

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



ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE

April to June 2021

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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE: APRIL TO JUNE 2021

Last quarter saw the Chinese antitrust authority (SAMR)'s continuing momentum to rein in home grown tech firms – "Choose one from two", after becoming a grave pain to Alibaba group, has not only invited a fine to Sherpa's, which is an online food delivery platform serving English-speaking residents in Shanghai, but also prompted a formal investigation into Meituan, a renowned tech platform that originally focused on online food delivery business in China. Softer yet innovative measures are in the meanwhile jointly taken by SAMR and cyber security authority towards most of the sizable online platforms in China, with the latter demanded to publicly commit to not engaging in anti-competitive conduct. On merger control front, the fire over Chinese tech firms' historical failure-to-file transactions has further spread, with another nine decisions published by SAMR, notably catching acquisitions of minority interest as low as 6.67%.

With the tech/platform wave going on, it was surprising to see that the last quarter has not experienced delay in clearing merger control cases on the part of the shorted-handed SAMR. On the contrary, there was a significant increase in the number of cleared cases, with 145 cases unconditionally cleared and Danfoss' acquisition of Eaton's hydraulic business cleared subject to divestitures. Further, a noteworthy penalty decision was made against Yangtze River Pharma's resale price maintenance behaviours which were fined approx. USD 117 million by SAMR.

Outside China mainland, in **Japan**, reports were published on competition policy in data market and digital advertising market; in **Korea**, dawn raids were conducted against Google and Facebook and Samsung's affiliates were fined for unfair competition; in **Taiwan**, Google's investigation ended without abusive findings; in **Australia**, the competition authority adopted a new organisational structure, introduced first class exemption for collective bargaining and was granted leave to appear in Epic v Apple appeal; in **Vietnam**, the annual report on competition law enforcements in 2020 was published; and in **India**, the competition authority's orders to probe WhatsApp, Amazon and Flipkart were supported before courts.

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SPECIAL REPORT: CHINA'S MOMENTUM TO REIN IN ONLINE PLATFORMS CONTINUES

While stakeholders did not fully get over the hit of the record fine by State Administration for Market Regulation (“**SAMR**”) on Alibaba, there were a series of enforcement activities targeting online platforms in this quarter, which once again evidence how determined SAMR is to clamp down on online platforms' potential anti-competitive behaviours.

"Choose one from two", for which Alibaba was fined RMB 18.23 billion (USD 2.8 billion), also became a pain to Sherpa's and possibly to Meituan:

- **Sherpa's**, an English language-based online food delivery platform, was fined by Shanghai Administration for Market Regulation (“**Shanghai AMR**”) on 12 April for restricting restaurants from selling on competing platforms of Sherpa's. Designed to attract foreign residents in Shanghai. Sherpa's was found to have a market share of over 50% in the relevant market. Through "choose one from two" Sherpa's has effectively caused 69 out of 72 restaurants to have ceased selling on competing platforms of Sherpa's in Shanghai. Shanghai AMR decided that Sherpa's had violated Article 17(4) of the Anti-Monopoly Law (“**AML**”) which prohibits exclusive dealing by dominant players and imposed a fine of RMB 1,168,644 (USD 182,659), amounting to 3% of Sherpa's revenue in 2018. Also notably, the decision of Shanghai AMR is remarkably well written and has been regarded as a textbook decision which contains comprehensive economic analysis, including among others how hypothetical monopolist test (i.e. the SSNIP test) was applied. This demonstrates that what is escalating in China is not only the authorities' scrutiny over online platforms but also their capabilities to rein in infringing players.
- Speaking of the online food delivery sector in China, the first brand coming across people's mind would probably be **Meituan**. On 26 April, SAMR announced its formal investigation into Meituan for its alleged "choose one from two" conduct. As of the date of this briefing, there has been no further detail released by SAMR about its investigation, leaving suspicion of a penalty outnumbering Alibaba's fine ungrounded.

The emerging **follow-on suits** mark another notable development in this quarter. Alibaba's wounds appeared to get deeper as its opposing parties before courts could now rely on SAMR's penalty decision to claim damages. **JD.com** (which is the closest competitor of Alibaba in the e-commerce sector in China) may become the first to benefit from such follow-on lawsuits after fighting with Alibaba in separate civil proceedings for years.

Historic **failure-to-file** transactions by tech companies continued to be uncovered by SAMR. In this quarter, nine decisions were publicized to further strengthen the deterrent effects. Again, each transaction was imposed with a maximum fine of RMB 500,000 (USD 78,150) and none of the transactions were found to harm competition. Note that many of the fined transactions were related to acquisition of minority stake (the lowest being 6.67%), which reflects SAMR's rigid approach to penalizing tech firms' historical failure-to-file transactions. More details about the decisions published in this quarter are included in **Annex 1** below.



SPECIAL REPORT: CHINA'S MOMENTUM TO REIN IN ONLINE PLATFORMS CONTINUES

In this quarter, SAMR (among other authorities) also cast a wider net over most (if not all) of the major online platforms in China through demanding the latter to publicly commit not engaging in anti-competitive behaviours. On 13 April 2021, SAMR, Cyberspace Administration and State Taxation Administration jointly held a meeting with 34 Chinese online platforms, including among others Tencent, Baidu, iQIYI, Didi, JD.com, Bilibili, Ctrip, Ele.me. These companies were required by the authorities to review and rectify anti-competitive conduct (if any) and submit commitment letters for public scrutiny. In the same week of the meeting, the 34 companies publicized their commitment letters in three batches through SAMR's official website.

In response to the increasing workload, SAMR is planning to appoint Ms. Dong Hongxia, currently a division head, to be the third Deputy Director-General of the Anti-Monopoly Bureau of SAMR. Besides, it is also reported that SAMR is recruiting to expand its merger review divisions to promote efficiency.

Annex 1: Failure-to-file fines

Fined transactions (with fined party's name <i>Italicized</i>)	Tech firms/online platforms involved
The acquisition of 68.18% stake in Bitauto Holdings Limited by <i>Tencent Holdings Limited ("Tencent")</i> in 2020	Tencent
The acquisition of 18.34% stake in Shanghai Lantu Information Technology Co., Ltd., by <i>Tencent</i> in 2019	Tencent
The establishment of a joint venture by <i>Linshi Tencent Technology Co., Ltd.</i> and <i>Dalian Wanda Commercial Management Group Co., Ltd.</i> in 2018	Tencent
The acquisition of 6.67% stake in Shanghai LinkCare Information Technology Co., Ltd. by <i>Shanghai Hantao Information Consulting Co., Ltd.</i> in 2018	Meituan
The establishment of joint venture by <i>Cheering Venture Global Limited ("Cheering Venture")</i> and <i>Toyota Motor Corporation</i> in 2019	Didi
The acquisition of an 11.77% stake in Yestock Car Rental Co., Ltd. by <i>Cheering Venture</i> in 2018	Didi
The establishment of a joint venture by <i>Didi Smart Transportation Technology Co., Ltd.</i> and <i>Jinan Inspur Zhitou Smart Technology Co., Ltd.</i> in 2019	Didi and Inspur (a leading cloud computing and big data service provider)
The acquisition of 15.21% stake in Shanghai Yiguo E-commerce Co., Ltd. by <i>Suning Rundong Equity Investment Management Co., Ltd.</i> in 2016	Suning
The establishment of a joint venture by <i>Hongyun Jiukang Data Technology (Beijing) Co., Ltd.</i> and <i>Shanghai Yuxin Venture Capital Management Co., Ltd.</i> in 2018	Alibaba

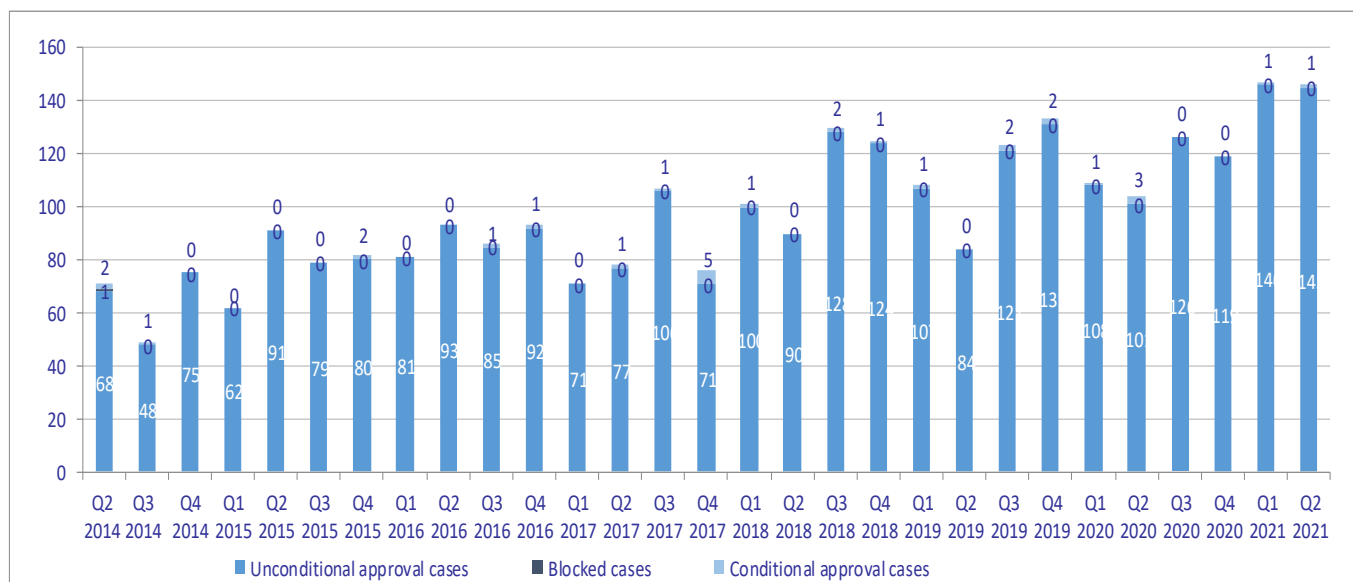


MERGER CONTROL

How many cases have there been?

There were in total 146 merger decisions released in the second quarter of 2021, a significant increase of 40.38% compared to the second quarter of 2020, with 145 reviewed cases in this quarter unconditionally cleared and 1 case conditionally approved. Around 132 cases were notified under the simplified procedure in this quarter, which represents 90.41% of the total reviewed cases.

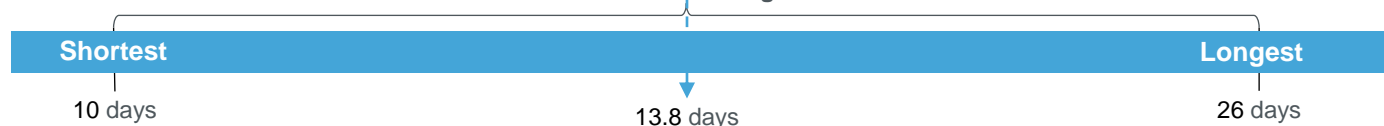
Merger control trends – Q2 2014 – Q2 2021



Simplified procedure: How quick is the review period?

Quarter	Average review period	Simplified procedure (%)	Cases exceeding 30 days
Q1 2017	25 days	81.7%	5
Q2 2017	23 days	66.7%	2
Q3 2017	20 days	82.2%	1
Q4 2017	21 days	76.3%	0
Q1 2018	19 days	92.1%	1
Q2 2018	18 days	81.1%	1
Q3 2018	16 days	76.9%	0
Q4 2018	17 days	80.0%	3
Q1 2019	16 days	77.8%	0
Q2 2019	17 days	85.7%	0
Q3 2019	19 days	78.9%	1
Q4 2019	14 days	81.2%	0
Q1 2020	14 days	87.16%	1
Q2 2020	13.7 days	86.54%	0
Q3 2020	14.4 days	72.22%	3
Q4 2020	13.7 days	83.19%	1
Q1 2021	14.9 days	80.27%	3
Q2 2021	13.8 days	90.41%	0

Q2 2021: Average

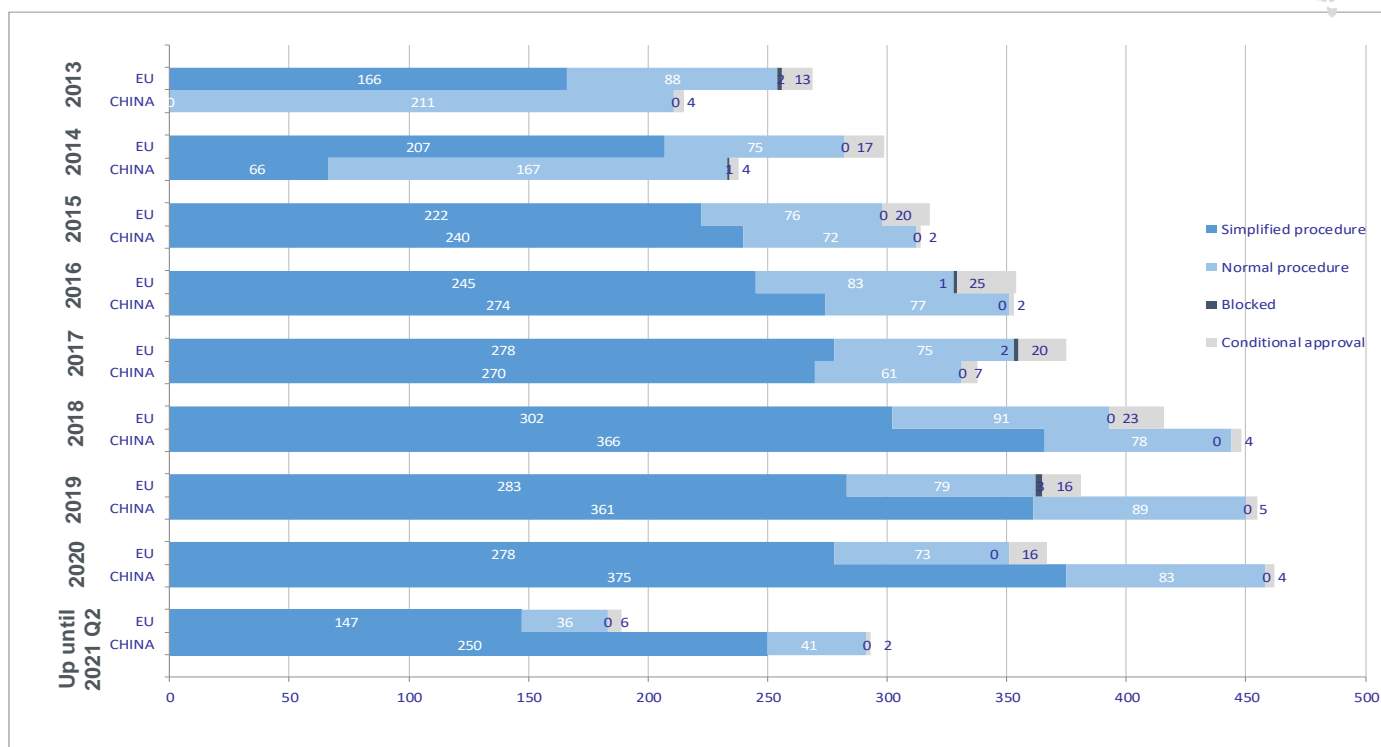




MERGER CONTROL

How does China compare internationally?

Comparison with EU – 2013 – 2021



SAMR conditionally approves Danfoss's acquisition of Eaton's hydraulic business

On 7 June 2021, SAMR conditionally approved Danfoss A/S ("**Danfoss**")'s acquisition of the hydraulic business of Eaton Corporation ("**Eaton**"). Danfoss is a Danish company active in R&D, manufacturing and engineering of heating and hydraulics products, and Eaton is an Ireland-based company that also manufactures and sells hydraulic components and systems. Upon review, SAMR found that the parties overlap in the mobile hydraulic products, including steering components, valves, motors, and pumps, and that the transaction would likely give rise to competition concerns in the relevant market for orbital motors in China.

SAMR found that the proposed transaction would restrict competition in the relevant market on the following basis – (i) Danfoss and Eaton are the two largest orbital motors players in China with a combined share of 50-55%, which would enable the combined entity to have a dominant market position in the relevant market; (ii) Danfoss and Eaton are each other's closest competitor in the relevant market and thus the transaction would remove the parties' most significant competitive restraints; (iii) the transaction would further raise the entry barrier by reinforcing the parties' existing advantages such as brand image, high quality, know-how and R&D strengths; and (iv) bargaining power of customers would be further weakened as they would be more dependent upon the parties due to limited presence of substitutes.

To address the competition concerns, SAMR required Danfoss to divest the orbital motor business of Danfoss Power System (Jiangsu) Co., Ltd., including all tangible and intangible assets (such as intellectual property rights), agreements, leasing contracts, commitments, client orders, and personnel, among others. This transaction has been conditionally approved by the European Commission subject to similar divestments, approved in Brazil with undisclosed remedies, unconditionally approved in Australia and is still under review in Turkey.



MERGER CONTROL AND OTHER NEWS IN CHINA

The 10th failure-to-file decision in this quarter

In addition to the nine failure-to-file cases reported in Annex 1, on 10 June 2021, SAMR published its penalty decision on China Yintai Holding Co., Ltd. ("**Yintai**") for the failure to notify its acquisition of 34.92% interest in Bank of Hangzhou Consumer Finance Co., Ltd. in 2019. SAMR fined Yintai RMB 500,000 (USD 78,150) and found that the transaction did not give rise to any anti-competitive effects.

Other news

Ningbo Court rules against Hitachi Metals for refusal to deal

On 23 April 2021, Ningbo Intermediate People's Court ("**Ningbo Court**") issued its ruling against Hitachi Metals, Ltd. ("**Hitachi Metals**") in a civil lawsuit initiated by Ningbo Ketian Magnet Co., Ltd. ("**Ketian**") concerning Hitachi Metals's abuse of dominance by refusal to deal. Hitachi Metals is one of the largest sintered neodymium-iron-boron ("**NdFeB**") magnets manufacturers in the world and holds all the relevant patents required to manufacture the NdFeB magnets. Ketian claimed that Hitachi Metals abused its dominance by refusing to license Chinese manufacturers the relevant patent portfolio that is essential to manufacture NdFeB magnets. Ningbo Court found that although intellectual property rights alone do not necessarily confer market dominance, given that Hitachi Metal exclusively holds all patents necessary to the manufacture of NdFeB magnets, Hitachi Metals has a dominant position in both the (upstream) global market for NdFeB magnets patents licensing and the (downstream) global market for manufacturing NdFeB magnets. In its assessment of the abuse of market dominance, Ningbo Court applied the essential facilities doctrine to the patent licensing context, finding that Hitachi Metals' patents constituted essential facilities and refusal to license such patents would constitute abuse of Hitachi Metals' dominant position. In particular, the relevant patents were indispensable and therefore the third-party manufacturers of NdFeB magnets highly relied on such patents. Further, competitors at both levels were unable to develop the same or similar patents using reasonable efforts and there were no technical or other objective hurdles that would reasonably prevent Hitachi Metals from licensing the patents. Ningbo Court maintained that Hitachi Metals violated Article 17(5) of the AML, awarded Ketian RMB 4,900,000 (USD 765,870) as damages, and ordered Hitachi Metals to stop the conduct of refusal immediately.

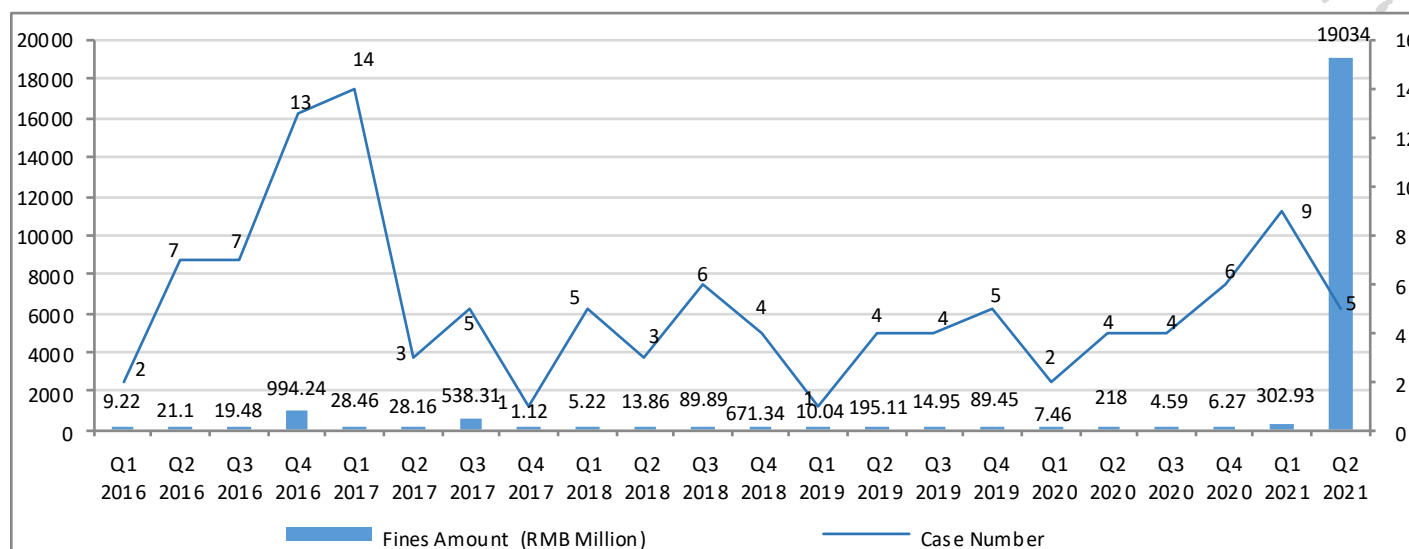
China and EU reinforce cooperation in competition policy

In April 2021, the 21st EU-China Competition Week was held online attended by officials in SAMR and the European Commission. The agencies exchanged their views on multiple critical issues including (i) the cases reviewed under the fair competition review system in China where local governments unduly subsidised local companies, (ii) the cooperation between European Commission and the European Union's Member States concerning state aid cases, as well as (iii) the agencies' respective strategies to cope with challenges posed by fast growing digital markets. The EU-China Competition Week is a biannual event for EU and China to discuss their priorities and challenges in relation to formation of effective competition policies. The next EU-China Competition Week is scheduled in October 2021.



ANTITRUST INVESTIGATIONS

Enforcement trends* – Q1 2015 to Q2 2021



*Note: From Q1 2016 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
Gas supply Sichuan AMR	1 April 2021	Abuse of dominance	1,658	N/A	N/A	1%	N/A
Online retail platform SAMR	10 April 2021	Abuse of dominance	18,228,000	N/A	N/A	4%	N/A
English language-based online food delivery Shanghai AMR	12 April 2021	Abuse of dominance	1,169	N/A	N/A	3%	N/A
Medicines SAMR	15 April 2021	RPM	764,008	N/A	N/A	3%	N/A
Fluocinolone acetonide active pharmaceutical ingredient Tianjin AMR	30 April 2021	Price fixing, market dividing	38,986	1,391	35,125	2%-4%	N/A

Sichuan AMR fines a gas company for imposing unreasonable trading conditions

On 1 April 2021, Sichuan Administration for Market Regulation ("**Sichuan AMR**") published its penalty decision on Fushun County Natural Gas Co., Ltd. ("**Fushun Gas**") for abuse of dominance through imposing unreasonable trading conditions. Fushun Gas is the exclusive supplier of pipeline gas in and around Fushun County areas. Since 1999, Fushun Gas has conditioned its supply of gas to non-resident customers upon payment of a certain amount of fees in advance. Such prepaid fees did not form part of the service fees and thus could not be deducted from the total payable fees of a customer. Sichuan AMR held that Fushun Gas, by imposing unreasonable trading terms upon customers, abused its dominant position in the pipeline gas market in Fushun areas and violated Article 17(5) of the AML. Considering that Fushun Gas actively cooperated in the investigation and had begun returning the prepaid fees before the investigation began, Sichuan AMR imposed a light fine of RMB 1,658,324 (USD 259,196) amounting to 1% of Fushun Gas' revenues in 2019.



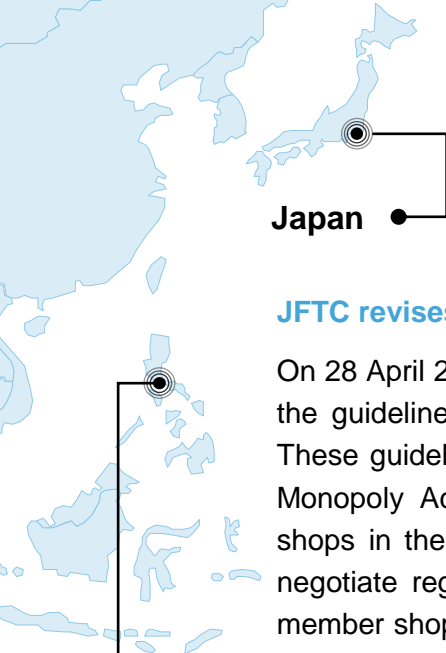
ANTITRUST INVESTIGATIONS

Yangtze River Pharma was hit with a big fine for RPM

On 15 April 2021, SAMR published its fine on Yangtze River Pharmaceutical Group ("**Yangtze**") for resale price maintenance ("**RPM**"). SAMR found that from 2015 to 2019, Yangtze reached and implemented multiple agreements with its customers (including distributors, chain drugstores, retail pharmacies, etc.) to fix its customers' resale prices and set the minimum resale prices of Yangtze's medicines. Specifically, to ensure effective implementation of its RPM strategy, Yangtze not only reached standard distribution agreements with its first-tier distributors, but also entered into tri-party agreements with both of its first-tier distributors and second-tier distributors/retailers, where the terms of fixed price or minimum resale price were specified. Further, Yangtze took targeted measures, including imposition of incentives and penalties on its sales staff and/or customers in case of compliance and non-compliance with the resale prices (including online prices) set by Yangtze. As a result, retail prices of the concerned products of Yangtze were effectively lifted compared to the price simulated in the economic analysis. SAMR concluded that Yangtze infringed Articles 14(1) and 14(2) of the AML, requiring Yangtze to cease the infringement and imposing a fine of RMB 764,007,948 (USD 116.8 million), amounting to 3% of Yangtze's revenue in 2018.

Tianjin AMR fines three API suppliers for price fixing and market allocation

On 30 April 2021, Tianjin Administration for Market Regulation ("**Tianjin AMR**") fined three pharmaceutical firms for price fixing and market allocation. Two of the three fined companies, namely Tianjin Tianyao Pharmaceuticals Co., Ltd. ("**Tianyao**") and Tianjin Pacific Chemical & Pharmaceutical Co., Ltd. ("**Pacific**") are the only two manufacturers of the active pharmaceutical ingredient ("**API**") of fluocinolone acetonide (which is mainly used to produce ointment and tincture to treat skin diseases) in China. Tianyao and Pacific entered a memorandum in 2008 to divide the market of fluocinolone acetonide API to raise prices. The price fixing arrangement collapsed in 2014 due to significant price cut caused by import of the concerned API. Tianyao and Pacific managed to become the only two distributors of the imported API in China in 2017. Shenzhen Fuhaitong Pharmaceuticals Co., Ltd. ("**Fuhaitong**") became the third distributor of the imported API and colluded with Tianyao and Pacific to further divide the market and raise prices. Tianjin AMR concluded that the three companies violated Articles 13(1) and 13(3) of the AML (which prohibit price fixing and market allocation among competitors), and imposed a total fine of RMB 38,986,139.82 (USD 6.1 million) (amounting to 2-4% of their respective revenues in 2019) and confiscated illegal gains of RMB 11,792,050 (USD 1.8 million).



Japan

JFTC revises guidelines concerning Franchise System under the Anti-Monopoly Act

On 28 April 2021, the Japan Fair Trade Commission ("**JFTC**") published a revised version of the guidelines concerning the Franchise System under the Japanese Anti-Monopoly Act. These guidelines were established in 2002 to clarify the concept under the Japanese Anti-Monopoly Act, especially in relation to transactions between headquarters and member shops in the franchise business. In the revised guidelines, new cases such as refusal to negotiate regarding shortened business hours (which was uncovered by a survey of the member shops of the major convenience stores conducted by the JFTC until last year) have been added. These conduct may breach the Japanese Anti-Monopoly Act, depending on the circumstances.

JFTC publishes report on competition policy in data market

The JFTC has been running a study group on competition policy in the data market to discuss various issues related to this subject since November 2020. On 25 June 2021, the study group published a report regarding competition policy in the data market. The report mentions that there is room for consideration of measures to ensure data portability and to ensure fair access by other businesses, against hoarding of data by digital platform operators.

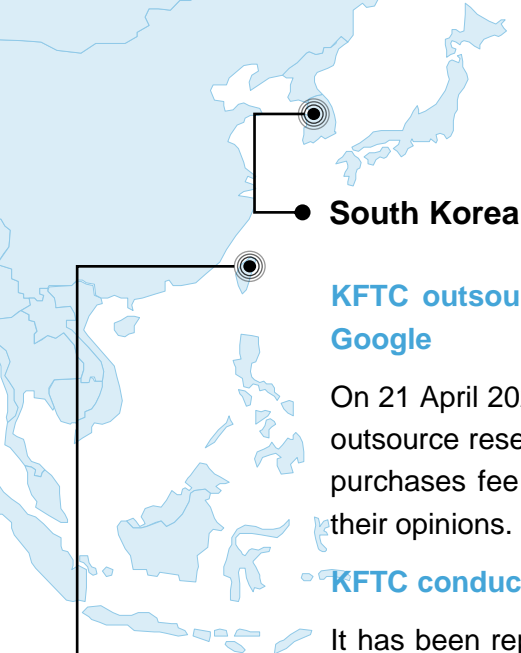
Headquarters for Digital Market Competition publishes assessment report on digital advertising market

On 27 April 2021, the Government's Headquarters for Digital Market Competition, which is responsible for developing rules and regulations for the digital market in Japan, published a final report on the competition assessment of the digital advertising market. This report provided specific directions for resolving issues such as the uncertainty of transactions in the digital advertising market, unilateral rule changes by large-scale platform operators, and concerns about the use of personal data. In addition, the report mentioned that the digital advertising field would be added to the scope of application of the regulations under the Act on Improving Transparency and Fairness of Digital Platforms.

Philippine

PCC investigates price-fixing in shipping industry

On 28 April 2021, it was reported that the Philippine Competition Commission ("**PCC**") is investigating the potential price-fixing between international shipping service providers. The investigation was initiated as a response to the recent policy brief of United Nations Conference on Trade and Development released on 19 April 2021 discussing the worldwide surging freight rates issue. The freight rates have significantly increased due to the scarcity of container supply during the COVID-19 pandemic and became a serious issue in Philippine. No specific timeline is provided for the probe.



● South Korea

KFTC outsources research on app market to push forward the investigation on Google

On 21 April 2021, it was reported that the Korea Fair Trade Commission ("KFTC") would outsource research on the app market in relation to its investigation into Google's in-app purchases fee policy and also conduct interviews with Korean app developers to hear their opinions.

KFTC conducts dawn raids against Google and Facebook

It has been reported that the KFTC conducted a dawn raid at Google in May 2021 and Facebook in April 2021 regarding alleged unfair conduct that Google and Facebook required app developers to sign exclusive advertising contracts.

KFTC proposes to amend merger filing threshold in South Korea

On 4 June 2021, the KFTC announced a proposed amendment to the Enforcement Decree to the Monopoly Regulation and Fair Trade Law, which includes new merger filing thresholds based on transaction value. A merger filing in South Korea is required if (i) the transaction value exceeds KRW 600 billion (USD 524 million); and (ii) the target company or its affiliates are active in the South Korean market at a substantial level (including where their products or services are provided in the South Korean market to at least 1 million persons on a monthly basis for 3 years). The proposed amendment is subject to public comments, and it is expected to become effective on 30 December 2021.

KFTC fines Samsung Group's affiliates for unfair practices

On 24 June 2021, the KFTC imposed KRW 234.9 billion (USD 205 million) in fines in total on five affiliates of Samsung Group for unfair practices related to their in-house cafeteria business. Prior to the decision, the KFTC rejected Samsung's consent decree proposal on 3 June 2021.

● Taiwan

TFTC concludes Google probe without finding of abuse of dominance

On 20 May 2021, the Taiwan Fair Trade Commission ("TFTC") concluded its investigation against Google concerning abuse of dominance for lack of evidence. The probe was launched in 2016, shortly after the European Commission accused Google of abusing its dominant position in the licensable smart mobile operating systems market and the Android app stores market. The TFTC's investigation lasted for five years, during which the TFTC investigated whether Google had abused its dominance by (i) requiring smart device manufacturers to pre-install certain Google applications (e.g. Google Search App, Google Chrome browser and Google Play Store); (ii) prohibiting manufactures from producing devices equipped with other operating systems built on Android open source project (i.e. Android forks); and (iii) sharing revenues with manufacturers whose devices exclusively pre-install Google Search App. The TFTC concluded that there was insufficient evidence to support the alleged contravention of the Fair Trade Act.



● Hong Kong

CFI dismisses application for a split trial of liability and quantum

On 8 June 2021, the Court of First Instance ("**CFI**") dismissed the application of the defendant, Meyer Aluminium Limited ("**Meyer**"), for a split trial of liability and quantum in the first proceedings transferred from the CFI to the Competition Tribunal. In its defence, Meyer sought to set off the unliquidated damages arising from the alleged anti-competitive conduct of Taching Petroleum Company Limited and Shell Hong Kong Limited against the price of industrial diesel delivered to Meyer. The CFI found that Meyer's application (which was made 7 weeks before trial) was late. It also considered that even if there was no trial on the quantum of loss and damages of Meyer, there would be no prejudice to Meyer, as it could have a follow-on action if the Competition Tribunal were to rule in its favour.

● Vietnam

VCCA publishes its 2020 annual report

The Vietnam Competition and Consumer Authority ("**VCCA**") published its 2020 annual report in April 2021. The report summarises the VCCA's actions taken in 2020 with respect to antitrust enforcement, consumer protection and international collaboration and sets out its 2021 priorities. According to the report, the VCCA has been active in antitrust enforcement, particularly on the merger control front. The VCCA handled 62 merger filings in 2020, representing an increment of 40 filings from 2019. The increase resulted from the new filing thresholds effective from May 2020, under which transactions are more easily caught. Going forward, VCCA will prioritise creating a database regarding market structure in critical industries including real estate, logistics and energy, and finalise the merger filing guidelines and other regulations regarding anti-competitive agreements and abuse of dominance, leniency policy, and exemption on certain cartels which could benefit consumers.

● Singapore

CCCS consults on proposed commercial cooperation between airlines

On 21 June 2021, the Competition and Consumer Commission of Singapore ("**CCCS**") sought feedback on the joint venture framework agreement between Singapore Airlines Limited and All Nippon Airways Co., Ltd. The parties agree to cooperate in relation to scheduling, pricing, sales and marketing, and other commercial areas to bring about a metal-neutral alliance in respect of services between Japan and Singapore. The parties have submitted that the proposed commercial cooperation is expected to result in significant consumer and economic benefits and efficiencies. Interested parties are invited to submit their views by 12 July 2021.



● Indonesia

KPPU fines three companies for late filings

In this quarter, the Indonesia Competition Commission ("**KPPU**") issued a number of penalties against companies for their failure to file within 30 business days following deal completion, including:

- **Orix Corporation**, a Japanese financial services company, was fined IDR 1 billion (USD 70,000) for late notification of its acquisition of Sinar Mitra Sepadan Finance, an Indonesian finance consultancy company. The transaction was completed on 4 November 2015 and was required to be notified to KPPU no later than 15 December 2015. However, the parties did not submit a filing until 16 December 2019.
- **Saratoga Investama Sedaya**, an Indonesian investment company, was fined IDR 1 billion (USD 70,000) for late notification of its acquisition of Wana Bhakti Sukses Mineral, a mining company. The transaction was completed on 22 July 2011 and was required to be notified to KPPU no later than 9 September 2011. However, the parties did not submit a filing until 10 December 2019.
- **Dharma Satya Nusantara ("DSNG")**, an Indonesian wood processing company, was fined IDR 1.2 billion (USD 84,000) for late notification of its acquisition of a miller company Karya Prima Agro Sejahtera. The transaction was completed on 30 January 2012 and was required to be notified to KPPU no later than 9 March 2012. However, the parties did not submit a filing until 26 November 2019. This is the third time that DSNG is penalized for failure to file.

KPPU is to scrutinize merger between Gojek and Tokopedia

On 20 May 2021, the KPPU announced that it will scrutinize the largest-ever merger in Indonesia (with a valuation of USD 18 billion) between Gojek and Tokopedia. Gojek, an Indonesian ride-hailing and payments company, and Tokopedia, an Indonesian leading e-commerce company, plan to merge into Indonesia's largest tech company GoTo Group. The combined group would be active in online shopping, courier services, ride-hailing, food delivery, financial activities, among others. As transactions in the digital space usually involve complex analyses on network effects, the KPPU expected that its review would focus on definition of relevant markets so any effect analysis can be properly conducted. The KPPU's preliminary concerns include whether the large volume of merchant and consumer data possessed by the combined entity could pose a significant entry barrier and whether the transaction could lead to anticompetitive effects in relation to the parties' overlapping services, i.e. digital payment methods and food ordering systems. The KPPU also said that if any anti-competitive effect is identified, it would instruct GoTo Group to adjust its operation models.



India ●

Delhi High Court refuses to reverse investigation against WhatsApp

On 22 April 2021, the Delhi High Court dismissed the petitions of Facebook and WhatsApp, challenging an order of Competition Commission of India ("CCI") to investigate WhatsApp's new privacy policy. WhatsApp announced in January 2021 that it would update its privacy policy to share users' data with its parent company Facebook and other Facebook affiliates. Users will not be allowed to use WhatsApp messaging services if they refuse to accept the new policy. On 24 March 2021, CCI made *prima facie* findings that the policy constituted an exploitative and exclusionary conduct which violates the Section 4 of the Competition Act 2002, and directed an investigation. Facebook and WhatsApp argued that since the Indian Supreme Court and Delhi High Court were already examining the privacy policy changes in separate proceedings, CCI should not be intervening. Delhi High Court considered that it would have been prudent for CCI to await the outcome of such proceedings; however, merely for CCI's decision not to wait, its order could not be said to be without jurisdiction or so perverse so as to warrant to be quashed.

CCI initiates investigation against Tata Motors

On 4 May 2021, CCI ordered a full-fledged investigation against the largest automaker in India, Tata Motors. It was alleged that Tata Motors entered into anti-competitive agreements, by allocating sales territories to its dealers, in violation of section 3(4) of the Competition Act 2002. Tata Motors was also accused of abuse of dominance in contravention of section 4 of the Competition Act 2002, by (i) coercing dealers to order vehicles according to Tata Motors' own wishes; and (ii) restricting dealers from engaging in any new business even if such business is not related to automobile industry; and (iii) imposing various unfair terms in the dealership agreement. CCI found that Tata Motors enjoys *prima facie* a dominant position in the market for manufacture and sale of commercial vehicles in India and the matters require an in-depth investigation. The probe is expected to complete in 60 days from the date of the order.

Karnataka High Court rules in favour of CCI's probe into Amazon and Flipkart

On 11 June 2021, the Karnataka High Court dismissed the petitions brought by Amazon and Walmart-owned Flipkart, challenging the CCI's order for investigation against them. In 2019, a group representing micro, small and medium sized traders filed a complaint against the two companies claiming that they offered deep discounts to affiliated sellers, granted preferential listing on their platforms and engaged in exclusive arrangements with selected private sellers. In response, CCI initiated a probe against Amazon and Flipkart. However, the probe was stayed by the Karnataka High Court in February 2020 on the basis that the probe was launched with insufficient evidence. In October 2020, CCI appealed against the stay order; the Indian Supreme Court then remitted the case back to Karnataka High Court. After review, the Karnataka High Court ruled that CCI should be able to launch an investigation if supported by "some reasoning" and given that the probe into Amazon and Flipkart was based on *prima facie* findings, it would be unwise to scuttle the investigation. Flipkart and Amazon appealed this ruling on 16 and 17 June 2021 respectively.

A light blue map of Australia and surrounding regions, including parts of Asia and the Pacific. A black dot is located on the eastern coast of Australia, with a horizontal line extending to the left towards the 'Australia' header and a vertical line extending downwards.

Australia

ACCC adopts new organisational structure from 1 July 2021

As announced on 28 June 2021, the Australian Competition and Consumer Commission ("**ACCC**") adopted a new organisational structure effective 1 July 2021. Operational divisions are more closely aligned with the ACCC's strategic objectives. Under the new organisational structure, operational divisions consist of (i) Consumer and Fair Trading (new division), (ii) Competition (new division), (iii) Consumer Product Safety (new division); (iv) Mergers, Exemptions and Digital, (v) Infrastructure, (vi) Consumer Data Right Division, (vii) Specialist Advice and Services, and (viii) Corporate. An organisation chart is available on the ACCC's website.

ACCC is granted leave to appear in Epic v Apple appeal

The ACCC (and Google Payment Australia Pty Ltd) were both granted leave to intervene (limited to written submissions) in Epic's appeal to the Full Federal Court against the Court's earlier decision to stay Epic's proceedings against Apple. The ACCC had sought the Court's leave to appear as "amicus curiae" (friend of the Court) or to intervene as a non-party in order to make submissions on the public policy in favour of disputes involving Australia's competition laws being heard and determined by Australian courts.

ACCC Chair Rod Sims has explained that the ACCC took this unusual step as "the stay application raises significant public policy issues about which, as the statutory agency responsible for administering Australia's competition law, we believe we can be of assistance to the Court". Mr Sims has further stated "this is a case filed in an Australian Court, involving Australian consumers and raising significant issues under Australia's competition laws", it therefore being "in the public interest for significant competition law cases such as this case to be determined by Australian courts, given the outcome of such cases can have significant implications of the broader Australian economy". Judgment is yet to be delivered from the 9 June 2021 appeal hearing.

ACCC introduces first class exemption for collective bargaining

Effective from 3 June 2021 a class exemption may be available to (i) fuel retailers (governed by the Oil Code of Conduct), (ii) franchisees (governed by the Franchising Code of Conduct), and (iii) small businesses, allowing collective negotiation without first needing to seek ACCC approval and risking possible competition law breach.

In effect, the exemption is applicable for more than 98% of Australian businesses, as it applies to businesses and independent contractors who form or are members of a bargaining group, with a turnover of less than AUD 10 million (USD 7.5 million) in the financial year before the bargaining group was formed. For example, the exemption will generally permit collective negotiation of eligible franchisees with franchisors or eligible fuel retailers with a fuel wholesaler.

A light blue map showing the continent of Australia and the surrounding regions of Southeast Asia and Oceania. A horizontal line extends from the left side of the page, passing through a small black dot and ending at a larger black dot on the eastern coast of Australia. The word "Australia" is positioned to the left of the first dot.

Australia

Previously, such exemption was only available on a case by case basis through an ACCC "authorisation" or "notification" process. This process has been streamlined, now only requiring provision of a one-page notice to the ACCC. For businesses that fall outside the scope of the exemption (for example larger or more complex businesses), the ACCC's "authorisation" and "notification" processes will still be available to seek legal protection to collectively bargain on a case by case basis. The ACCC has had the power to make class exemptions for specific types of business conduct since November 2017.

Country Care acquittal: Australia's first contested prosecution under criminal cartel provisions is heard before a jury

On 2 June 2021, the Country Care Group Pty Ltd ("**Country Care**"), its CEO and a former employee were acquitted of eight criminal cartel offence by a Federal Court jury. The charges brought in 2018 by the Commonwealth Director of Public Prosecution ("**CDPP**") followed an earlier ACCC investigation and related to the supply of rehabilitation and aged care assistive technology products. It was alleged Country Care had attempted price-fixing and bid-rigging, more specifically by entering into (i) a cartel arrangement involving over 40 healthcare companies across Australia to fix prices for goods supplied by Country Care and the other businesses; (ii) an understanding that a competitor would not bid if a public state health organisation requested bids for equipment; and (iii) an arrangement that Country Care and a competitor would both bid in a NSW Health tender on the basis that one of the bids would more likely be successful.

While the ACCC investigates cartel conduct, manages the immunity process and can bring proceedings in the Federal Court in respect of civil cartel contraventions, serious cartel conduct is referred to the CDPP which is responsible for prosecuting criminal cartel offences in accordance with Commonwealth Prosecution Policy. Trial on indictment of any offence against any law of the Commonwealth requires unanimous jury verdict (under section 80 of the Australian Constitution). As a criminal case, Country Care and its executives are unable to recover any costs however could be able to make a tax deduction claim for litigation as a business expense.

Under Australian competition law, a cartel is considered to exist where businesses agree to act together instead of competing with each other, by way of price fixing, sharing markets, rigging bids and/or controlling the output/limiting the amount of goods and services. The ACCC has created an ACCC Cartel Hotline to which cartel conduct can be reported and has indicated it will continue to give high priority to detecting and dismantling cartels, taking enforcement action in appropriate cases.



New Zealand

New Zealand reforms its misuse of market power legislation while Australia makes its first contravention finding under Australian misuse of market power provision introduced in 2017

The Commerce Amendment Bill ("**Amendment Bill**"), introduced 10 March 2021 and currently before the Select Committee of New Zealand Parliament, intends to repeal New Zealand's existing misuse of market power prohibition to replace it with an Australian market power prohibition equivalent (as amended in 2017 in response to the Harper Review of Australia's competition laws). In the interim, the Federal Court of Australia made its first declaration (by consent) under the Australian market power prohibition (section 46 of the Competition and Consumer Act 2010). It has been held that Tasmanian Ports Corporation Pty Ltd ("**TasPorts**") engaged in conduct that had the likely effect of substantially lessening competition in the markets for towage and pilotage services by imposing a new port access charge on one of its customers after the customer notified TasPorts it was going to switch to a new provider of towage and pilotage services. The ACCC asserted there was no legitimate business justification for the conduct.

The ACCC also considered the result of the proceeding important as TasPorts provided the ACCC with a court-enforceable undertaking, requiring it to ensure that the new provider of towage services (Engage Marine) has access to berth space for tug boats in northern Tasmania on reasonable commercial terms, and that charges imposed by TasPorts for regulatory functions are reasonable. Importantly, the undertaking also provides that TasPorts will spend at least AUD 1 million (USD 0.75 million) on the wharf infrastructure that would facilitate competition. In the circumstances of this undertaking, the ACCC agreed not to press for a penalty order.

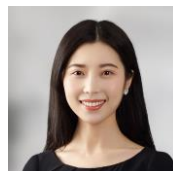
As stated by ACCC Chair Rod Sims, the decision is important as "the first time a corporation has been declared to have breached the revised misuse of market power law". As the case was settled without a contested court process, it is questionable whether it may be regarded as precedent that having a "legitimate business justification" is a defence to a market power action under the Australian market power prohibition. Some submissions in respect of the Amendment Bill have in fact raised the need for a more express legitimate business exception to be included in the proposed legislation, rather than being left to enforcer discretion.

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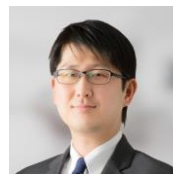
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