cholesterol, ZGBH, with a share of more than 50%, is the largest supplier both worldwide and China-wide. On such basis, SAMR concluded that the Transaction would give rise to (i) unilateral effects through weakening the competition between the parties and further cementing the concentrated market structure; (ii) coordinated effects through possible collusive conduct between the parties on price and volume; and (iii) anti-competitive input and customer foreclosure considering the parties' substantial market power in the relevant upstream (NF-grade lanolin cholesterol) and downstream markets (human-use and animal-use vitamin D3).



## MERGER CONTROL

The behavioural commitments offered and accepted by SAMR primarily include (a) holding separate the parties' businesses excluding DHC and ensuring that the parties continue to compete on the vitamin D3 markets; and (b) putting in place fire walls with respect to the JV's operations to ensure the JV does not act as a conduit of exchanging competitively sensitive information or other anti-competitive conduct between the parties. All the conditions will be lifted automatically after five years following the date of this decision, marking the second time when SAMR adopted a sunset clause since the Cargotec/TTS decision.

### SAMR conditionally approves Novelis' acquisition of Aleris

On 20 December 2019, SAMR conditionally approved the acquisition of Aleris Corporation ("**Aleris**") by Novelis Inc. ("**Novelis**"). The relevant markets involved are (i) China-wide aluminium auto body sheet ("**ABS**") inner plates market and (ii) China-wide aluminium ABS outer plates market, where the parties have horizontal overlaps.

SAMR took the view that the transaction would eliminate or restrict competition on the following basis – The market structure of the relevant markets, which is already extremely concentrated, would be further concentrated as the number of players on the aluminium ABS inner plate market would be reduced from 5 to 4 and the number of players on the aluminium ABS outer plate market would be reduced from 3 to 2. Novelis, with a share of 65-70% in each relevant market, has market power and was considered by SAMR to be a dominant player. Aleris, irrespective of its small incremental share of 5-10%, was regarded as an important competitor which has the potential to exert significant competitive constraints upon Novelis. Therefore, the transaction would likely give rise to unilateral effects through removing a key competitive constraint in the relevant markets and posing purchasing risks to downstream customers. In addition, the market structure post-transaction would be prone to coordination between the merged entity and its competitor(s). This would be in particular likely given that a joint venture (JV) between Novelis and the remaining competitor on the aluminium ABS inner plate market is already in place to supply cold-rolled plates to each of JV parents. Since the merged entity is also likely to engage in supplying cold-rolled plates, there would be heightened risks of coordination between the merged entity and its remaining competitor.

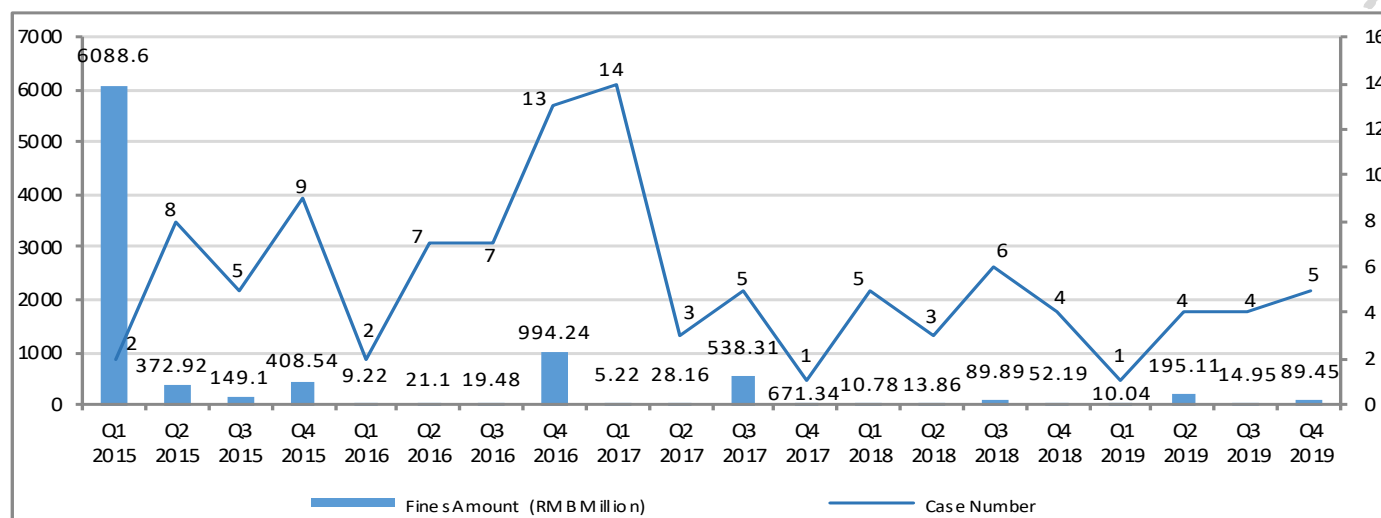
Conditions imposed by SAMR to alleviate its competition concerns include (i) a divestiture of Aleris's entire aluminum ABS business in the European Economic Area, and (ii) a ban on the merged entity from supplying cold-rolled plates to the Chinese aluminum ABS market, which would automatically expire after ten years following the date of this decision.

Outside China, the transaction has been unconditionally cleared in the US and cleared by the European Commission subject to similar structural remedies as those imposed in China. The review timespan of this case in China is particularly long, which was 477 days since initial submission and involved three rounds of pull and re-file.



## ANTITRUST INVESTIGATIONS

Enforcement trends\* – Q1 2015 to Q4 2019



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

Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency/Co-operation
<b>Concrete</b> Shanxi AMR	8 October 2019	Price fixing	250	N/A	N/A	N/A	Yes
<b>Auto</b> Shandong AMR	1 November 2019	Collective boycotting	300	N/A	N/A	N/A	No
<b>Water supply</b> Jiangsu AMR	26 November 2019	Abuse of dominance (tying)	877.64	N/A	N/A	4%	N/A
<b>LNG</b> Hunan AMR	11 December 2019	Market sharing and price fixing	412.80	33.58	105.36	1-2%	Yes
<b>Auto</b> Jiangsu AMR	27 December 2019	RPM	87,613.06	N/A	N/A	2%	Yes

### Five local premixed concrete firms fined by Shanxi AMR for price-fixing

It was published on 8 October 2019 that five premixed concrete firms in Yongji were fined by Shanxi Administration for Market Regulation ("**Shanxi AMR**") for horizontal price fixing.

Following public complaints, Shanxi AMR initiated an investigation in May 2019 and found that on 31 October 2018, the suppliers concerned held a physical meeting and agreed to increase the price of premixed concrete in Yongji through a written notice. The price increase notice was scheduled to take effect from 1 November 2018 but was not actually implemented.





## ANTITRUST INVESTIGATIONS

Shanxi AMR concluded that such conduct infringed Article 13(1) of the Anti-Monopoly Law (the "**AML**"), which prohibits price fixing among competitors. Considering that the price-fixing was not implemented and therefore the actual anti-competitive effects were limited, Shanxi AMR imposed a relatively light fine of RMB 50,000 (USD 7,001) on each infringing firm.

### A local automotive trade association fined by Shandong AMR for boycotting

On 18 October 2019, Shandong Administration for Market Regulation ("**Shandong AMR**") penalized Heze Automotive Industry Association (the "**Association**") for organising a collective boycott. The investigation was initiated in July 2018 following complaints.

Shandong AMR found that the Association prohibited its members from participating in auto shows organized by third-parties other than itself in 2016, 2017 and 2018. The ban was carried out through requesting members to sign commitment letters. Furthermore, a penalty mechanism was also put in place in case of non-compliance – members breaching the ban were requested to pay fines or forsake their membership. Being the largest and the most influential automotive trade association in Heze, the Association's anti-competitive conduct led to a significant decrease in the number of participants of auto shows organized by third parties.

Shandong AMR concluded that the Association's conduct constituted organizing a collective boycott and therefore violated Articles 13(5) and 16 of the AML, and imposed a fine of RMB 300,000 (USD 42,633).

### Lenovo RPM investigation formally suspended by Beijing AMR

On 15 November 2019, SAMR published a decision by Beijing Administration for Market Regulation ("**Beijing AMR**") to formally suspend its investigation against Lenovo's alleged resale price maintenance ("**RPM**"). The two-year investigation which was initiated in 2017 revealed that Lenovo had demanded its authorised service points to implement minimum resale prices with respect to some of Lenovo's products and services.

In light of Beijing AMR's findings, Lenovo put forward a remedy package on 13 July 2018 terminating its internal RPM policies, reviewing existing distribution contracts, lowering resale prices of the concerned products and services as well as holding antitrust compliance training sessions. Beijing AMR found the proposed measures sufficient to address the competition concerns identified and therefore decided to suspend the investigation in accordance with Article 45 of the AML.

## ANTITRUST INVESTIGATIONS

### A local water supplier fined by Jiangsu AMR for abuse of dominance

On 26 November 2019, SAMR published a fine imposed by Jiangsu Administration for Market Regulation ("**Jiangsu AMR**") on Suqian Zhengyuan Tap Water ("**Zhengyuan**") for abuse of its dominant position through tying.

Zhengyuan holds a dominant position in the local tap water supply market as it is the sole tap water supplier in Suyu District, Suqian, Jiangsu Province. Jiangsu AMR upon investigation found that Zhengyuan tied installation services of tap water facilities with its water supply through making its supply of tap water to real estate developers conditional upon their full payment of installation service fees to Zhengyuan.

Zhengyuan was therefore engaged in tying behavior and infringed Article 17(5) of the AML, which prohibits unjustified tying by dominant players. The penalty imposed by Jiangsu AMR consists of a fine of RMB 877,640 (USD 124,654), accounting for 4% of Zhengyuan's revenue in 2016, and a confiscation of illegal gains of RMB 1,176,414 (USD 167,090).

### Seven local bottled gas firms fined by Hunan AMR for market sharing and price fixing

On 11 December 2019, SAMR published an aggregate fine of RMB 412,801 (USD 58,659) imposed by Hunan Administration for Market Regulation ("**Hunan AMR**") against seven bottled liquefied petroleum gas ("**LPG**") firms for market sharing and price fixing in Zhangjiajie.

Following an investigation commenced in July 2018, Hunan AMR found that the seven firms entered into a ten-year cooperation agreement on 18 November 2015, aiming to allocate sales quota among them. Further, one of the firms (New Century Petrochemical) was jointly appointed by the other six to procure raw materials (i.e., LPG), collect revenues and allocate profits to each of the six firms on a monthly basis in accordance with the pre-agreed quota. The investigation also revealed that the seven firms fixed sales price of bottled LPG since February 2016.

Hunan AMR concluded that the seven firms through engaging in market sharing and price fixing, violated Articles 13(1) and 13(3) of the AML. It is worth noting that the infringing firms attempted to justify their conduct on the basis of one or more of the exemptions under Article 15 of the AML but failed. The fines imposed accounted for 1%-2% of the seven firms' 2017 turnover with no illegal gains confiscated.

### Toyota fined RMB 87.6 million for RPM

On 27 December 2019, SAMR published another decision imposing a large RPM fine on Toyota Motor (China) Investment ("**Toyota**"), the second RPM fine in the automobile sector in 2019. Following an investigation which was initiated in December 2017, Jiangsu AMR found that Toyota had reached and implemented agreements with its distributors in Jiangsu (including Suzhou, Wuxi and Changzhou) in relation to their online and offline resale prices of Lexus models from June 2015 to March 2018.

## ANTITRUST INVESTIGATIONS

More specifically, Toyota required its distributors to strictly follow Toyota's recommended resale price ("**RRP**") when submitting fee quotes for the concerned Lexus models through online platforms. In addition, Toyota also fixed the maximum discount percent (i.e., no larger than 6% of RRP) of certain popular Lexus models and thereby fixed the minimum resale prices of these products. To monitor and ensure compliance with the above requirements, Toyota adopted multiple measures, including: (i) conditioning regional sales managers' KPI upon distributors' online fee quotes; (ii) requiring distributors to submit invoices (Fapiao) to Toyota and provide justifications in case of prices lower than the minimum resale prices set by Toyota; and (iii) using supply-cuts as threats to warn distributors that sold the concerned models at prices lower than the level set by Toyota.

Jiangsu AMR in light of the above concluded that Toyota infringed Article 14 of the AML (which prohibits RPM) and imposed a fine of RMB 87.6 million (USD 12.5 million), which accounted for 2% of Toyota's turnover in 2016. It is clarified in the decision that the basis of the fine is Toyota's total turnover as opposed to the proportion related to the concerned Lexus models. Another notable aspect of this case is that WeChat group chatting formed crucial evidence of Toyota's infringement.

The year of 2019 therefore has seen two influential RPM cases in the automobile sector which result in an aggregated fine of RMB 251 million (the other being imposed on Chang'an Ford as reported in our briefing for the second quarter of 2019).

### Other news

#### **SAMR seeks public consultation for Draft Anti-Monopoly Compliance Guidelines**

On 28 November 2019, SAMR released for public comments the *Draft Anti-Monopoly Compliance Guidelines for Undertakings* (the "**Draft Guidelines**"). The consultation period ended on 12 December 2019. The Draft Guidelines are not legally binding and are designed to guide undertakings to develop and implement their own antitrust compliance programs. Key highlights of the Draft Guidelines include, among others, that undertakings are encouraged to establish internal antitrust compliance departments, to take specific steps, e.g., launch whistle-blower policy, improve IT system for compliance monitoring, hold antitrust compliance training sessions, and to report implementation progress to SAMR in writing. Undertakings are expected to comply with the AML on substantive and procedural levels. The Draft Guidelines also provide guidance on the commitment and leniency policies which play a key role in the enforcement of the AML. Notably, the Draft Guidelines warn against overseas antitrust risks when undertakings expand their businesses overseas.



## Hong Kong

### HKCC refuses efficiency exclusion for proposed pharmaceutical sales survey

On 22 October 2019, the Hong Kong Competition Commission ("**HKCC**") published its decision in respect of the application of the Hong Kong Association of the Pharmaceutical Industry (the "**Association**") under section 9 of the Competition Ordinance (Cap 619) ("**CO**"). It was decided that the pharmaceutical sales survey proposed by the Association is not excluded from the first conduct rule by virtue of the economic efficiency exclusion. Although the HKCC did not form a view on whether the proposed survey would give rise to a contravention of the first conduct rule, it indicated that to the extent the proposed survey would permit product specific sales data to be directly or indirectly discerned or robustly estimated by competing pharmaceutical product manufacturers, this would likely raise competition concerns under the first conduct rule. On the other hand, the sharing of some other information such as company total sales data comprised of at least four products of a participant company, would be unlikely to raise competition concerns.

### HKCC 2018/2019 annual report released

On 20 November 2019, the HKCC published its 2018/2019 annual report. Between 1 April 2018 and 31 March 2019, the HKCC received a total of 709 enforcement contacts and escalated 28 cases to the initial assessment and/or investigation phases for further investigations. The top three sectors involved are (1) real estate and property management; (2) transport, logistics and storage; and (3) information technology. The CEO of the HKCC noted in the report that to enhance the deterrent effect of its work, the HKCC will continue to pursue the liability not only of culpable businesses but also individuals involved in contraventions of the CO; the HKCC will also seek deterrent remedies with an aim to encourage compliance.

### Competition Commission submits views on the Franchised Taxi Services Bill

On 23 December 2019, the HKCC submitted its views to the Bills Committee of the Legislative Council on the Franchised Taxi Services Bill ("**Bill**"). The Bill proposes to confer the Chief Executive in Council the powers to grant and administer the franchises for franchised taxi service. The HKCC has put forward two key proposals: (1) instead of fixing the flag fare of franchised taxi at HK\$36 (which is 50% higher than the existing taxi flag fare), it is recommended that the franchise bidders should be required to compete by offering the lowest fare for passengers without sacrificing service quality; (2) the proposed number of franchised taxis to be introduced under the scheme is 600; the HKCC suggested reassessing the number within a short period of time (possibly two years) to meet the community's demand.



### Philippines sees its first abuse of dominance decision

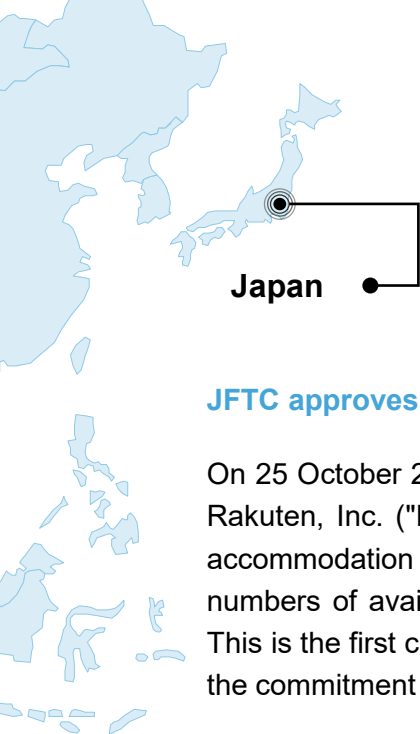
On 2 October 2019, the Philippine Competition Commission ("**PCC**") announced its decision with respect to the abusive conduct of Urban Deca Homes Manila Condominium Corporation ("**Urban Deca Homes**") and its parent company 8990 Holdings, Inc. In March 2019, Urban Deca Homes, a condo developer in the Philippines, was charged by the PCC in a Statement of Objections with abuse of dominance for imposing exclusivity terms on its unit owners and tenants with respect to the choices of internet service provider ("**ISP**"). Unit owners and tenants were prohibited from switching to other ISPs when the services provided by Urban Deca Homes' designated ISP was unsatisfactory. Following the PCC's finding that Urban Deca Homes was engaged in exclusive dealing and therefore violated Section 15 of the Philippine Competition Act, Urban Deca Homes commenced its settlement talks with the PCC in May which were finalized in July 2019. Pursuant to the settlement, Urban Deca Homes shall immediately cease its infringement and pay a fine of PHP 27.11 million (USD 521,204.15). Notably, this case marks the PCC's first decision related to abuse of dominance.

### Philippine issues rules for dawn raids

In October 2019, the Supreme Court of the Philippines issued the Rule on Administrative Search and Inspection under the Philippine Competition Act (the "**Rules**"), which has come into effect since 16 November 2019. The Rules set out powers and limits of the PCC during dawn raids, including, amongst others: (i) the PCC shall apply for an inspection order in advance before a special commercial court, which shall issue the order only in the presence of reasonable grounds of suspicion; (ii) the person or entity whose premise is dawn raided is entitled to file a motion to challenge the legitimacy of the dawn raid on the grounds that the inspection order has procedural defects; (iii) the PCC is not allowed to seize original documents and shall limit its use of seized information to administrative proceedings only; and (iv) as a general rule, the PCC shall only conduct dawn raids during business hours.

### PCC approves Grab's application for amending commitments

On 18 November 2019, the PCC approved Grab's application for amending its voluntary commitments, which were previously submitted to the PCC in exchange for the authority's clearance of the Grab/Uber merger. On 10 August 2018, the PCC approved the transaction subject to conditions, which were initially intended to last for one year but further extended twice afterwards. Given the fact that Grab still does not face effective competitive constraints on the market and the identified competition concerns remain in place, the PCC considered it necessary to modify the scope of Grab's previous commitments and extend the duration. Grab has therefore submitted a new set of voluntary commitments which are related to non-exclusivity, service quality and pricing. Other than the non-exclusivity commitments, the rest of the package will be effective for one year starting from 1 November 2019. Any breach of these conditions will lead to fines, additional remedies, and other applicable measures. In relation to this, Grab was already penalized by the PCC in November 2019 with a fine of PHP 23.45 million (USD 469,000) for breaching its pricing commitments during the first three quarters of the initial commitments.



### JFTC approves Rakuten's antitrust commitment system application

On 25 October 2019, Japan Fair Trade Commission ("**JFTC**") approved the commitment plan of Rakuten, Inc. ("**Rakuten**") in relation to the JFTC investigation on Rakuten's agreements with accommodation operators where such operators were required to make the prices and the numbers of available rooms equal to or better than those made to other distribution channels. This is the first case in Japan where the commitment plan was approved since the introduction of the commitment procedure in December 2018.

### JFTC publishes report on trade practices of digital platforms

On 31 October 2019, the JFTC published a report regarding trade practices on digital platforms focusing on online retail platform operators and app store operators. This is based on the fact-finding surveys conducted from January to March 2019. The report indicated that certain conducts of online retail platform operators and app store operators could have issues under the Anti-Monopoly Act of Japan, such as a unilateral revision of a contract and a preferential treatment to themselves if they also provide goods through its own digital platform.

### JFTC revises merger review guidelines

On 17 December 2019, the JFTC revised Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Merger Guidelines) and the Policies Concerning Procedures of Review of Business Combination ("**Merger Review Procedures Policies**"). In the revised Merger Review Procedure Policies, even if the target company's turnover is below the threshold, the parties are recommended to consult with JFTC if (1) the total consideration for the acquisition exceeds 40 billion yen (approx. USD 368.56 million) and (2) the transaction is expected to affect domestic consumers. Also, it indicates that the JFTC may request the parties to submit internal documents such as board minutes or internal emails, although currently the JFTC normally does not require it.

### JFTC publishes guidelines to prevent data misuse by digital platforms

On 17 December 2019, the JFTC published the guidelines with regards to the abuse of a superior bargaining position in transactions between digital platform operators and consumers that provide personal information. The guidelines indicate that unjust acquisitions or unjust use of consumers' personal information could be regarded as the abuse of a superior bargaining position.



## Japan

### Japan publishes outlines to regulate digital platform operators

On 17 December 2019, the Digital Market Competition Council published the outline of the regulations on digital platform operators. The outline includes potential obligations of digital platform operators, such as (i) disclosure and pre-notification of changes relating to the terms and conditions with users and (ii) regular reports to the regulators regarding self-assessments of their operations to ensure fairness of transactions.

### JFTC raids four drug wholesalers for alleged bid-rigging

On 27 November 2019, the JFTC conducted on-site inspections of Mediceo Corporation, Alfresa Corporation, Suzuken Co., Ltd. and Toho Pharmaceutical Co., Ltd. as these drug wholesalers were suspected of bidding at prearranged prices for general public bidding with regards to medical drugs to be supplied to Japan Community Health Care Organization.

## South Korea

### KFTC revises antitrust compliance guidelines

On 22 October 2019, the Korea Fair Trade Commission ("**KFTC**") amended the guidelines on operation of internal antitrust compliance programs of companies. In the amended guidelines, companies which previously violated the antitrust law may apply for a compliance program evaluation. The KFTC also exempts those companies receiving the highest evaluation regarding the compliance program from the requirement to publish the fact they were made subject to a KFTC corrective order.

### KFTC establishes taskforce to oversee technology sector

On 18 November 2019, the KFTC announced that it has set up a taskforce, with 15 members, to oversee the information and communications technology (ICT) sector, such as digital platforms and mobile services.

### KFTC to monitor semiconductor industry ahead of the 5G era

On 19 December 2019, the KFTC's chairperson, Joh Sung-wook, mentioned that the KFTC would closely monitor the semiconductor industry particularly because there will be transitions from 4G to 5G.

## India ●



### CCI releases FY19 annual report

The Competition Commission of India ("**CCI**") released its annual report for the year 2018-19 (the "**FY19 Report**"). According to the FY 19 Report, the CCI reviewed 68 antitrust cases (including anti-competitive agreements and abuse of dominance) and 94 notifications of mergers. With respect to conduct issues, the CCI found 21 cases in breach of the law and a total penalty of INR 3.58 billion (USD 50.3 million) being imposed. With respect to merger control, out of the 94 merger notifications, 14 related to the financial sector followed by IT sector (11 notifications) and pharmaceuticals sector (9 notifications).

### India probes Amazon and Flipkart for undue influence over retail prices

In October 2019, India commenced an investigation against two e-commerce giants Amazon and Flipkart (a subsidiary of Walmart), over their pricing practices, which were alleged to have infringed the Foreign Direct Investment Policy ("**FDI Policy**") in India. According to India's FDI Policy, international online retailers are prohibited from directly or indirectly influencing the retail prices of goods and services. The investigation was initiated following a petition filed by the Confederation of All India Traders, which claimed that Amazon and Flipkart had breached the FDI Policy through pressing retailers to offer identical discounts in their websites. Given that the two platforms are regarded by retailers as unavoidable trading partners in practice, retailers had no choice but comply with the requirements imposed upon them. It remains to be seen whether the CCI would be interested to intervene on antitrust grounds.



## Singapore ●



### CCCS publishes online travel study

On 30 September 2019, the Competition and Consumer Commission of Singapore ("**CCCS**") published its market study report on online travel booking sector in Singapore. The CCCS considered competition concerns which may arise from price and non-price parity clauses, pricing algorithms, tying and bundling and withholding of information by airlines and hotels. Whilst the study does not indicate that there is evidence of these practices giving rise to harm to competition or potential infringements of the Competition Act, CCCS will continue to monitor market developments in the online travel booking industry in Singapore. The study also identified common pricing practices of online travel booking providers that raise consumer protection concerns, namely drip pricing, pre-ticked boxes, strikethrough pricing, and pressure selling using false or misleading claims. Following from the study, CCCS has developed a set of guidelines on price transparency to assist suppliers of all consumer-facing industries in their display and advertisement of prices to avoid misleading consumers and infringing the Consumer Protection (Fair Trading) Act.

### CCCS approves the application by Emirates to vary its undertaking

Following Emirates' application in April 2019 to vary its undertaking by removing the minimum base seat capacity commitment in respect of the Singapore-Brisbane route, CCCS considered the evidence provided by Emirates in support of its claims on capacity under-utilisation, falling revenues and rising costs in relation to the Singapore-Brisbane route and conducted a public consultation on the application in September 2019. CCCS announced on 14 November 2019 that it has approved the application by Emirates. CCCS is of the view that there remains competitive constraint on Emirates and Qantas, seat capacity remains adequate to meet demand for passengers and the alliance between Emirates and Qantas with the varied capacity commitments will continue to have net economic benefit on air passenger services.



## Indonesia

### KPPU merger control regime starts to catch asset deals

On 2 October 2019, Indonesia's Commission for the Supervision of Business Competition (the "KPPU") issued Regulation No.3 of 2019 ("**No.3 Regulation**"), expanding in-scope transactions from acquisitions of shares to acquisitions of shares and acquisition of assets. The No. 3 Regulation formally came into effect on 3 October 2019 and will apply to transactions that are entered into afterwards. According to No.3 Regulation, if an asset acquisition satisfies the filing thresholds, it will need to be notified within 30 business days following completion. In addition, "asset" is broadly defined to include "all tangible and intangible assets that are valuable or have economic value". Other aspects of the filing regime remain unchanged.

### KPPU fines companies for late merger notifications

In the past quarter, the KPPU fined seven companies for late merger notifications. This suggests that despite the adoption of a post-closing filing regime, Indonesia is actively enforcing against the failure to file notifiable transactions within 30 business days following competition.

- Citra Prima Sejati for its acquisitions of Mitra Bisnis Harvest and Buana Minera Harvest (over 62 months late) – an aggregated fine of IDR 20.66 billion (USD 1.46 million);
- Matahari Pontianak Indah Mall for its acquisition of Indo Putra Khatulistiwa (over 14 months late) – a fine of IDR 12.6 billion (USD 892,220);
- Wijaya Karya Beton for its acquisition of Citra Lautan Teduh (over 51 months late) – a fine of IDR 1 billion (USD 71,304);
- Ciliandry Anky Abadi for its acquisition of Anugerah Abadi Multi Usaha (12 months late) – a fine of IDR 1.1 billion (USD 79,957);
- Pancasurya Agrindo for its acquisition of Gerbang Sawit Indah (72 months late) – a fine of IDR 1.37 billion (USD 98,020);
- Lumbang Capital for its acquisitions of (i) Citra Jaya Nurcahya, (ii) MBH Minera Resource and (iii) Bintan Mineral Resource (59 months late for each acquisition) – an aggregated fine of IDR 2.65 billion (USD 171,231); and
- Metro Pacific Tollways for its acquisition of Nusantara Infrastructure (over 15 months late) – a fine of IDR 1.06 billion (USD 76,162).



### Proceedings instituted against Google in relation to alleged misuse of personal data

On 29 October 2019, the Australian Competition and Consumer Commission ("**ACCC**") instituted court proceedings against Google LLC and Google Australia Pty Ltd (collectively, "**Google**") alleging that:

- From January 2017 until late 2018, Google breached the Australian Consumer Law by not properly disclosing to consumers that two settings ('Location History' and 'Web & App Activity' settings) had to be switched off if consumers didn't want Google to collect, keep and use their location data. Instead, the ACCC alleges that consumers would have incorrectly believed, based on Google's conduct, that 'Location History' was the only Google Account setting that affected whether Google collected, kept or used data about their location.
- From around mid-2018 until late 2018, Google represented to consumers that the only way they could prevent Google from collecting, keeping and using their location data was to stop using certain Google services, including Google Search and Google Maps. However, this could be achieved by switching off both 'Location History' and 'Web & App Activity'.
- Google's on-screen statements explaining how location data would be used when customers accessed their 'Location History' and 'Web & App Activity' settings were misleading.

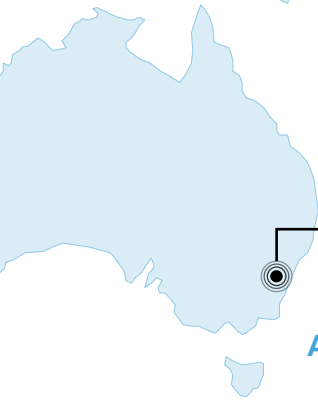
This is the first time a regulator has taken on the global giant over the alleged misuse of personal data. The ACCC is seeking penalties, declarations and orders requiring the publication of corrective notices and the establishment of a compliance program.

### Two proceedings instigated against ports regarding alleged misuse of market power

On 6 December 2019, the ACCC instituted court proceedings against Tasmanian Ports Corporation Pty Ltd ("**TasPorts**") alleging that TasPorts sought to stop a new entrant, Engage Marine Tasmania Pty Ltd ("**Engage Marine**"), from competing effectively with TasPorts' marine pilotage and towage businesses, with the purpose, effect and likely effect of substantially lessening competition. The ACCC alleges that TasPorts prevented Engage Marine from:

- Expanding in Tasmania by failing to provide long term berths for its tug boats, and refusing to place Engage Marine on the shipping schedule, which is necessary for it to provide towage services; and
- Providing pilotage services at Port Latta by failing to provide training to Engage Marine's employees, which only they could provide, and demanding that Engage Marine's sole customer pay about \$750,000 (USD 525,600) a year in fees to TasPorts after the customer stopped contracting with TasPorts.

This is the ACCC's first case under the amended misuse of market power provision and comes shortly after a private action commenced by Qube Ports Pty Ltd against the Port of Newcastle ("**PON**") on 19 November 2019 alleging that PON abused its market power to ensure that existing terminal users have no choice but to use its new crane service.



## ● Australia

### ACCC's first enforcement outcome in relation to concerted practices

Two Sydney roofing companies – ANZ Roofing Pty Ltd and Ivy Contractors Pty Ltd – and their respective directors entered into enforceable undertakings on 9 December 2019 acknowledging that discussions on social media about setting minimum rates for the repair of hail-damaged homes were likely to constitute an attempt to fix prices, and in some circumstances could raise concerns under the new concerted practices prohibition, which came into effect in November 2017. Following a damaging hailstorm, ANZ Roofing's director posted a message on a Facebook group noting: *"I think this latest storm is the perfect opportunity for the roofers of Sydney to increase pricing across the board as a standard that doesn't decrease!"* A message from Ivy Contractors' director stated *"Let's agree that we start from AUD 65 (USD 45) and go up"*. This is the first enforcement outcome for the ACCC in relation to concerted practices.

### Government adopts key recommendations from the ACCC's Digital Platforms Inquiry

On 12 December 2019, the Australian Government released its response and implementation roadmap to the ACCC's final report for the Digital Platforms Inquiry, released on 26 July 2019. Following on from the Government's response:

- The ACCC has been tasked with overseeing the development of a new voluntary code to address bargaining power imbalances between digital platforms and news media businesses.
- The ACCC has been allocated AUD 26.9 million (approx. USD 18.6 million) to invest in a permanent Digital Platforms Branch to continue its work in digital platforms. The unit will monitor and report on the state of competition and consumer protection in digital platform markets, take enforcement action as necessary, and undertake inquiries as directed by the Treasurer, starting with the supply of online advertising and ad tech services.
- A voluntary notification regime is to be implemented such that large digital platforms can provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia.

ACCC recommendations regarding the use of data, and privacy protections also form part of the Government's plans, which include steps to ensure consumers are adequately informed about how their data is collected, and to provide consumers with greater control over how it is used.

A light blue map of Australia and New Zealand is shown in the top right corner. A black line extends from the 'Australia' section header to a dot on the map, and another black line extends from the 'New Zealand' section header to a dot on the map.

## Australia

### Volkswagen ordered to pay record AUD 125m in penalties

On 20 December 2019, the Federal Court ordered Volkswagen AG ("**Volkswagen**") to pay AUD 125 million (USD 86.4 million) in penalties, after it declared by consent that Volkswagen breached the Australian Consumer Law ("**ACL**") by making false representations about compliance with Australian diesel emissions standards. The AUD 125 million that Volkswagen has been ordered to pay is the highest total penalty order ever made by the Court for contraventions of the ACL. The penalties were imposed under the previous penalty regime of up to AUD 1.1 million (USD 0.76 million) per breach. However, as of September 2018, maximum penalties under the ACL are now the higher of AUD 10 million (USD 6.92 million), three times the profit or benefit obtained or, if this cannot be determined, 10% of turnover.

## New Zealand

### Proceedings filed against alleged horse transport cartel

On 17 October 2019, the New Zealand Commerce Commission ("**NZCC**") filed proceedings in the High Court against the International Racehorse Transport New Zealand Partnership ("**IRT Partnership**") for alleged price fixing in the provision of services for equine air freight. In 1989, IRT Partnership entered into a joint venture agreement with a competitor which included a pricing structure for the provision of trans-Tasman equine airfreight services, for which they had previously been in competition for, and a profit-sharing clause. Those arrangements remained in place until October 2018, during which time key details, including pricing rates, were re-negotiated and updated. The NZCC alleges that the agreement provided for the fixing, controlling and maintaining of the retail prices and the size of discount that could be given for equine airfreight services, and hence amounted to cartel conduct.

### Proceedings filed against container depot company and director for attempted price fixing

On 6 December 2019, the NZCC filed proceedings in the High Court against Specialised Container Services (Christchurch) Limited ("**SCS Christchurch**") – a container depot operator in Christchurch – and its director Grant Tregurtha for attempting to engage in price fixing with one of its competitors. The NZCC alleges that in January 2018, Mr Tregurtha sought to reach an agreement with a competitor to charge the same "vehicle booking system" fee to customers, and that this conducted amounted to an attempt by SCS Christchurch and Mr Tregurtha to enter into a price fixing agreement with its competitor.

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