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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE

April to June 2022

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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE: APRIL TO JUNE 2022

INTRODUCTION

On 24 June 2022, China passed amendments to its Anti-Monopoly Law (AML), these being the first since the law was enacted in 2008. The amended AML will come into force on 1 August 2022. On 27 June 2022, the Chinese antitrust authority (SAMR) followed up by publishing draft amendments to six sets of antitrust regulations and rules for the purposes of implementing the amended AML and providing much-needed clarification to it. Key changes introduced to the amended AML include, among others: (i) a considerably strengthened penalty regime, in particular a 10 times higher failure-to-file and gun-jumping fine, a new personal fine in anti-competitive agreements and a punitive fine of 2-5 times higher in extreme circumstances; (ii) a stop-the-clock procedure in SAMR's merger control review; (iii) SAMR's extended jurisdiction over below-filing thresholds transactions; (iv) a safe harbour rule for vertical agreements in general; and (v) a more relaxed approach to resale price maintenance.

Besides, in this quarter, SAMR published its 2021 Antitrust Annual Report and approved II-VI's acquisition of Coherent subject to behavioural conditions. On antitrust enforcements, provincial antitrust authorities imposed penalties in six cartel and abuse of dominance cases, and it attracted a lot of attention from the public that China's largest academic database company was investigated for alleged abuse of dominance.

Outside China, the region has seen notable enforcements against cartel conduct in this quarter – the Competition Commission in Hong Kong (HKCC) brought before the Tribunal a five-year-long bid-rigging case in the air conditioning contracting sector; Taiwan fined 15 air conditioning firms for colluding to set warranty terms; and Australia saw its first-ever criminal cartel case in which sentences of imprisonment were imposed on responsible individuals. Apart from this, in Australia, a patent settlement and licence agreement regarding cancer treatment pharmaceuticals was denied authorisation in a draft decision due to unclear public benefits.

The digital economy remains under close antitrust scrutiny across the region. India's two largest food delivery platforms were investigated for anti-competitive vertical agreements; in Japan, a new governmental organ was established to strengthen the country's merger control review in the digital sector, an interim report on mobile ecosystem competition assessment was released for public comments, and a market survey report indicated that the Japanese cloud service market had become less competitive. On broader legislation and policy making, India further strengthened its existing foreign investment control rules against investors from bordering countries by requiring director appointments to seek prior approval in India. Malaysia published draft amendments, including a proposal for a cross-sector merger control regime, to the Competition Act for public comments. In Australia, the fourth report in the Digital Platforms Services Inquiry and the new Australian Government's competition agenda were released, and Australia identified digital platform transparency as a key priority for 2022 and 2023. Vietnam published its 2021 annual report which indicated that the number of merger control notifications had doubled. Hong Kong reappointed Mr. Samuel Chan Ka-yan as the chairman of HKCC for a term of two years from 1 May 2022. Indonesia revoked its temporary relaxation to its antitrust rules, in particular merger control rules, which was introduced to adapt to the Covid-19 pandemic.

YONG BAI
Partner, Head of Antitrust, Greater China

T +86 10 6535 2286
M +86 13910850420
E yong.bai@cliffordchance.com

DAVE PODDAR
Partner, Head of Antitrust, Asia Pacific

T +61 28922 8033
M +61 422800415
E dave.poddar@cliffordchance.com

SPECIAL REPORT: AFTER 14 YEARS, CHINA HAS PASSED ITS AMENDED ANTI-MONOPOLY LAW

The Chinese Anti-Monopoly Law ("**AML**"), which was enacted on 1 August 2008, has for the first time been amended and will come into force on 1 August 2022.

By way of background, the National People's Congress ("**NPC**") announced in September 2018 that the revision of the AML would be on its legislative agenda. The initial proposed amendments were released by the Chinese antitrust agency, namely the State Administration for Market Regulation ("**SAMR**"), on 2 January 2020 for public consultation, with a revised draft submitted to the NPC for the "first reading" in October 2021, and for the "second reading" in June 2022. The final text was passed only three days after the second reading, which was in an unprecedentedly expeditious manner. The amended AML is generally viewed as opportune as SAMR has, over the past 14 years, gained significant experience but has, until the amended AML, been challenged by uncertainties in the underlying law and practice.

The final text of the amended AML, which was published on 24 June 2022, emphasises the fundamental role of competition policy in China's market economy and encapsulates substantial changes such as the introduction of a "stop-the-clock" mechanism to merger review, a relaxed approach towards resale price maintenance ("**RPM**"), a safe harbour for certain vertical agreements, and platform-specific rules. Furthermore, the overall antitrust penalty regime has been substantially strengthened, and fines can be imposed on individuals as well as undertakings if they organise or facilitate the conclusion of anti-competitive agreements.

To provide clarification on the amended AML, on 27 June 2022, SAMR published drafts of six relevant antitrust regulations and rules for public consultation: (i) *Regulations on the Merger Control Filing Thresholds*; (ii) *Provisions on Prohibition of Monopoly Agreements*; (iii) *Provisions on Prohibition of Abuse of Dominance*; (iv) *Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of IP Rights*; (v) *Provisions on Prohibition of Elimination and Restriction of Competition through Abuse of Administrative Power*; and (vi) *Provisions on Merger Control Review* (collectively, the "**Consultation Draft of Implementing Rules**"). The public consultation period will end on 27 July 2022, without indicating when the final text is to be published.

Please see below for more details of the highlights of the amended AML and the Consultation Draft of Implementing Rules.

1. "Stop-the-clock" for merger control review

The amended AML allows SAMR to suspend a merger review if:

(i) the notifying parties fail to provide requested information or materials so that the merger review cannot proceed;

(ii) new circumstances or new facts that materially impact the merger review occur, and the merger review cannot proceed without examining the new circumstances or facts; or

(iii) the proposed remedies require further assessment, and the relevant undertakings request suspension.

The "stop-the-clock" mechanism can provide SAMR with more time when reviewing complex merger cases, in particular those involving remedy negotiations. Under the existing law, SAMR has a period of up to 180 calendar days to clear a merger filing, which, in practice, is usually extended by notifying parties' "pull and refile" when it is not feasible for SAMR to finish its review within 180 days.

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A potential downside, however, is that the "stop-the-clock" mechanism may cause uncertainty on timing in less complex cases. To ensure that the "stop-the-clock" power is duly exercised by SAMR in practice, the Consultation Draft of Implementing Rules proposes that once the interrupting factors, as described in paragraphs (i) to (iii) above, have passed, SAMR shall resume its review. In particular, regarding the scenario described in paragraph (i) above, parties to a transaction are entitled to request an extension of the deadline, and only if they fail to supply the requested information by the extended deadline may SAMR stop the clock.

Although many other jurisdictions have similar rules, before seeing how this new tool is used by SAMR companies are advised to exert extra care when planning transaction timelines if Chinese merger clearance is required.

2. Below-threshold transactions may be caught

Pursuant to the Amended AML, if there is evidence proving that a transaction that falls below the merger control filing thresholds has or may have the effect of eliminating or restricting competition, SAMR can require the parties to notify the transaction.

Pursuant to the Consultation Draft of Implementing Rules, if the transaction concerned is completed, SAMR can require the parties to supplement a filing within 180 days. If the below-threshold transaction is not completed at the time of filing, the parties to the transaction cannot complete the transaction before obtaining clearance from SAMR. If, however, a transaction is completed at the time of filing, SAMR can require parties to cease implementation of the transaction or take other necessary measures.

If the parties concerned do not follow SAMR's requirement to notify a below-threshold transaction, SAMR will investigate the transaction. Nonetheless, parties to a below-threshold so-called "killer acquisition" acquisition have no obligation to file in China unless and until the Chinese antitrust agency requires them to do so. Failing to meet that requirement will lead to SAMR's investigation into the transaction, which, as explained above, will either be approved or subject to interim measures.

This new provision grants broad power to SAMR to "call in" below-threshold concentrations, particularly acquisitions of mavericks or nascent competitors by incumbent digital giants (the "killer acquisitions" referred to above) which have also attracted antitrust scrutiny in other jurisdictions.

In terms of filing thresholds, the Consultation Draft of Implementing Rules proposes to revise the Chinese filing thresholds through (i) raising the existing filing thresholds and (ii) introducing a new threshold which is considered to catch killer acquisitions by sizable Chinese companies, as set out below:

- **(i)** (a) the combined worldwide turnover test is proposed to raise from RMB 10 billion (USD 1.49 billion) to RMB 12 billion (USD 1.79 billion); (b) the combined Chinese turnover test is proposed to raise from RMB 2 billion (USD 299 million) to RMB 4 billion (USD 598 million); and (c) the individual Chinese turnover test is proposed to raise from RMB 400 million (USD 59.8 million) to RMB 800 million (USD 119.6 million).
- **(ii)** if the primary test described in paragraph (i) above is not met, (A) one party with more than RMB 100 billion (USD 14.9 billion) turnover in China in the previous financial year; and (B) the other party (merging party or target) with (a) market value or valuation of RMB 800 million (USD 119.6 million) or more, and (b) more than one- third of its worldwide turnover generated from China in the previous financial year.

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3. Safe harbour for certain vertical agreements

The amended AML introduces a market share-based safe harbour for vertical agreements in certain circumstances.

The new safe harbour provision in the amended AML, however, is quite vague as it does not provide specific market share thresholds but states that "*if undertakings can prove that their market shares in the relevant markets are below the standards provided by the State's antitrust authorities, and meet other conditions provided by the same, such vertical agreements will not be prohibited*".

The Consultation Draft of Implementing Rules sheds useful light by proposing that the specific market share threshold is 15%, a standard stricter than the 2022 Vertical Exemption Block Exemption as applied in the European Union ("**EU**").

Regarding the scope of application, it is clear in the amended AML that the new safe harbour rule will not apply to horizontal agreements. However, significant ambiguity lies in whether RPM can benefit from the safe harbour.

The legal text does not expressly limit the safe harbour to non-RPM vertical agreements, but since it includes language stating "*meeting other conditions provided by the [State's antitrust authorities]*", we are inclined to think that RPM, as a hardcore vertical restraint, may not benefit from the safe harbour. This is consistent with the existing Antitrust Guidelines for Automotive Industry which was published by the State Council's Antitrust Commission in January 2019, where safe harbour test, based on market share, only applies to non-RPM vertical agreements, and is also in line with practices in other major jurisdictions, such as the EU. But this is to be further clarified by the authorities.

4. Relaxed approach to RPM

Under the amended AML, RPM remains presumed to be illegal, but will not be prohibited if the undertakings concerned can prove that there are no anti-competitive effects.

Previously, China, like the EU and many other jurisdictions, considered RPM to be illegal *per se*, unless exempted by efficiency-related conditions (i.e., the equivalent of Article 101(3) of the Treaty on the Functioning of the EU). In addition, China has also endorsed a bifurcated approach to RPM in public enforcement and private proceedings, as anticompetitive effects need to be proved in court cases by plaintiffs, but need not be proved by law enforcers.

The amended AML clarifies that the lack of anti-competitive effects can serve as a defence against public enforcement. However, it is unclear what level of evidence would be considered as sufficient by SAMR. It remains to be seen whether this seemingly relaxed approach will indeed lead to significant relaxation towards RPM enforcement in practice.

5. Organisers/facilitators held liable for monopoly agreements

The amended AML provides that undertakings shall not organise or provide substantial assistance to the parties of a monopoly agreement.

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Previously, the AML only prohibited the organisation of monopoly agreements by trade associations. The new provision will empower SAMR to hold liable any organiser/facilitator of monopoly agreements and to tackle hub-and-spoke agreements more effectively. The Consultation Draft of Implementing Rules seeks to clarify that "substantial assistance" means support provided to the conclusion or implementation of monopoly agreements, bearing a causal link with the effect of elimination or restriction of competition, wherein the concerned facilitator's role is significant.

6. Strengthened penalty regime

The penalty regime under the amended AML has been significantly strengthened, given the AML was previously considered to provide insufficient deterrence. Key changes are discussed below:

- ***Maximum failure to file / gun-jumping fines 10 times higher.*** For an unreported merger that does not lead to competition concerns, the maximum fine is increased from RMB 500,000 (USD 75,000) to RMB 5 million (USD 747,000). When anti-competitive effects are found, the maximum fine will be further increased to up to 10% of the notifying party's group turnover in the last year. Note also that, if SAMR considers a failure-to-file case as a particularly severe violation, in theory the fine can be up to 50% of the notifying party's turnover in the last year.
- ***Personal liability for monopoly agreements.*** The Amended AML introduces personal liabilities for substantive antitrust violation for the first time. Previously, personal liability was only imposed for procedural violations (obstruction of an antitrust investigation). The amended AML provides that legal representatives, principal responsible persons, and directly responsible persons can now be fined up to RMB 1 million (USD 149,000) if they are personally responsible for a monopoly agreement. Although it remains to be seen how actively SAMR would exercise such power, adding personal fines to its toolbox in itself proves China's resolution to enhance deterrence.
- ***Uplifted fines.*** Antitrust fines can be further increased to a range between two and five times the initial amount if the circumstances of an antitrust violation are "particularly serious", with “particularly egregious impact" and "particularly serious repercussions." These standards are not clarified in the amended AML, but this new rule will open the door to an unprecedented level of monetary antitrust fines in China.
- ***Potential criminal liability.*** The amended AML introduces a new article, stipulating that persons committing antitrust infringements may be held criminally accountable, if the infringement constitutes a crime. Previously, the potential to constitute a criminal offence was only connected with obstruction of antitrust investigations. Some commentators consider that this new standalone article leaves room for the criminalisation of anticompetitive conducts, not just obstruction of antitrust investigations. However, the implementation of that would require future amendment to China's Criminal Law.
- ***Credit records impacted.*** Antitrust penalties upon undertakings will be reflected in their credit records following relevant national provisions, and will be announced to the public. However, it is unclear what the relevant national provisions refer to and where public announcements will be made. One thing that is certain is that the price of infringing antitrust law in China is becoming higher.

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7. Digital economy

The General Principles chapter of the amended AML now states that the elimination or restriction of competition through the abuse of data and algorithms, technologies, capital advantage, and platform rules is prohibited. Under the Abuse of Dominance chapter, a new paragraph has been added to prohibit dominant undertakings from using data and algorithms, technologies, and platform rules to impose unreasonable restrictions on other undertakings. Previously, similar wording could only be found in the Antitrust Guidelines for Platform Economy.

The heightened scrutiny of the digital economy has been reflected in the organisational structure of the new National Anti-Monopoly Bureau, which was established in November 2021 to elevate the Anti-Monopoly Bureau's status from that of a sub-organ of SAMR to one that is equal to SAMR. The new bureau now consists of three sub-bureaus (supervising merger control, conduct and competition policies), each of which has set up a standalone division to deal with digital economy issues.

The Consultation Draft of Implementing Rules further reflects the features specific to abuse of dominance in the digital economy, e.g., by expressly recognising self-preferencing. It is expected that antitrust enforcement against digital platforms will remain active in China as in other key jurisdictions.

8. Other notable changes

Setting priorities for merger control review. The amended AML provides, through a newly added article, that in order to improve review quality and efficiency, SAMR shall set up a classification system for its merger reviews and strengthen its focus of review on concentrations in important sectors that concern national strategies and people's living. The reference to a "classification system" was not seen in previous drafts of the AML amendments circulated for consultation, and, according to the Consultation Draft of Implementing Rules, SAMR is expected to lay out specific review guidelines in this regard. Nonetheless, the message is clear that appropriate priorities should be set for SAMR's merger control regime to achieve greater efficiency.

Introduction of public interest antitrust litigation. The amended AML introduces a new channel of public interest litigation, via which public prosecutors can initiate civil public interest litigation before courts when the concerned anticompetitive conduct harms social welfare. This new procedure has been introduced to facilitate plaintiffs' recovery of civil damages in antitrust proceedings. In the private domain, private antitrust litigation in China remains undeveloped and it has been widely recognised that collecting evidence to prove anticompetitive behaviours is notoriously difficult.

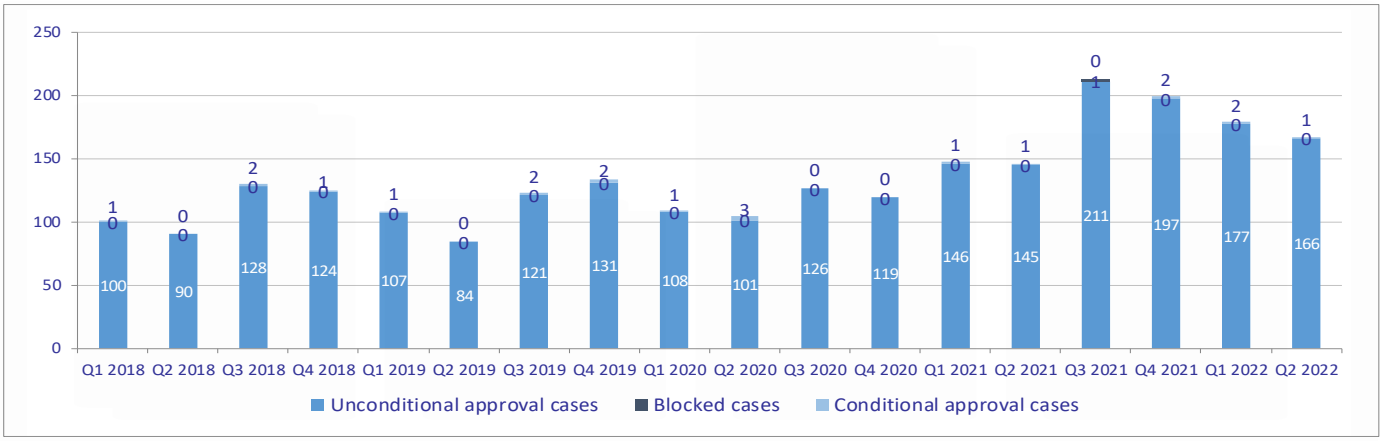
Heightened scrutiny over administrative monopoly. The Fair Competition Review System ("**FCRS**") was established in China in 2016 to specifically curb government organs' administrative monopoly behaviour. The FCRS is now enshrined in the amended AML, which elevates the FCRS's policy status and provides, as a fundamental principle, that "organisations with public affairs functions shall be screened under the FCRS when forming rules for market players".

MERGER CONTROL

How many cases have there been?

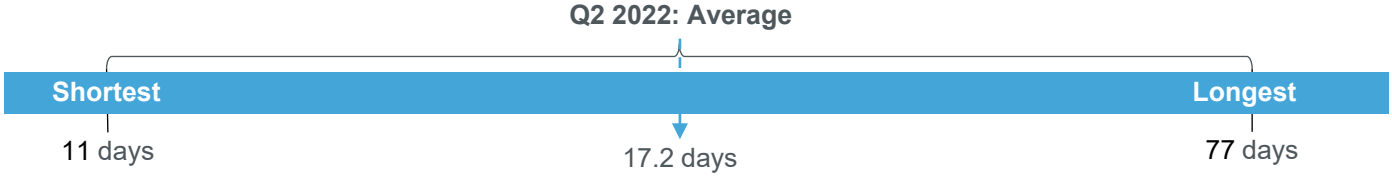
There were in total 167 merger decisions released in the second quarter of 2022, an increase of 14.38% compared to the second quarter of 2021, with 166 cases unconditionally cleared and one case approved subject to conditions. Around 146 cases were notified under the simplified procedure, which represents 87.43% of the total cases reviewed in this quarter.

Merger control trends – Q1 2018 – Q2 2022



Simplified procedure: How quick is the review period?

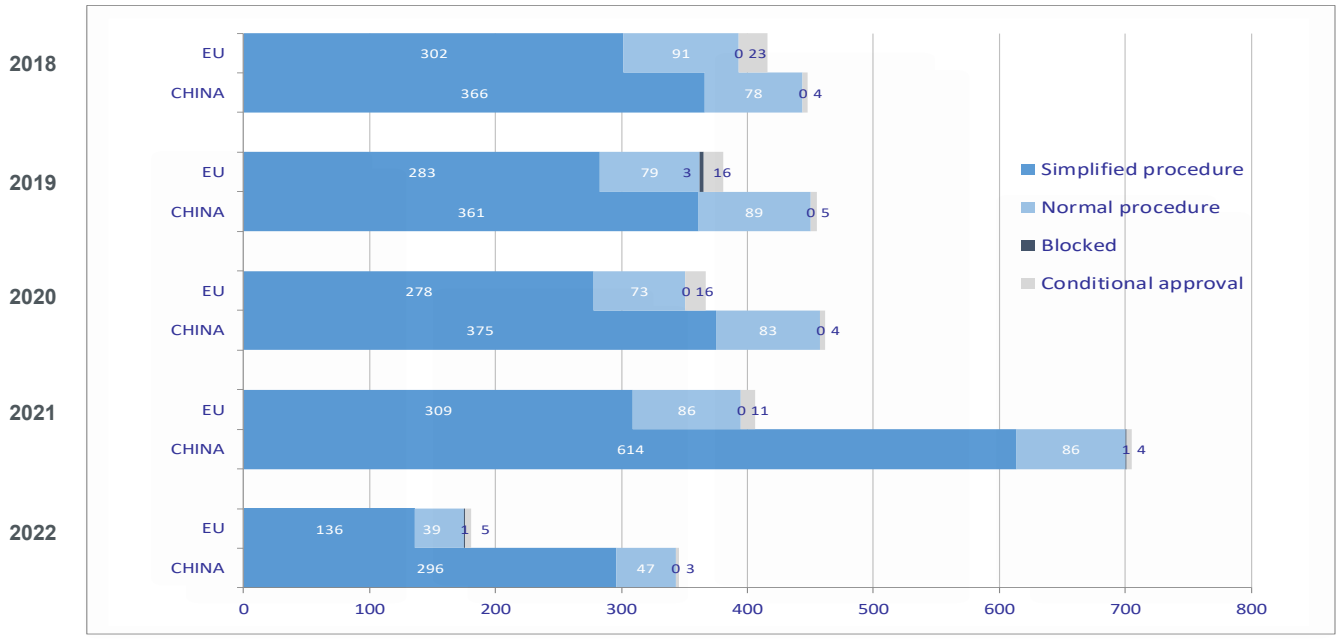
Quarter	Average review period	Simplified procedure (%)	Cases exceeding 30 days
Q1 2018	19 days	92.1%	1
Q2 2018	18 days	81.1%	1
Q3 2018	16 days	76.9%	0
Q4 2018	17 days	80.0%	3
Q1 2019	16 days	77.8%	0
Q2 2019	17 days	85.7%	0
Q3 2019	19 days	78.9%	1
Q4 2019	14 days	81.2%	0
Q1 2020	14 days	87.2%	1
Q2 2020	13.7 days	86.5%	0
Q3 2020	14.4 days	72.2%	3
Q4 2020	13.7 days	83.2%	1
Q1 2021	14.9 days	80.3%	3
Q2 2021	13.8 days	90.4%	0
Q3 2021	13.4 days	86.3%	3
Q4 2021	15.6 days	91.0%	3
Q1 2022	17.1 days	83.8%	1
Q2 2022	17.2 days	87.43%	2



MERGER CONTROL

How does China compare internationally?

Comparison with EU – 2018 – 2022



SAMR conditionally approves II-VI's acquisition of Coherent

On 28 June 2022, SAMR conditionally approved II-VI Incorporated's ("**II-VI**") acquisition of 100% interest in Coherent, Inc. ("**Coherent**") through cash and share swap. II-VI is a supplier of engineered materials and optoelectronic components, and Coherent is a supplier of laser devices. Both companies are US companies listed on NASDAQ.

The transaction concerns the laser equipment industry where II-VI is active in the upstream markets for supplying components and inputs, and Coherent is active in the downstream markets for producing and selling laser devices. Among the 22 vertical links identified from the parties' activities, SAMR identified competition concerns in respect of the following three vertical links: (i) *upstream*: high-power CO_2 laser optics, *downstream*: high-power CO_2 lasers; (ii) *upstream*: low-power CO_2 laser optics, *downstream*: low-power CO_2 lasers; and (iii) *upstream*: glass-based laser optics used in excimer lasers; downstream: excimer lasers. SAMR considered the relevant geographic markets for all relevant products worldwide, but also evaluated the impact on competition in China.

With respect to each of the three vertical links, SAMR found that the combined entity will have both the ability and the incentive to eliminate or restrict competition based on the following factors: II-VI is the biggest player in the upstream high- and low-power CO_2 laser optics markets both globally and in China; and Coherent has the largest share in the downstream CO_2 laser markets and is dominant in the downstream excimer lasers market both globally and in China. II-VI's strong R&D capabilities and the superior performance of its products granted it unparalleled competitive advantages. High market entry barriers also prohibited new players from entering the market in the short-term. As such, the combined entity could harm competition by anti-competitive input foreclosure and customer foreclosure.

MERGER CONTROL & OTHER NEWS

To address these competition concerns, SAMR required the parties and the combined entity to continue to: (i) perform the existing contracts regarding procurement of relevant laser optics; (ii) supply CO_2 laser optics to customers in China without differential treatments; (iii) procure glass-based laser optics used in excimer lasers from multiple suppliers without increasing II-VI's share of supply to Coherent; and (iv) keep third parties' competitive sensitive information strictly confidential. These conditions will expire automatically in five years. Outside China, this transaction has been unconditionally approved in the United States, Germany and South Korea.

Other news

SAMR publishes its 2021 Antitrust Annual Report

On 8 June 2022, SAMR published the 2021 Annual Report on China Antitrust Enforcement (the "**Report**"). The Report summarises SAMR's antitrust enforcement with respect to anti-competitive agreements, abuse of dominance, merger control, failure to file, and administrative monopoly in sectors, including internet, public utilities, pharmaceuticals, construction materials, semiconductors, warehousing & logistics, new energy vehicles & battery charging and swapping, and chemicals. Key highlights of the Report include the following:

- **Merger Control** – 824 transactions were notified in China in 2021, with decisions made for 727 of those. Among the 727 transactions, one was prohibited and four were cleared subject to conditions, with the remaining 722 receiving unconditional clearance. The intervention rate in 2021 is therefore approximately 0.7%. The Report also noted a particular focus on close scrutiny of concentrations involving platform companies: 40 cases involving platform companies were reviewed, with one of those blocked, in 2021.

- **Antitrust Investigations** – Enforcement against anti-competitive agreements remained active in 2021, with 30 investigations initiated and 11 penalty decisions made, focusing on sectors including pharmaceuticals, construction materials and public utilities. In addition, 11 penalty decisions were made on abuse of dominance in 2021, three of which targeted the platform economy and the rest targeted livelihood-related sectors such as pharmaceuticals, water and gas supply, and energy.

- **Legislation** – 2021 witnessed considerable progress in antitrust legislation in China. Apart from the amended AML discussed in length above, Antitrust Guidelines on Active Pharmaceutical Ingredients and Platform Economy were also published. Additionally, SAMR published the Guidance on Overseas Antitrust Compliance to guide Chinese companies to comply with competition rules abroad.

ANTITRUST INVESTIGATIONS

Provincial AMRs impose fines on cartel and abuse of dominant position cases

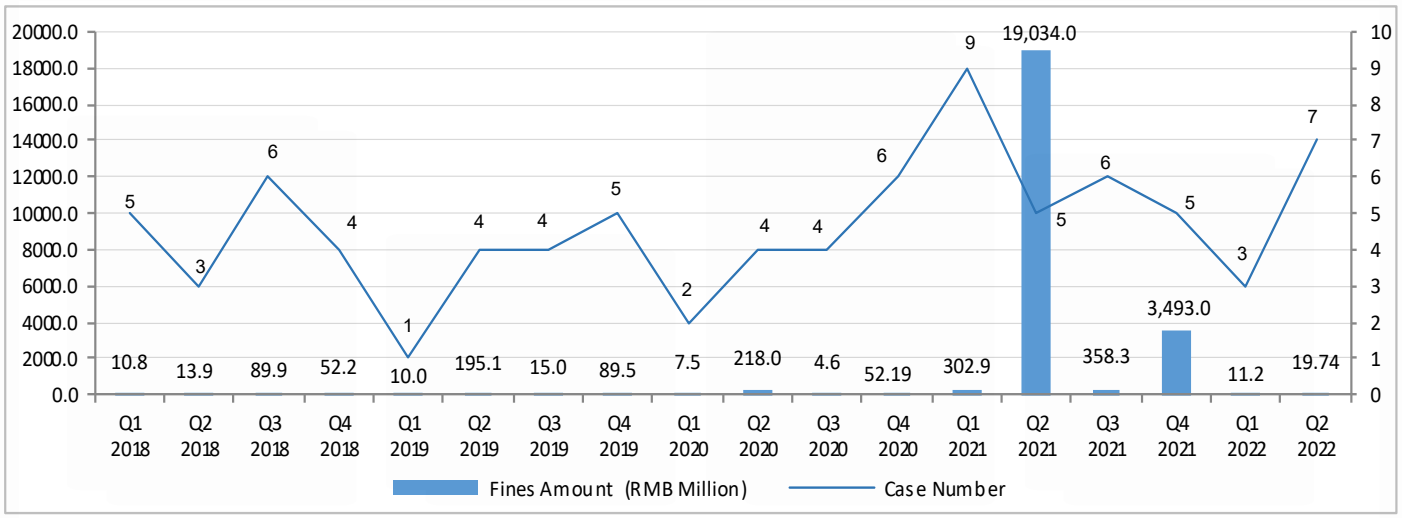
In the past quarter, the local Administration for Market Regulation ("**AMR**") in Ningxia, Zhejiang, Guizhou, Jiangsu, Yunnan and Jilin actively enforced punishments against local anti-competitive conduct in public utility sectors, such as water and gas supply. A summary of these local enforcement cases is attached below, with more details provided in the table below.

- Ningxia AMR fines a local gas supplier for abuse of dominance through tying
- Zhejiang AMR fines two local water suppliers for exclusive dealing and imposing unreasonable trading conditions
- Guizhou AMR fines eight LPG companies for price-fixing and market division
- Jiangsu AMR fines a trade association for organising price-fixing
- Yunnan AMR fines six stamp companies for price-fixing
- Jilin AMR fines 11 automobile inspection companies for price-fixing

Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency
Gas supply service Ningxia AMR	26 May 2022	Tying	358	N/A	N/A	2%	N/A
Water supply service Zhejiang AMR	9 June 2022	Exclusive dealing, imposing unreasonable conditions	7,391	N/A	N/A	3%	N/A
Water supply service Zhejiang AMR	10 June 2022	Exclusive dealing, imposing unreasonable conditions	9,912	N/A	N/A	3%	N/A
Bottled liquefied petroleum gas Guizhou AMR	20 June 2022	Price fixing, market dividing	1,428	49	349	1%-2%	N/A
Rice association Jiangsu AMR	20 June 2022	Organizing price fixing	400	N/A	N/A	N/A	N/A
Anti-counterfeiting stamp Yunnan AMR	30 June 2022	Price fixing	35	0 (no sales in the preceding year)	17	3%	N/A
Automobile inspection service Jilin AMR	30 June 2022	Price fixing	216	6	40	2%-3%	N/A

ANTITRUST INVESTIGATIONS

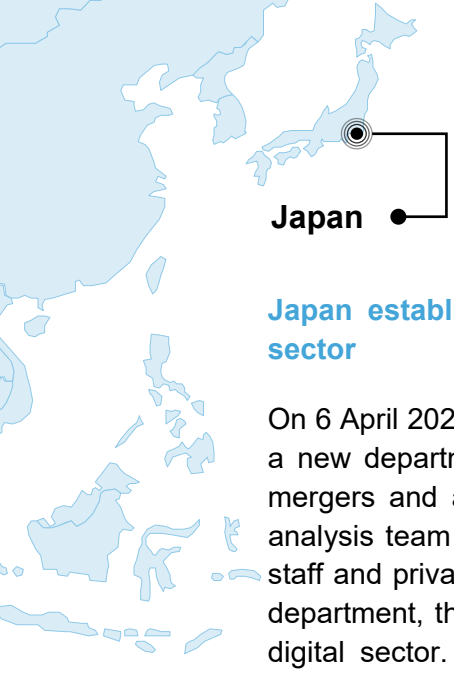
Enforcement trends* – Q1 2018 to Q2 2022



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

China's largest academic database company is under antitrust investigation for alleged abuse of dominance

China National Knowledge Infrastructure ("**CNKI**") is a research resource platform aggregating more than 95% of Chinese academic papers and journals, and has long been complained about by users for abusing its dominant position through excessive subscription fees. On 13 May 2022, SAMR formally launched an antitrust investigation against CNKI. The investigation has prompted CNKI to take corrective measures, e.g., granting to individual users access to CNKI's plagiarism checking function, which was only accessible by business users previously. SAMR's investigation is still ongoing.



Japan establishes a new organ to strengthen the merger control review in digital sector

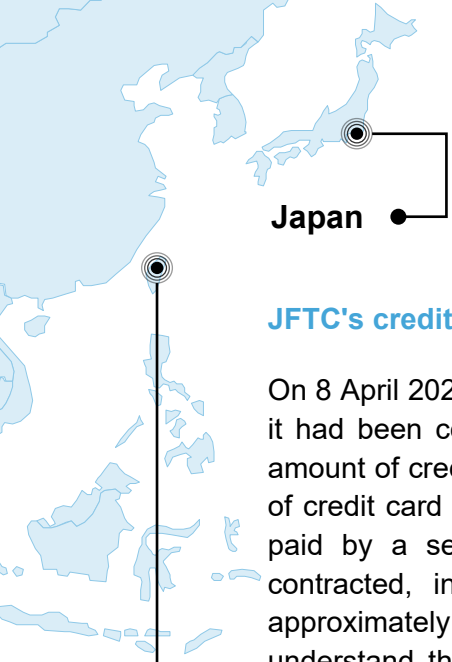
On 6 April 2022, the Japan Fair Trade Commission ("**JFTC**") announced that it had launched a new department comprising 15 people specialising in market analysis for the review of mergers and acquisitions of big tech companies. The JFTC employed another economic analysis team in the past, but it was not an independent department and comprised JFTC staff and private economists who worked side by side. By establishing this specialised new department, the JFTC is aiming to strengthen its review of mergers and acquisitions in the digital sector. Following this, in June 2022 the JFTC announced that it would publicise information about antitrust cases against big tech companies (such as the names of companies and case summaries) even if the process was at an early stage, as the JFTC needs to gather evidence quickly and react more effectively to the fast-changing market. Tech companies will be notified in advance that the information will be made public. In this regard, on 22 June 2022 the JFTC published a summary of its review of mergers and acquisitions cases in the 2021 fiscal year (i.e. from April 2021 to March 2022). In this report, the JFTC's approach to recent reviews of business combinations in the digital market was explained, and it clarified that the JFTC had conducted necessary reviews of these cases (such as Google's acquisition of shares in Pring Inc) even though the filing thresholds had not been met. The JFTC will also seek external input on merger and acquisition cases, especially in the tech sector, at an earlier stage when necessary. As part of this shift, the JFTC has begun seeking outside opinions on (i) Microsoft's proposed acquisition of Activision Blizzard and (ii) Google's proposed acquisition of Mandiant.

Japan publishes an interim report on mobile ecosystem competition assessment for comments

On 25 April 2022, the Government's Headquarters for Digital Market Competition ("**HDMC**"), which is responsible for developing rules and regulations for the digital market in Japan, published an interim report on the competition assessment of the mobile ecosystem. The interim report indicated that (i) there is an oligopoly of platform operators and (ii) the establishment and enforcement of various rules by platform operators are strengthening and securing their influence within the mobile ecosystem, which raises concerns from a competition perspective. The interim report raises issues regarding 27 types of conduct within the mobile ecosystem (including app store restrictions by Apple, sideloading restrictions by Google, and obligations in relation to payment systems within apps), and, for many of these 27 issues, the HDMC suggests ex-ante regulations. The HDMC has invited opinions and comments on the interim report, and will prepare a final report, taking into account such opinions and comments.

Survey report indicates a less competitive cloud service market in Japan

On 28 June 2022, the JFTC published a report on its cloud services survey. The report indicates that Amazon, Microsoft and Google are expanding their market shares in the cloud services market, and there is a risk that this may lead to a non-competitive market. Additionally, the report picked up some examples of the cloud services providers' conduct which could be seen as problematic under Japanese antitrust law (such as excessively high fees for data transfer, and bundling of different functions of cloud services).



Japan

JFTC's credit card market survey suggests disclosing standard interchange fee rates

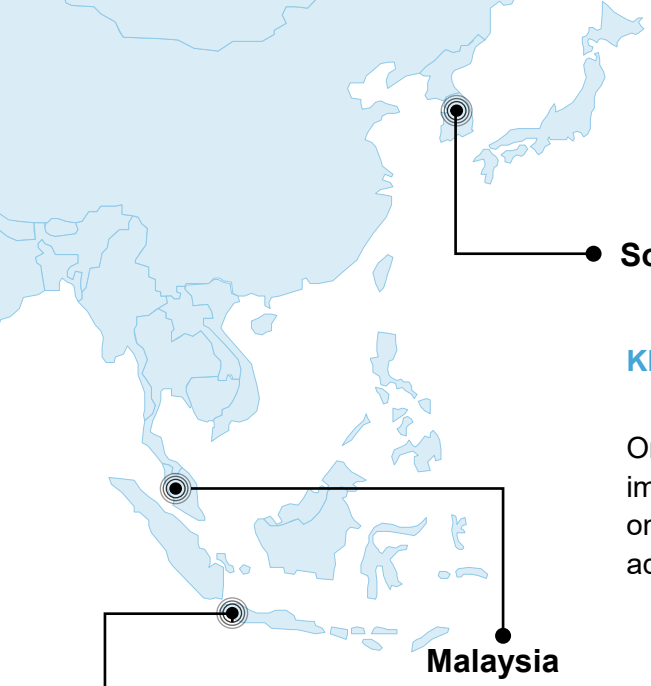
On 8 April 2022, the JFTC published the results of a survey of credit card transactions which it had been conducting since July 2021. The background to this survey is that, while the amount of credit card payments in Japan has been on the rise in recent years, the high cost of credit card merchant fees has been identified; to be specific, interchange fees (i.e., fees paid by a settlement company contracted by a store to another settlement company contracted, in turn, by a user when payment is made by credit card) account for approximately 70% of credit card merchant fees. The survey was conducted to seek to understand the status of the disclosure of standard interchange fee rates and to identify issues related to competition policy in the credit card market.

In the analysis of the survey results, the JFTC concluded that all the actions mentioned below would be problematic under the Japanese Anti-monopoly Act: (i) international brands jointly determining standard interchange fee rates; (ii) credit card companies jointly deciding to use standard interchange fee rates set by international brands; or (iii) international brands and credit card companies jointly determining standard interchange fee rates. The JFTC concluded that it would be appropriate to disclose standard interchange fee rates in Japan for international brands that have established standard interchange fee rates, as such disclosure would facilitate negotiations on credit card merchant fees between merchants and acquirers and competition among acquirers in the credit card merchant management markets in Japan. The JFTC will continue to closely monitor developments in the credit card market.

Taiwan

TFTC fines 15 air conditioner companies for warranty collusion

On 10 May 2022, the Taiwan Fair Trade Commission ("**TFTC**") published a penalty decision against 15 air conditioner ("**AC**") companies for anti-competitive collusion. The TFTC initiated the probe following public complaints which alleged that the AC companies in Taiwan may have colluded to reduce their warranty period. The TFTC found that, since March 2019, the three largest AC brands in Taiwan, namely Hitachi, Panasonic, and Daikin, all extended their warranty periods from three years to seven years, which prompted other AC players in Taiwan to follow suit, which promoted competition over warranty conditions on the Taiwanese AC market. However, at a meeting in November 2019, 15 AC companies reached a written agreement to uniformly reduce their warranty periods to three years from the beginning of 2020. Notably, the concerned AC companies have a collective market share of more than 90% in Taiwan. The TFTC concluded that the concerted action to reduce the warranty period was in violation of Article 15(1) of the Fair Trade Act, and imposed a fine in total of TWD 13.9 million (USD 469,000) on the 15 AC companies.



South Korea

KFTC imposes corrective orders on GM Korea

On 3 June 2022, the Korea Fair Trade Commission ("**KFTC**") imposed corrective orders on GM Korea, as it restricted the online advertising activities of car dealers, allowing only advertising on Facebook.

Malaysia

MyCC publishes draft amendments to Competition Act for public comments

On 25 April 2022, the Malaysia Competition Commission ("**MyCC**") published the draft amendments on the Competition Act 2010 for public comments, which represents the first attempt by MyCC to update the antitrust framework since the Competition Act 2010 came into effect on 1 January 2012.

The most notable change is probably the widely-anticipated cross-sector merger control regime. Currently, the merger control regime in Malaysia only applies to the aviation services and communication sectors, and the amendments now contemplate a hybrid format where transactions exceeding certain thresholds (which are to be prescribed in a specific order after the amendments are passed) would be subject to a mandatory pre-closing notification, while other transactions may be subject to a voluntary notification. Regarding the review timeline, the proposed regime will give MyCC up to 120 working days to review a merger, consisting of an initial 40-day phase I and additional 80-day phase II, regardless of whether the reviewed transaction takes place within or outside Malaysia. In addition, MyCC is reflecting international standards and best practices through the amendments -- for example, a leniency program has been introduced to provide up to 100% exemption of fines to the first applicant. The consultation for the amendments ended on 27 May 2022, and MyCC expects the new law to be passed by the end of this year.

Indonesia

KPPU revokes pandemic-era relaxed antitrust rules

On 1 April 2022, the Indonesia Competition Commission ("**KPPU**") issued a regulation to end the pandemic-era relaxed antitrust enforcement rules ("**Relaxed Rules**") with effect from 1 May 2022. The Relaxed Rules were introduced in November 2020 to cushion the pandemic's damaging effects. Under the Relaxed Rules, businesses are allowed to enter into potentially anti-competitive agreements and adopt potentially abusive practices, subject to KPPU's review and to benefit from an extended filing deadline of 60 business days from closing to submit merger filings. With the revocation of the Relaxed Rules, companies will no longer be able to seek approval for potentially anti-competitive conduct and will be obliged to file in Indonesia within 30 business days after closing once filing thresholds are met.

Vietnam publishes its 2021 annual report

On 7 April 2022, the Vietnam Competition and Consumer Authority ("**VCCA**") published its 2021 annual report. The report summarises the VCCA's overall enforcement actions in 2021. Notably, the VCCA received 130 merger notifications in 2021 – a remarkable increase from the number of 62 in 2020. Most filings have a local connection with Vietnam, with, however, around 30% of the notified transactions taking place outside Vietnam.

The 2021 annual report also sets out VCCA's key priorities in 2022, including properly establishing the National Competition Commission ("**NCC**") by the year end. Under the current Competition Law 2018, the VCCA would not be able to conduct formal investigations until the NCC is established, and for this reason the VCCA has only issued warnings and recommendations against anti-competitive conduct. The annual report further reveals that the VCCA will promulgate implementation guidelines and strengthen market supervision, especially with a focus on merger control filings with respect to acquisitions of sizable companies in key sectors in Vietnam.

CCCS grants conditional approval to commercial cooperation between airlines

On 10 May 2022, the Competition and Consumer Commission of Singapore ("**CCCS**") granted conditional approval over the proposed commercial cooperation between Singapore Airlines Limited and Malaysia Airlines Berhad. On 30 October 2019, the parties notified the CCCS of their Commercial Cooperation Framework Agreement, whereby they would seek to establish an alliance in respect of airline services between Singapore and Malaysia through a Joint Business Arrangement ("**JBA**"). Specifically, the proposed JBA involves coordination between the parties on pricing, inventory management and distribution, joint sales and marketing, and revenue-sharing, among others. The parties have claimed that the proposed JBA is expected to bring significant consumer and economic benefits and efficiencies, including enhanced air travel services, more competitive fares and potential scheduling benefits and time savings. However, the disruption caused by the pandemic has made it difficult for the CCCS to evaluate the forward-looking competition status in the airline service market and the JBA's potential implications. As such, the parties submitted commitments to the effect that the JBA would be implemented only during the recovery phase of the pandemic, subject to further review once the airline sector is recovered. With the commitments taken into account, the CCCS was of the view that the JBA would not amount to a monopoly agreement as prohibited by section 34 of the Competition Act.

HKCC announces significant senior appointments

On 29 April 2022, the Hong Kong Competition Commission ("**HKCC**") announced the re-appointment of Mr. Samuel Chan Ka-yan as the chairman of HKCC for a term of two years from 1 May 2022. Mr. Chan was first appointed as a member of the HKCC in 2016 and has served as the chairman since 2020.

Along with the re-appointment of its chairman, HKCC also re-appointed 12 incumbent members, and appointed three new members, including Professor Fong Yuk-fai (whose research focuses on management and strategy as well as economics), Ms. Sabrina Ho Shuk-ying (who is a practising barrister focusing on commerce, corporate and insurance laws) and Mr. Eric Xin Yue-sheng (a private equity veteran) for the same term of two years.

On 26 May 2022, HKCC announced the appointment of Mr. Mark Mills to the position of executive director (legal services). Prior to joining HKCC, Mr. Mills was a Senior Civil Servant and Deputy Legal Director at the Office of Gas and Electricity Markets in the UK.

HKCC proposes to renew shipping block exemption order

On 5 May 2022, HKCC announced that it proposed to renew the five-year block exemption order for vessel sharing agreements ("**VSAs**") between liner shipping companies, which will expire on 8 August 2022. VSAs are agreements between liner shipping companies who agree on operational terms for the provision of liner shipping services. HKCC had issued the Block Exemption Order for Vessel Sharing Agreements in August 2017 (the "**2017 Order**"), which declared that, in light of the economic efficiencies, activities undertaken pursuant to VSAs are excluded from the application of the First Conduct Rule which prohibits anti-competitive agreements, provided that the following conditions are met: (i) parties to a VSA have a combined market share of no more than 40%; and (ii) VSAs do not involve price fixing, limiting capacity or allocation of markets or customers. Given the economic uncertainties arising from the pandemic, HKCC now proposed to renew the Order for another four years for the sake of economic efficiencies. The consultation for this renewal proposal ended on 6 June 2022.

HKCC commences proceedings against air-conditioning contractors' bid-rigging before the Tribunal

On 16 June 2022, HKCC announced that it had brought two undertakings and three individuals before the Competition Tribunal ("**Tribunal**") for infringing the First Conduct Rule through bid-rigging. Specifically, Analogue group and Shun Hing group are air-conditioning contractors in Hong Kong. From 14 December 2015 to 4 December 2019, two senior engineers at Analogue and a senior manager at Shun Hing frequently discussed to agree on cover bidding and shared commercially sensitive information before responding to tender requests for air-conditioning contracting projects in Hong Kong. On this basis, HKCC found that the two competitors engaged in horizontal anti-competitive agreements in violation of the First Conduct Rule. HKCC also included three individuals in the proceedings for their involvement in the cartel. Additionally, HKCC also disclosed that it had identified other alleged anti-competitive conduct in the air-conditioning sector, and may commence further proceedings in the Tribunal in the near future.

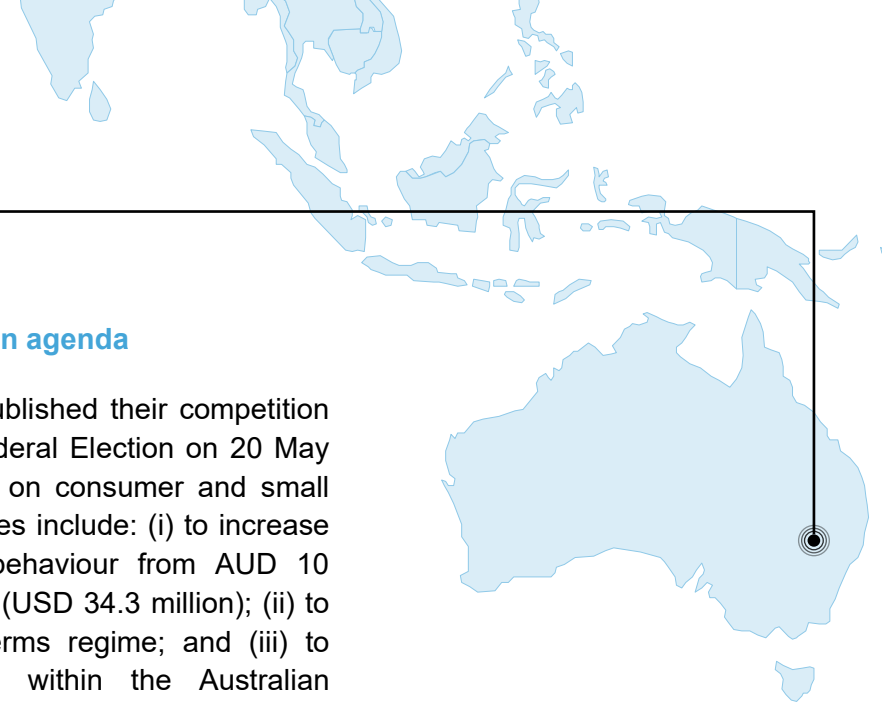
India

CCI investigates India's largest food delivery platforms for anti-competitive practices

On 4 April 2022, the Competition Commission of India ("**CCI**") initiated an investigation into Zomato and Swiggy, the two largest online food delivery platforms in India for potential anti-competitive agreements with their respective restaurant partners, following a complaint filed by the National Restaurants Association of India in July 2021. After preliminary review, CCI *prima facie* held that the two platforms may have violated India's Competition Act, 2013 ("**Competition Act**") by: (i) **preferential treatment** – Zomato and Swiggy each hold commercial interests in the concerned restaurant partners, which could give rise to conflicts of interest and may have incentivised Zomato and Swiggy to give preferential treatment to their affiliated restaurant partners; and (ii) **price parity** – Zomato and Swiggy also restricted their restaurant partners from offering lower prices or higher discounts on any competing platforms, which made it harder for new platforms to enter the market as they would not be able to attract new customers through more favourable pricing. CCI has launched a full-fledged investigation to verify its initial views, but no decision has been released yet.

Important amendments are introduced to the Indian foreign investment control rules

The existing Indian foreign investment control rules require any direct or indirect investment in an Indian target by investors from countries sharing land border with India ("**Neighbouring Countries**", including Mainland China, Hong Kong, Macau, and Taiwan) to seek prior approval from the federal government of India, irrespective of the level of interest being acquired by such foreign investors. In May and June 2022, amendments were introduced to the existing rules to impose closer scrutiny. Following the amendments, any person from Neighbouring Countries seeking to be a director of an Indian company shall be required to obtain security clearance from the Ministry of Home Affairs in India prior to appointment; furthermore, no offer or invitation of any securities (under private placement) can be made to a person from Neighbouring Countries unless prior approval is obtained. These amendments, which came into force on 1 June 2022, will undoubtedly add to Chinese investors' regulatory burdens when entering into transactions involving Indian elements.



Australia

New Australian Government's competition agenda

The recently elected Labor Government published their competition policy outline just before the Australian Federal Election on 20 May 2022. The policy indicates a strong focus on consumer and small business protections. Labor's main objectives include: (i) to increase maximum penalties for anti-competitive behaviour from AUD 10 million (USD 6.9 million) to AUD 50 million (USD 34.3 million); (ii) to effect changes to the Unfair Contract Terms regime; and (iii) to introduce a 'Super Complaint' function within the Australian Competition and Consumer Commission ("**ACCC**"). It has been indicated that under the "Super Complaint" function, consumer groups and business sector advocates will be able to enlist the competition regulator to investigate serious behaviour complaints. A similar function is currently available in the United Kingdom. While the Australian Treasurer is notionally responsible for competition policy, Dr Andrew Leigh has been appointed Assistant Minister – Competition, Charities and Treasury.

ACCC denies authorisation of patent settlement and licence agreement in draft determination

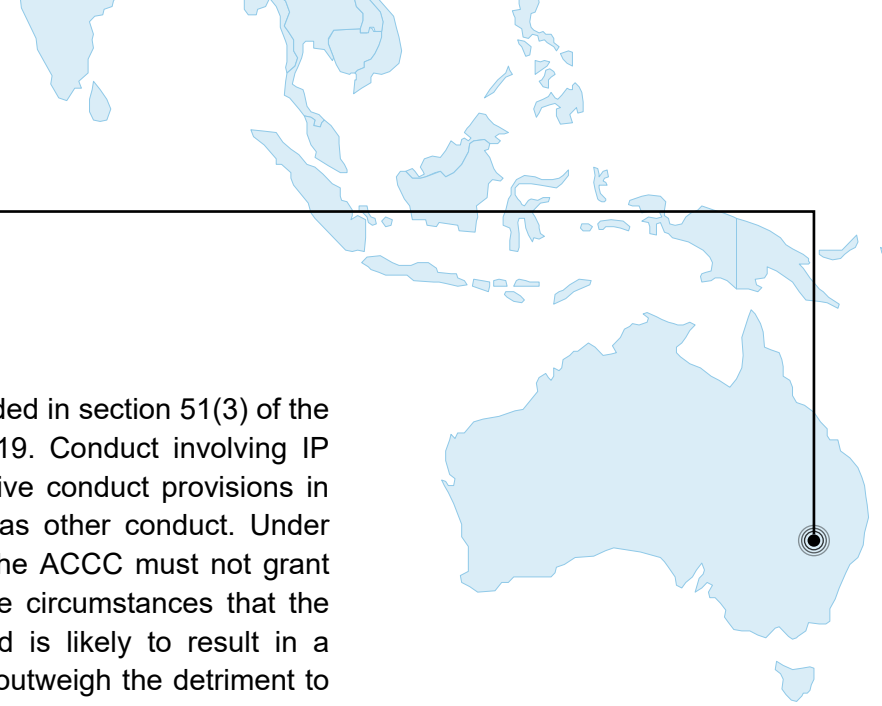
The authorisation application

On 23 March 2022, the ACCC issued its Draft Determination proposing to deny a December 2021 authorisation application (the "**Application**") brought by Swiss-based Celgene Corporation (and its Australian subsidiary), Australian-based Juno Pharmaceuticals Pty Ltd, and Indian-based Natco Pharma Ltd (the "**Applicants**") to give effect to a settlement and licence agreement (the "**Agreement**") in relation to cancer treatment pharmaceuticals. The Application seeks authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth)("**CCA**") for conduct that may make or give effect to a contract, arrangement or understanding that may contain a cartel provision per sections 45AF, 45AJ, 45AG and 45AK of the CCA.

The agreement in question

In summary, the Applicants submitted the Agreement's purpose and their proposed conduct as: (i) resolving pending legal proceedings between the Applicants; and (ii) allowing Juno / Natco to (a) bring their generic products to market from launch dates at least two months earlier than under any scenario involving Juno / Natco launching the products and before the relevant Celgene patents expire (i.e. "at risk" entry); (b) agree to not export the generic products; and (c) agree to not challenge Celgene's patents' validity. The Applicants claimed the Agreement is likely to give rise to a public benefit in the form of cost savings to the Australian Government (i.e. trigger a 25% price reduction under a Government scheme), greater supply security, and litigation cost savings.

Australia



Rationale for seeking authorisation

Intellectual property ("**IP**") exemptions provided in section 51(3) of the CCA were removed on 13 September 2019. Conduct involving IP rights are now subject to the anti-competitive conduct provisions in Part IV of the CCA in the same manner as other conduct. Under subsections 90(7) and 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the proposed conduct sought to be authorised is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the proposed conduct. Accordingly, a condition precedent of the Agreement was the ACCC's granting of an authorisation to protect against potential prosecution under CCA provisions prohibiting cartel conduct.

Reasons for the ACCC's draft determination

The following points were relevant to the ACCC's conclusion that the net public benefits were "uncertain, minimal, or unlikely to arise at all" and that it could not be satisfied of the extent and significance of the public detriment that would arise from the Agreement. The CCA does not define what constitutes public benefit or detriment, but the ACCC has been known to adopt a broad approach.

- *Public benefit* – Insufficient evidence of savings from relevant health authorities and as a result of the Agreement itself, as the Australian Government was still open to seek damages from Celgene to recover government scheme expenditure. No evidence of supply issues, in fact third parties suggested the proposed conduct could result in supply issues.

- *Public detriment* – Competitive tension would not be reduced as Celgene would have greater control over the timing of generic entry by Juno / Natco, allowing Celgene a 'first mover advantage' in respect of (i) imposing with conditions of entry (i.e. timing) on Juno / Natco lessening competition between the Applicants; and (ii) which may also affect the investment decisions of other generic manufacturers which could deter or delay their entry into the market at a cost to competition.

- *Limitations of evidence provided* – The ACCC considered it "exceptional and unusual" that the full details of the relevant counterfactual were unable to be made public and impacted the ability for interested third parties to make fully-informed submissions on it. As there were few internal documents provided, the ACCC was also unable to properly test propositions with the Applicants and market participants.

Next steps and takeaways

The ACCC's comments to date do indicate a toughening of the regulator's views against patent settlements seeking to restrict market participants. The ACCC's final determination is currently scheduled for 29 July 2022.

Australia

ACCC releases fourth report in Digital Platforms Services Inquiry

On 28 April 2022, the ACCC announced its fourth report in its Digital Platform Services Inquiry. In summary, the report examined whether online marketplaces are promoting fair and competitive markets for sellers and consumers. Four main online retail marketplaces were the focus of the report: Amazon Australia, Catch, eBay Australia and Kogan. The report did not find any of these online marketplaces to have reached a dominant position in Australia (unlike other jurisdictions), however the potential for the market to tip in the favour of a single dominant marketplace was identified. Many large Australian online retailers such as Target and David Jones were found to have larger sales than Amazon Australia and eBay Australia. The report has highlighted a range of concerns in respect of online retail marketplaces: (i) the use of algorithms to decide how products are ranked and displayed (including some marketplaces preferencing their own products); (ii) the collection and use of consumer data; (iii) a need for more consumer protections; and (iv) inadequate dispute resolution processors.

The ACCC also expressed concern with "hybrid" marketplaces, that sell their own products in competition with other third-party sellers that use their platform. As with other vertically integrated digital platforms, hybrid marketplaces face conflicts of interest and are incentivised to advantage their own products with particularly adverse effects for consumers and third parties. Similar concerns have also been raised by overseas regulators. The ACCC's fifth report in its Digital Platform Services Inquiry is to consider whether specific *ex-ante* rules should apply to digital platform markets and is due to the Federal Treasurer on 30 September 2022.

Australian regulatory group identifies digital platform transparency as 2022/2023 key priority

On 29 June 2022, the recently formed Digital Platform Regulators Forum ("**DP-REG**") announced its 2022/2023 agreed priorities. A key focus is addressing power and information asymmetries between digital platforms, users and use of personal information data, as well as the impacts of algorithm use, such as in profiling and product ranking on online marketplaces. DP-REG has foreshadowed it will seek to address existing transparency and accountability issues that are identified through potential regulatory or enforcement action brought by forum members. Ongoing coordination between DP-REG members is expected throughout 2022/2023 as they jointly engage with stakeholders, on submissions and advice to Government, also providing training and other capability building programs. The DP-REG is a recently formed Australian regulator group comprised of the ACCC, Australian Media and Communications Authority, eSafety Commissioner, and Office of the Australian Information Commissioner.

Australia

Australia's first ever criminal cartel case involving jail sentence

On 9 June 2022, the Federal Court of Australia made a judgment imposing criminal sactions on Vina Money and four indivisuals for price fixing. The accused operated separate money remittance businesses that offered the service of transferring money from Australia to Vietnam, and were found to have agreed to fix their foreign exchange rates when transferring money from Australia to Vietnam between 1 December 2011 and 31 October 2016, rather than openly competing on price. The factual circumstances underpinning the proceeding were discovered by Australian Crime Commission in 2014, who then referred the matter to the Australian Federal Police and ACCC for investigation which led to charges being laid in April 2019. According to the judgment, four of the five individuals are sentenced for imprisonment and Vina Money is fined for a sum of AUD 1 million (USD 685,000). The four were sentenced to terms of imprisonment varying from 9 months to 2.5 months, although all were immediately released on recognizance orders due to their previous good character and low risks of re-offending.

As noted in the ACCC's March 2022-23 Compliance and Enforcement Priorities statement, the ACCC will always prioritise cartel conduct causing detriment in Australia. In relation to international cartels, the ACCC's focus is on pursuing cartels that have a connection to, or cause detriment in Australia; specifically, cartels that involve Australians, Australian businesses or entities carrying on business in Australia.

CLIFFORD
CHANCE

REGIONAL CONTACTS

Beijing

Yong Bai
Partner, Head of Antitrust, Greater China
T +86 106535 2286
M +86 13910850420
E yong.bai @cliffordchance.com

Zibo Liu
Counsel
T +86 106535 4925
M +86 13910555340
E zibo.liu @cliffordchance.com

Sydney

Dave Poddar
Partner, Head of Antitrust, Asia Pacific
T +61 28922 8033
M +61 422800415
E dave.poddar @cliffordchance.com

Isabella Ledden
Associate
T +61 28922 8512
M +61 403197674
E isabella.ledden @cliffordchance.com

Tokyo

Masafumi Shikakura
Counsel, Head of Antitrust, Japan
T +81 (0)3 6632 6323
M +81 (0)80 1385 9808
E masafumi.shikakura @cliffordchance.com

Machiko Ishii
Qualified Lawyer
T +81 (0)3 6632 6415
M +81 (0)80 2087 7893
E machiko.ishii @cliffordchance.com

Clifford Chance, 33/F, China World Office 1, No. 1 Jianguomenwai Dajie, Chaoyang District, Beijing 100004, People's Republic Of China

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