

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



ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE

October to December 2023

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ANTITRUST IN CHINA AND ACROSS THE REGION

QUARTERLY UPDATE: OCTOBER TO DECEMBER 2023

INTRODUCTION

238 merger filings were reviewed and cleared by SAMR in the final quarter of 2023, reaching the record high for a single quarter. Put through an over 14-month review period in China, Broadcom's acquisition of VMware cleared its last merger control hurdle by obtaining SAMR's approval subject to a couple of behavioural conditions on 21 November. In addition, the long-overdue amendments to the Chinese merger filing thresholds saw substantial progress of receiving State Council approval in December but the final text of the new thresholds was not released yet. On the antitrust conduct front, SAMR and its local counterparts' efforts primarily went to quashing cartel in construction and real estate sectors as well as excessive pricing by, among others, a state-owned pharmaceutical company Shanghai Pharma, resulting in a total monetary penalty of RMB 1.22 billion (USD 171 million). By way of taking a softer stance in order to strike the right balance in antitrust enforcement, China rolled out a "three notices and one letter" system to give potential infringers sufficient room for correction. Conduct developments in the last quarter, however, might have been eclipsed by two private antitrust lawsuits concerning the "Big Tech" of the Chinese digital economy - Ant Group (an Alibaba affiliate) fended off a lawsuit brought by an individual who claimed that Ant Group abused its dominant position through limiting online shoppers' payment choices to Alipay. The victory, however, did not last as Alibaba lost dearly to JD.com owing the latter a compensation of RMB 1 billion (USD 141 million) in the other battlefield where JD.com sued Alibaba's online shopping platform (Taobao.com) to have abused dominance by imposing exclusivity requirements on vendors from 2017. Separately, Chinese antitrust enforcers started to examine potential antitrust concerns arising from the skyrocketing live-streaming industry.

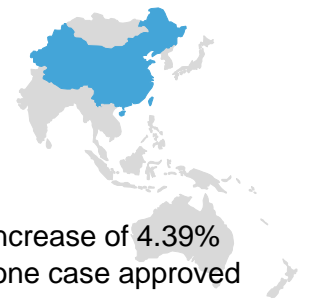
Outside China, there were no signs of abated antitrust scrutiny over the digital economy across the region: Japan commenced probe Google's potential abusive conduct in relation to its contractual terms with Android device producers; South Korea penalised Google and Apple and proposed antitrust regulations to rein in digital platforms; the Philippines released merger review guidelines for the digital sector; Hong Kong accepted commitments offered by two leading online food delivery platforms Foodpanda and Deliveroo; and Australia was in the process of reviewing digital platform regulation. Bid-rigging was hit most bitterly in the last quarter: Japan inspected five travel agencies for alleged bid-rigging; South Korea fined four manganese alloy manufacturers for bid-rigging; and Singapore dismissed an appeal against CCCS' financial penalty against bid-rigging. On legislation side, Australia continued to push for changes to merger control laws; New Zealand guided enterprises to collectively achieve sustainability goals without breaching competition rules; and India proposed draft regulations on a new leniency system to detect cartel more effectively.



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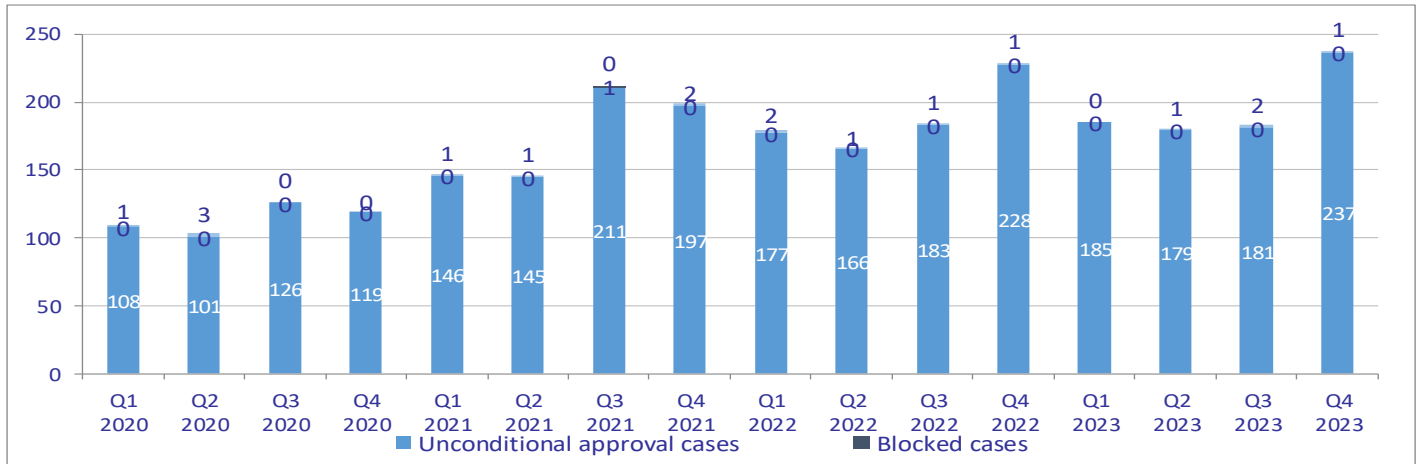


MERGER CONTROL

How many cases have there been?

There were in total 238 merger decisions released in the fourth quarter of 2023, an increase of 4.39% compared to the fourth quarter of 2022, with 237 cases unconditionally cleared and one case approved subject to conditions. 215 cases were notified under the simplified procedure, which represents 90.34% of the total cases reviewed in this quarter.

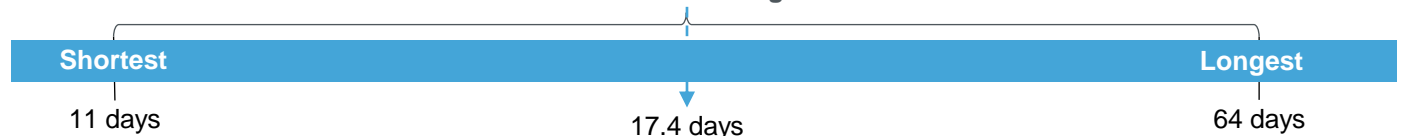
Merger control trends – Q1 2020 – Q4 2023



Simplified procedure: How quick is the review period?

Quarter	Average review period	Simplified procedure (%)	Cases exceeding 30 days
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	87.4%	2
Q3 2022	21.7 days	85.3%	2
Q4 2022	18.1 days	93.5%	2
Q1 2023	19.3 days	91.4%	4
Q2 2023	20.2 days	86.1%	6
Q3 2023	18.5 days	89.1%	2
Q4 2023	17.4 days	90.3%	5

Q4 2023: Average

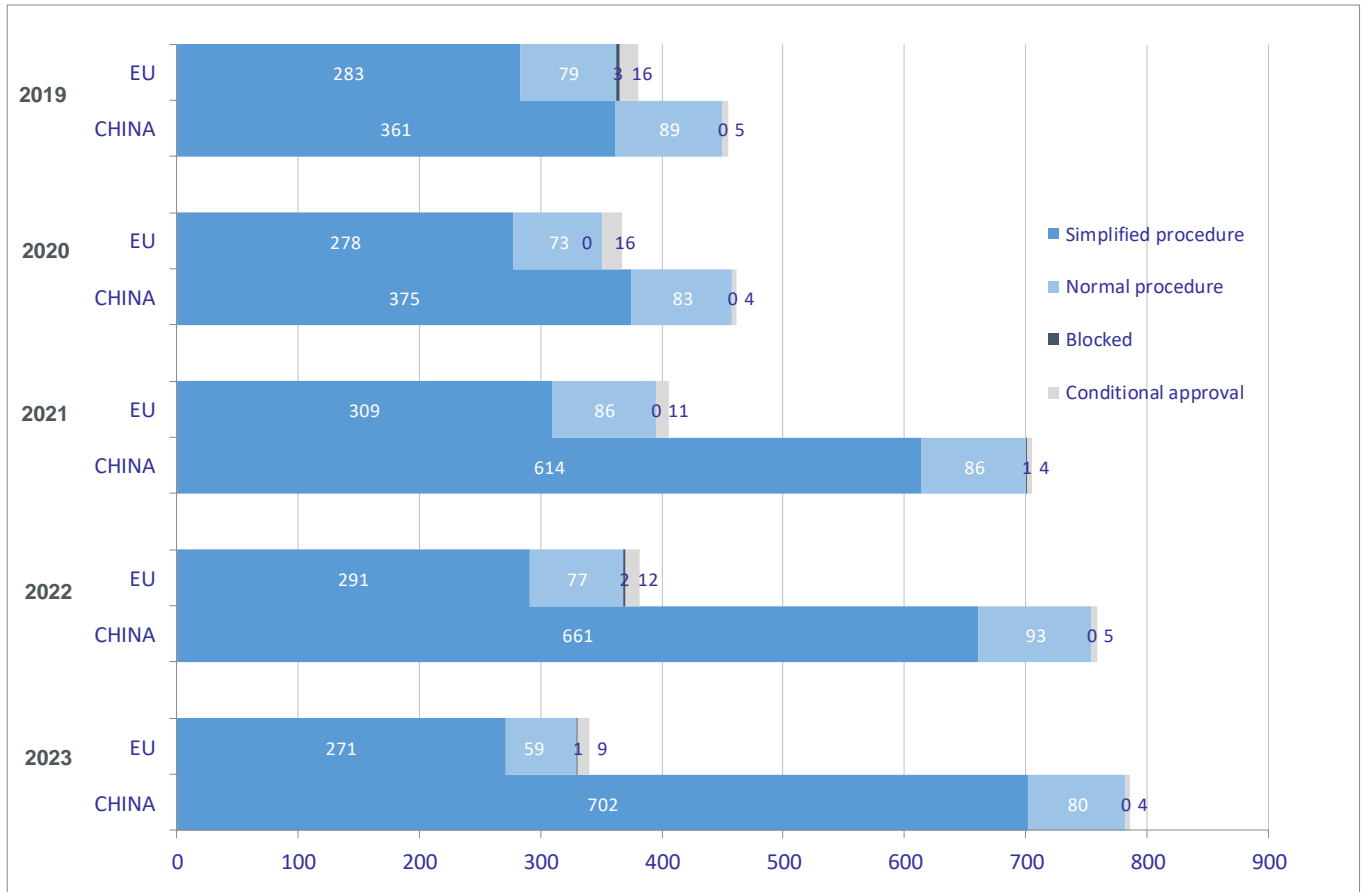




MERGER CONTROL

How does China compare internationally?

Comparison with EU – 2019 – 2023



SAMR conditionally approves Broadcom's acquisition of VMware

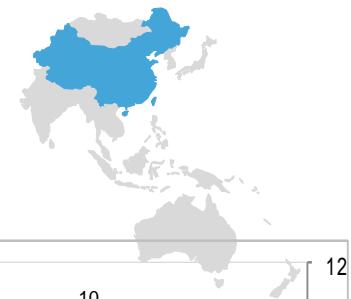
On 21 November 2023, the State Administration for Market Regulation ("**SAMR**") conditionally approved the acquisition by Broadcom Inc. ("**Broadcom**") of VMware Inc. ("**VMware**"), another high-profile case attracting global attention. SAMR identified potential competition concerns in the global and Chinese markets for: (i) *non-public cloud virtualisation software* of which VMware is considered an irreplaceable supplier on the market; (ii) *fibre channel adapters* of which there are only two suppliers on the market, where Broadcom is one of the two players and thus has a dominant position; (iii) *storage adapters* of which Broadcom is the biggest player and charges the highest price on the market; and (iv) *Ethernet network adapters of Broadcom that could be considered to have neighbouring relationships with VMware's non-public cloud virtualisation software*. SAMR's concerns mainly lie in the merged entity's potential incentives to engage in anti-competitive conduct, such as tie in VMware's non-public cloud virtualisation software with Broadcom's hardware products in order to reduce interoperability or refuse/delay certification of virtualisation software for non-Broadcom hardware suppliers; and VMware's potential unfair use of non-Broadcom suppliers' competitively sensitive information. To address these concerns, SAMR imposed a series of 10-year-term behavioural remedies that are aimed to ensure supply stability, interoperability, no tie-in sales or uncompetitive information exchange. Notably, SAMR took more than 14 months to greenlight this transaction, becoming the last of the 12 jurisdictions where this transaction was notified.



MERGER CONTROL

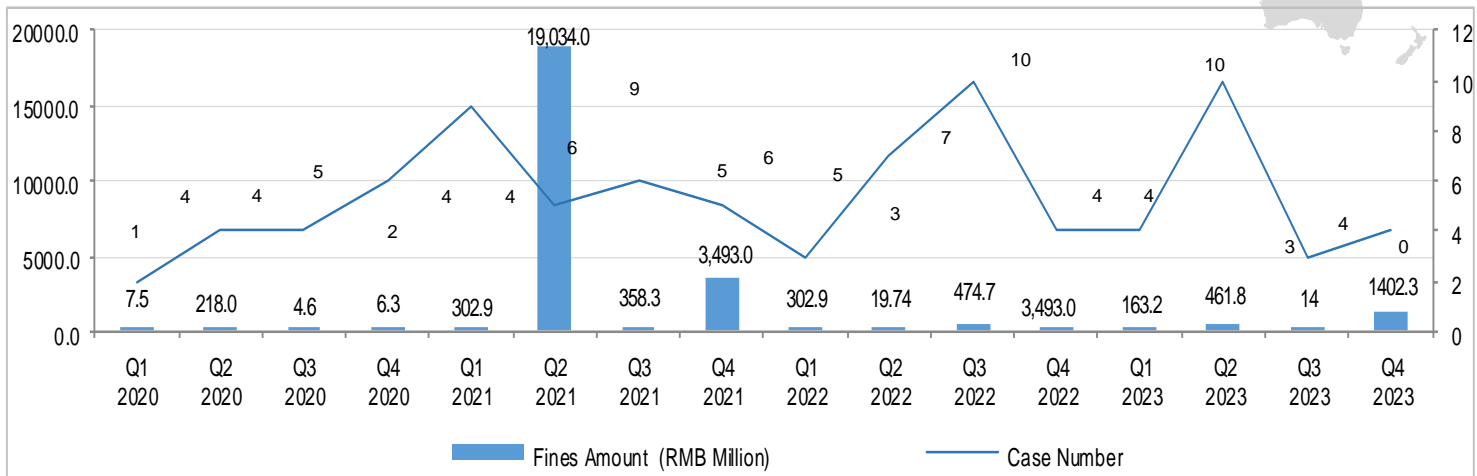
State Council approves draft regulations on Chinese merger filing thresholds

On 29 December 2023, it was announced that an executive meeting of the State Council approved the "Provisions of the State Council on the Criteria for Prior Notification of Concentration of Undertakings (Draft Revision)" in which the Chinese merger control thresholds are amended. In June 2022, SAMR published the consultation draft, raising the combined worldwide turnover test from RMB 10 billion (USD 1.49 billion) to RMB 12 billion (USD 1.79 billion), the combined Chinese turnover test from RMB 2 billion (USD 299 million) to RMB 4 billion (USD 598 million) and the individual Chinese turnover test from RMB 400 million (USD 59.8 million) to RMB 800 million (USD 119.6 million). The consultation draft in 2022 also introduced a new threshold which is considered to catch killer acquisitions by sizable Chinese companies. The full text of the approved regulation has not yet been publicised, and thus it is not certain whether the proposed thresholds in the consultation draft (as set out above) would be subject to further changes.



ANTITRUST INVESTIGATIONS

Enforcement trends – Q1 2020 to Q4 2023



Case	Date announced	Issue	Total fine (RMB '000)	Minimum (RMB '000)	Maximum (RMB '000)	% of Turnover	Leniency
Concrete Zhejiang AMR	9 November 2023	Price fixing; Market sharing; Output restriction	174,084	1,054	27,548	2%,5%	Yes
Pharmaceutical Shanghai AMR	22 December 2023	Abuse of dominance	1,219,342	7,440	689,090	3%,8%	Yes
Real Estate Appraisal Fujian AMR	8 December 2023	Organization of cartel	300	N/A	N/A	N/A	No
Gas Shanxi AMR	26 December 2023	Abuse of dominance	8,600	N/A	N/A	N/A	No

Zhejiang AMR penalises 21 concrete manufacturers for price fixing, market sharing and output restriction

On 9 November 2023, SAMR published a decision where the Zhejiang Administration for Market Regulation ("**Zhejiang AMR**") fined 21 concrete companies for price fixing, market sharing and output restriction. From mid-2016 to September 2018, the 21 companies colluded to collectively raise the price of commercial concrete, operate within their respective designated areas and align production following quotas assigned by two jointly funded sales firms. Found in violation of Article 13(1), Article 13(2) and Article 13(3) of the former AML, the 21 companies received an aggregate fine of approximately RMB 174.08 million (USD 23.9 million), with 11 leading companies receiving more severe penalties that amounted to 5% of their respective turnover in 2017. Noteworthy, Zhejiang AMR initiated the investigation following a judicial suggestion from a local court, which handed down a criminal verdict regarding the alleged forced dealing based on violence and threats relating to the same cartel. One of the companies claimed that Zhejiang AMR's decision was problematic as it had already received penalties as a result of the local court's judicial proceeding. Zhejiang AMR dismissed the challenge as anticompetitive conduct, when infringing criminal law, could be levied in addition to separate penalties under criminal law.



ANTITRUST INVESTIGATIONS

Shanghai AMR penalises four pharmaceutical companies for abuse of dominance through excessive pricing

On 22 December 2023, SAMR published a decision where the Shanghai Administration for Market Regulation ("**Shanghai AMR**") fined a wholly owned subsidiary of the state-owned Shanghai Pharmaceuticals ("**Shanghai No.1 Pharmaceutical**") and three other companies that are collectively controlled by two individuals (collectively the "**Huihai Entities**") for abusing their market dominant position through excessive pricing in the Chinese market for injection-use polymyxin B sulphate, an antibiotic used for treating infections of the urinary tract, meninges and bloodstream. Upon investigation, Shanghai AMR found that Shanghai No.1 Pharmaceutical was the sole producer of the downstream injection-use polymyxin B sulphate in China, and the Huihai Entities controlled the supply of the active pharmaceutical ingredients ("**APIs**") of polymyxin B sulphate in China through exclusive import arrangements with a Danish supplier, which was also financially incentivised not to directly supply the APIs to other Chinese companies. From December 2017 to June 2023, the four pharmaceutical companies colluded to raise the prices of polymyxin B sulphate by faking the invoice prices of the polymyxin B sulphate APIs and gradually increasing production costs. In determining the excessive pricing conduct, Shanghai AMR referred to the actual production costs and prices of polymyxin B sulphate in other overseas markets such as the US, India and Russia as benchmarks, and noted that the listed prices of polymyxin B sulphate in China were 157 – 339 times the actual production costs and 12 – 62 times of the prices of the same product sold in the US, Indian and Russian markets. Shanghai AMR concluded that the conduct violated Article 22(1) of the AML and penalised the four companies RMB 1,219,341,948.53 (USD 170,695,679) in total, including both fines (the equivalent of 3% of Shanghai No.1 Pharmaceutical's 2022 sales) and confiscation of illegal gains. The huge penalties once again demonstrate the focus of Chinese antitrust enforcement and that state-owned players are not exempted from antitrust scrutiny.

Fujian AMR penalises an industry association for coordinating cartel among real estate appraisal companies

On 8 December 2023, the Fujian Administration for Market Regulation ("**Fujian AMR**") published a decision where it fined the Fuzhou Real Estate Appraisal Association (the "**Association**") for facilitating a cartel among its member real estate appraisal companies. Upon investigation, Fujian AMR found that in November 2019, the Association coordinated the relevant appraisal companies to sign a "commitment letter", which set the real estate appraisal fee standards in Fuzhou and established the minimum discount rates and service fees for various real estate appraisal services in Fuzhou. In August 2020, the Association further issued guidelines to regulate its members' bidding behaviour and limit their price competition through the issuance of warnings, suspension of services and financial sanctions. Fujian AMR concluded that the Association violated Article 16 of the former AML for coordinating cartel and fined the Association RMB 300,000 (USD 41,969).



OTHER NEWS

[The Shanghai Intellectual Property Court rules in favour of Alibaba and Ant Group in a private antitrust litigation](#)

On 13 October 2023, the Shanghai Intellectual Property Court (the "**Court**") dismissed an antitrust lawsuit brought forth by an individual, who is a scholar familiar with anticompetitive conduct in the financial sector, against the Alibaba Group, its e-commerce platforms Taobao and T-mall, its financial offshoot Ant Group and affiliated mobile payment provider Alipay (together "**Defendants**"). Citing SAMR's 2021 penalty decision against Alibaba's "choose one from two" conduct as proof of dominance, the plaintiff accused the Defendants of abusing their collective market dominance by limiting consumers' choices of online payment services to Alipay, violating Articles 17(4) (exclusive dealing) and 17(5) (tie-in sales) of the former AML. The Court dismissed the claim that the Defendants forced customers to only transact with Alipay or implement tie-in sales as Alipay's online payment services should be deemed to be an integral part of Tmall/Taobao's online retail platforms. The Court further recognised the efficiencies and synergies arising from Tmall/Taobao's combination with Alipay. In addition, the Court found no evidence supporting the allegation that Tmall/Taobao excluded non-Alipay online payment service providers. The plaintiff has appealed the first instance decision, and in parallel has also brought other antitrust suits against Alipay and the wider Alibaba Group.

[Beijing High Court awards JD.com RMB 1 billion in its antitrust lawsuit against Alibaba](#)

On 29 December 2023, JD.com, the Chinese online shopping platform, announced that it had been awarded compensation of RMB 1 billion (USD 140.87 million) by the Beijing High People's Court (the "**Beijing High Court**") in the first-instance decision of its abuse of dominance claim against three Alibaba-affiliated defendants (collectively "**Alibaba**"). In its decision, the Beijing High Court concluded that Alibaba had abused its dominant market position by implementing the so-called "choosing one from two" policy (i.e. preventing brand merchants on the Alibaba platform from dealing with competing platforms including JD.com or participating in JD.com's promotional activities), thereby causing serious damage to JD.com. The legal battle originated in 2015 when JD.com first complained about Alibaba's behaviour to SAMR's predecessor and was brought to the Beijing High Court in 2017, followed by years of jurisdictional disputes until the Supreme People's Court confirmed the Beijing High Court's jurisdiction. This judgment is in line with SAMR's 2021 decision, which rendered a record penalty against Alibaba where the company received a fine of RMB 18.228 billion (USD 2.558 billion) for its "choosing one from two" conduct.

[Local AMRs publish antitrust compliance guidelines](#)

This quarter continues to witness enthusiasm of local Administration for Market Regulation ("**AMR**") in rolling out local-level antitrust compliance guidelines. On 30 October 2023, Liaoning AMR released *Antitrust Compliance Guidelines for Undertakings*, guiding local companies to set up comprehensive antitrust compliance mechanisms. On 31 October 2023, Shanghai AMR published the final version of the *Competition Compliance Assessment Guidelines for Internet Platform Enterprises*, aiming to provide antitrust guidance to internet platform companies on self-assessment and internal compliance. On 1 November 2023, Guangdong AMR released local guidelines with a special focus on the digital economy, outlining typical anti-competitive practices of online platforms. On 27 November 2023, Hubei AMR released local guidelines setting out the antitrust risks faced by platform companies and providing guidance on the establishment and operation of compliance management systems.



OTHER NEWS

Live-streaming e-commerce starts to draw antitrust attention

The booming live-streaming e-commerce industry in China has recently attracted antitrust scrutiny as some live streamers appear to have engaged in exclusive dealing and/or imposed most-favoured-nation ("MFN") restrictions. Over the Singles' Day shopping spree (the equivalent of Black Friday in the US) in November, Shanghai AMR looked into a popular live streamer's "price floor" agreement which allegedly excluded its vendors from selling on other live-streaming channels or offering lower prices thereon. Earlier on 30 October 2023, the Hangzhou Municipal Justice Bureau released *Draft Live-streaming E-commerce Industry Compliance*, which also explicitly prohibits "price floor" arrangements by live-streaming channels.

China establishes a “three notices and one letter” system for antitrust enforcement

On 6 December 2023, the General Office of Anti-monopoly and Anti-unfair Competition Commission of the State Council and SAMR jointly launched a “three notices and one letter” system to exemplify soft antitrust enforcement. This system includes one "Warning Letter", and three notices, namely "Regulatory Talk Notice", "Case Investigation Notice" and "Administrative Penalty Notice". A company may receive a Warning Letter if there is a risk of AML violation and if it fails to timely or fully implement the necessary corrective measures following the Warning Letter, and the antitrust enforcers may issue a Regulatory Talk Notice to call in legal representatives or responsible persons. A Regulatory Talk Notice also applies when potential AML violations cause media events or there are refusals to cooperate with investigations. The Case Investigation Notice and the Administrative Penalty Notice are not new concepts introduced this time, but will together exhibit a more flexible and softer approach to antitrust enforcement. Local antitrust authorities are required to formulate their own "three notices and one letter" systems.



Japan initiates investigation against Google for alleged antitrust breach

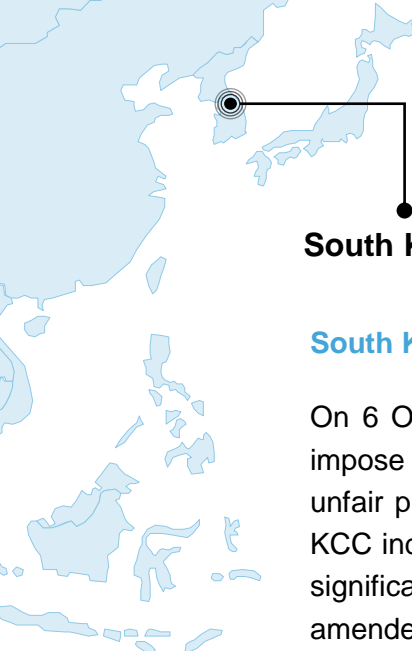
On 23 October, the JFTC announced that it has initiated an investigation against Google regarding its conduct such as contracting with Android smartphone manufacturers (i) forcing them to pre-install its apps (such as Google Search and Google Chrome) in order to allow their pre-installation of its other apps (such as Google Play) and directing them where to display those apps on the smartphone screen or (ii) (for those smartphone manufacturers who do not pre-install competitors' search apps) to distribute profits earned from search advertising, which are alleged breaches of the antitrust law. The JFTC sought information or comments from third parties such as related business operators and consumers in relation to this investigation. This is the first time the JFTC has sought information and comments from third parties in the early stage of an investigation.

Japan hosts the G7 Joint Competition Enforcers and Policy Makers Summit

On 8 November the JFTC and the Headquarters for Digital Market Competition announced that the G7 Joint Competition Enforcers and Policy Makers Summit ("**Summit**") was held in Tokyo, attended by heads of G7 competition authorities and policy makers. At the Summit, the following topics were discussed: (1) enforcers' priorities, challenges and approaches in digital markets; (2) recent updates on policy initiatives and frameworks in the digital competition field; (3) common issues and challenges in planning and implementing laws and regulatory tools in digital competition; and (4) how to tackle issues on Big Techs that expand their activities across markets. The G7 competition authorities and policymakers adopted the "Digital Competition Communiqué", which sets out the initiatives to promote and protect competition in digital markets and commitments to address competition concerns arising from emerging technologies such as generative AI.

Japan inspects five Japanese travel agencies for alleged bid-rigging

It was reported that on 15 November that the JFTC conducted on-site inspections against five travel agencies (JTB, Kinki Nippon Tourist, Tobu Top Tours, Meitetsu World Travel and Nippon Travel Agency) regarding alleged bid-rigging in relation to the transfer service for COVID-19 patients.



South Korea

South Korea penalises Google and Apple for unfair competition

On 6 October, the Korea Communications Commission ("**KCC**") announced that it would impose corrective measures and penalty surcharges on Google and Apple regarding their unfair practices, including forcing specific payment methods on app market operators. The KCC indicated that the enforcement of specific payment methods by Google and Apple is a significant concern because it has the potential to undermine the primary goal of the amended Telecommunications Business Act of September 2021, which is to promote fair competition in the app market. The KCC will make a final decision on an up to KRW 68 billion (approx. USD 50 million) penalty surcharge, including KRW 47.5 billion for Google and KRW 20.5 billion for Apple, after hearing opinions from business operators on the draft and going through the necessary processes.

South Korea fines nine steel spring wire manufacturers for price-fixing

On 18 October, the Korea Fair Trade Commission ("**KFTC**") imposed fines of KRW 54.9 billion (approx. USD 40.7 million) in total for the alleged price-fixing of steel spring wire between April 2016 and February 2022 on nine steel spring wire manufacturers.

South Korea conditionally approves Broadcom's acquisition of VMware

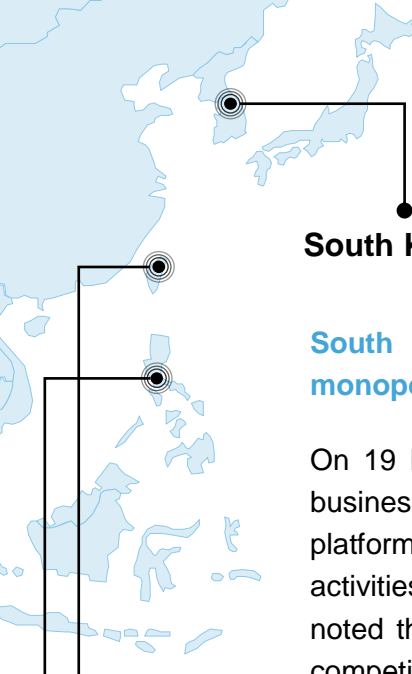
On 23 October, the KFTC conditionally approved Broadcom's proposed USD 69 billion cash and share acquisition of VMware. KFTC anticipated that the transaction may give rise to certain anti-competitive issues, such as excluding Marvell (Broadcom's only rival) and hindering newcomers from entering the market, resulting in price increases of products in the market for Fibre Channel Host-Bus Adapters ("**FC HBA**"), thereby restricting consumers' rights. The KFTC has requested the following in order to resolve antitrust concerns: (1) guarantee interoperability for competitors and new businesses for the next 10 years; (2) maintain interoperability with competitors at the same or higher levels; and (3) share source code and licences for Broadcom's FC HBA when asked by a third party for interoperability.

South Korea revises merger guidelines to review deals in the digital economy

On 15 November, the KFTC announced that it has revised its merger guidelines in a bid to review deals in the digital economy. It cannot be classified as a simple case if the target entity provides goods and services to over five million users per month or spends more than KRW 30 billion (approx. USD 23 million) on research and development annually.

South Korea fines four manganese alloy manufacturers for bid-rigging

On 13 December, the KFTC imposed a KRW 30.53 billion (approx. USD 23 million) fine in total on four manganese alloy manufacturers for the alleged bid-rigging of participation in 165 tenders floated by 10 domestic steelmakers to procure manganese alloy between December 2009 to June 2019.



South Korea

South Korea proposes to enact regulations to reduce platform businesses' monopolistic practices

On 19 December, the KFTC announced that it will enact regulations to reduce platform businesses' monopolistic practices. The regulation is expected to label a few large digital platform operators as "controlling" and prohibit them from carrying out certain unfair activities such as giving preferential treatment and preventing multi-homing. The KFTC noted that companies such as Kakao and Google have abused their dominance to drive competitors out of the market, and the regulation should ultimately aid in preventing unfair activities.

Taiwan

TFTC conditionally approves Taiwan Mobile's acquisition of Taiwan Star Telecom

On 12 October 2023, the Taiwan Fair Trade Commission (the "**TFTC**") announced its conditional approval of Taiwan Mobile's proposed acquisition of Taiwan Star Telecom. Given that the telecommunication service market in Taiwan is highly concentrated and the proposed acquisition will further reduce the number of operators, the TFTC imposed remedies on this transaction in order to protect consumers' interests and promote competition. The conditions imposed on Taiwan Mobile include maintaining its services to all existing consumers, providing preferential plans to disadvantaged groups and other users for a specified period, improving its service and network quality and reporting to the TFTC annually such improvements for five years post-transaction. The TFTC also requires Taiwan Mobile to serve different types of consumers fairly and without discrimination. Taiwan Mobile is also required not to modify its wholesale service terms, charge unreasonable prices without justification or enter into exclusivity arrangements.

Philippines

PCC releases guidelines on the review of mergers and acquisitions in digital markets

In October 2023, the Philippine Competition Commission (the "**PCC**") released the *Guidelines for the Motu Proprio Review of Mergers and Acquisitions in Digital Markets* (the "**Guidelines**") to provide more transparency and predictability regarding the PCC's power of *motu proprio* review of mergers and acquisitions ("**M&As**") in the digital market. The PCC may review M&A transactions either on its own initiative or upon notification from the transacting parties. The Guidelines list the types of transactions that may raise competition issues in the digital market and trigger a *motu proprio* review by the PCC, including transactions involving gatekeepers, data-centric operations and those that may significantly enhance network effects, etc. Parties involved in M&A transactions in the digital market are encouraged to assess whether their intended transaction falls under the above categories and, if necessary, to consult with the PCC before executing definitive agreements in order to seek legal certainty as to whether the PCC may take jurisdiction over a given transaction.



● Hong Kong

HKCC takes estate agencies' price-fixing cartel case to Competition Tribunal

On 14 November 2023, the Competition Commission of Hong Kong ("**HKCC**") commenced proceedings in the Competition Tribunal ("**Tribunal**") against Midland Realty International Limited, Hong Kong Property Services (Agency) Limited and Midland Holdings Limited (collectively "**Midland**") and five individuals (officials of the above-mentioned companies). The HKCC found that between December 2022 and March 2023, Midland and its competitors, Centaline Property Agency Limited and Ricacorp Properties Limited (collectively "**Centaline**"), agreed to fix the minimum net commission rate for the sale of new residential properties in Hong Kong at 2%, which effectively fixes or restricts the maximum level of rebate their frontline agents could offer to the purchasers of such properties. As rebate is an element that affects the price that a purchaser will ultimately pay for the relevant property, the HKCC believes that such arrangements amount to serious anticompetitive conduct in the form of price fixing, and/or exchange of competitively sensitive information, in contravention of the First Conduct Rule of the Competition Ordinance ("**Ordinance**"). In the course of the HKCC's investigation, Centaline submitted a leniency application under the HKCC's Leniency Policy for Undertakings Engaged in Cartel Conduct (Leniency Policy) to fully cooperate with the HKCC in exchange for the HKCC not to take any legal proceedings against Centaline and its officers or employees, and a leniency agreement was subsequently entered into between Centaline and the HKCC. The HKCC is seeking remedies before the Tribunal, including: (1) a declaration that Midland has contravened the First Conduct Rule, and each of the five individuals has been involved in the contravention; (2) an order for pecuniary penalties; (3) director disqualification orders for the five individuals; (4) orders for the payment of the HKCC's costs of investigation and proceedings; and (5) orders requiring Midland to adopt an effective compliance programme as the Tribunal considers appropriate.

HKCC publishes Annual Report 2022/2023

On 27 November 2023, the HKCC released its Annual Report 2022/2023, covering the period from 1 April 2022 to 31 March 2023. With respect to investigations, during the year, the HKCC received and processed 261 complaints. A total of 10 cases which warrant further assessment were escalated to the initial assessment phase. Where the HKCC has reasonable cause to suspect a contravention of a conduct rule, it will proceed to the investigation phase. During the period, the HKCC commenced investigations in five cases. Sectors most frequently involved in initial assessment and investigation cases are information technology and real estate & property management, etc. In terms of cases filed, the HKCC filed three new cases with the Tribunal during the year. The Annual Report also highlighted the HKCC's other enforcement, advisory, liaison and advocacy work over the past year.

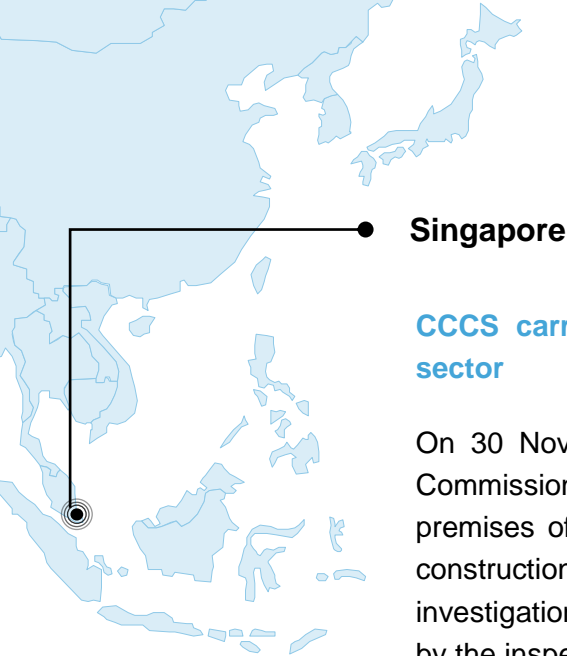


● Hong Kong

HKCC accepts commitments offered by Foodpanda and Deliveroo

On 29 December 2023, the HKCC announced the acceptance of commitments offered under section 60 of the Ordinance by two leading online food delivery platforms in Hong Kong, namely Delivery Hero Food Hong Kong Limited ("**Foodpanda**") and Deliveroo Hong Kong Limited ("**Deliveroo**"). The acceptance of the commitments will result in amendments to Foodpanda's and Deliveroo's respective agreements with their partnering restaurants, thereby addressing the HKCC's concerns about possible contravention of the First Conduct Rule under the Ordinance. In June 2023, the HKCC conducted a consultation ("**First Consultation**") on the proposed commitments offered by Deliveroo and Foodpanda. The commitments were proposed in response to the HKCC's earlier investigation, which had found that certain requirements imposed by Deliveroo and Foodpanda on their partnering restaurants may hinder entry and expansion by new and/or smaller platforms and/or soften competition in the market, potentially in contravention of the First Conduct Rule (for more details, please refer to our Asia-Pacific Quarterly Antitrust Briefing – Q2 2023). On 10 November 2023, the HKCC commenced a consultation on a newly proposed commitment ("**New Commitment**") offered by Deliveroo in September 2023. The New Commitment largely mirrored Deliveroo's proposed commitment that underwent the First Consultation, except for the key change of excluding restaurants partnering with Deliveroo under Profit Guarantee Terms or Outlet Expansion Terms from the scope of the New Commitment. Having carefully considered the representations received in both consultations, the HKCC concluded that it was appropriate to accept the commitments offered by Foodpanda and Deliveroo. Foodpanda and Deliveroo offered to make the necessary amendments to existing agreements and communicate the changes to partnering restaurants within 90 days after the commitments enter into force. In the meantime, Foodpanda's and Deliveroo's partnering restaurants are free to work with small food delivery platforms starting from 29 December 2023¹. The commitments came into effect on 29 December 2023 and will remain in force for a period of three years, with reporting mechanisms in place to ensure compliance. The acceptance of Foodpanda's and Deliveroo's commitments also marked the closure of the HKCC's investigation into the two platforms, and no proceedings will be filed with the Tribunal against them regarding the matters covered by the commitments.

1 In that regard, the HKCC has come to the conclusion that the online food delivery platform operated by Meituan, branded as KeeTa, does not qualify as a small platform since its market share at present exceeds 10% of the local online food delivery market. As a result, the commitments do not prevent Foodpanda and Deliveroo from requiring their partnering restaurants to refrain from partnering with KeeTa if exclusivity has been agreed between Foodpanda or Deliveroo and their respective partnering restaurants.



Singapore

CCCS carries out unannounced inspections in the building construction sector

On 30 November 2023, it was published that the Competition and Consumer Commission of Singapore ("**CCCS**") carried out unannounced inspections at the premises of certain businesses active in the market for the provision of building construction services in Singapore. Unannounced inspections are part of investigations into possible infringements of section 34 of the Competition Act 2004 by the inspected businesses, which prohibits, amongst other things, agreements or concerted practices that prevent, restrict or distort competition in Singapore. The

fact that the CCCS carries out such inspections does not mean that the businesses investigated have in fact infringed the Competition Act 2004; nor does it prejudice the outcome of the investigation. There is no legal timeline by which investigations into anti-competitive practices must be concluded. At the conclusion of the investigation and in case of infringement, the CCCS may issue such directions that it considers appropriate under section 69 of the Competition Act 2004, which may include the imposition of a financial penalty on the infringing business.

Competition Appeal Board dismisses water feature maintenance contractor's appeal against CCCS's financial penalty for bid-rigging

On 21 November 2023, the Competition Appeal Board ("**CAB**") published its decision dismissing the appeal by CU Water Services Pte. Ltd. ("**CU Water**") against the penalty of SGD 308,680 imposed by the CCCS for CU Water's bid-rigging conduct, which spanned close to a decade. The CCCS issued an infringement decision on 14 December 2020, where it found that CU Water engaged in a record 521 instances of bid-rigging in tenders for the provision of maintenance services for swimming pools, spas, fountains and water features. CU Water was involved with two other parties in a systemic pattern of requesting support quotations from one another, where the support quotation was intentionally priced higher to increase the requesting party's chances of winning the tender. The infringing conduct was a breach of section 34 of the Competition Act 2004 and affected at least 220 privately owned property developments in Singapore, including condominiums and hotels. The CCCS imposed the maximum allowable financial penalty on CU Water while lower penalties were imposed on the other two parties as they had, amongst other things, applied for leniency under the CCCS's Leniency Programme and participated in the CCCS's Fast Track procedure. Only CU Water appealed against the quantum of its financial penalty. The CAB noted the CCCS's shift in policy to consider higher penalties in respect of serious infringements such as bid-rigging and other cartel activity. The CAB also acknowledged the CCCS's discretion in determining an appropriate financial penalty on the facts of each case. The CAB cautioned that any future appellants must show how the CCCS's penalty calculation framework was flawed or applied erroneously, and that it is not sufficient to simply assert that the financial penalty was excessive.

Australia ●

In Q4 2023, the Australian Competition and Consumer Commission ("**ACCC**") continued to push for changes to merger control laws in Australia, with consultation on the Treasury's policy options currently underway. The Australian Federal Government also commenced review of stakeholder feedback on an Aviation Green Paper ("**Green Paper**") to help inform the development of the long-term policy direction for the aviation sector in Australia. In addition, with the Australian Federal Government expressing support in principle for the recommendations made by the ACCC as part of the ongoing Digital Platform Services Inquiry, digital platforms are expected to be subject to dedicated legislation in Australia.

The ACCC remained active in the merger review space. Notably, the ACCC opposed the proposed acquisition of Healius Limited ("**Healius**") by Australian Clinical Labs Limited ("**ACL**"). The ACCC also accepted a court-enforceable undertaking from Woolworths Group Limited ("**Woolworths**") and PETstock Pty Ltd ("**Petstock**") to resolve competition concerns which arose as a result of past Petstock acquisitions which had not been reviewed by the ACCC.

ACCC's proposed reforms and regulatory developments

Treasury consults on merger reforms

The ACCC believes that the merger review process in Australia is no longer fit for purpose, with merger rules being too permissive and favouring clearance. Specifically, the ACCC has raised concerns that the anti-competitive effects of certain acquisitions by large firms, including creeping or serial acquisitions, acquisitions of nascent competitors and expansions into relevant markets (including digital platforms), are not adequately addressed by current competition laws in Australia.

Against this backdrop, since March 2023 the ACCC has advocated for reform of Australia's merger laws in an attempt to move to a formal merger notification process to bring Australia in line with most OECD jurisdictions. The ACCC proposes and supports the implementation of a mandatory formal suspensory merger regime in which transactions above certain thresholds must be notified to the ACCC. Importantly, the ACCC's proposal includes a reversal of burden of proof whereby, to obtain clearance, parties would need to demonstrate and the ACCC would need to be positively satisfied that the merger was not likely to substantially lessen competition, or that the transaction has net public benefit. The ACCC's policy option also gives greater focus to the effect of a transaction on market structure by updating and modernising merger factors in section 50(3) of the Competition and Consumer Act 2010 (*Cth*).

On 20 November 2023, the Treasury released a consultation paper seeking feedback on three options for merger control going forward. Consultation on the proposed merger reforms is a step towards the most significant change proposed to Australian merger control laws in recent years, as it will inform the advice a Competition Taskforce, comprising competition law and economic experts, provides to the Australian Federal Government about the proposed changes.

Australia ●



The ACCC's proposal is being tested alongside two alternative policy options, including:

- a voluntary formal clearance regime similar to the voluntary clearance process that operated in Australia between 2007-17 and is currently utilised in New Zealand and the UK. Under this option, notified transactions would be suspended pending the ACCC's assessment and would include upfront notification requirements; and
- a mandatory notification and suspensory regime, broadly based on the judicial enforcement models adopted in the US and Canada.

Each policy proposal has a range of implications for transactions in Australia and should be carefully considered from both a commercial and regulatory perspective.

Stakeholders are encouraged to use the Treasury's consultation process to make submissions to the Competition Taskforce to voice their perspectives on the ACCC's proposal for reform by 19 January 2024. Interested parties may wish to consider the ACCC's preliminary views on policy options for merger control process published on 20 December 2023.

Reforms to Australian aviation industry on the horizon

Through a Green Paper, the Australian Federal Government sought input from interested parties and industry participants on a range of aviation matters, including capacity constraints at Sydney airport, the controversial issue of "slot hoarding" and airport market power. Following a three-month consultation, the Australian Federal Government is reviewing feedback received from 189 stakeholders, including the ACCC.

In its submission published on 21 December 2023, the ACCC reiterated that Australia's domestic airline industry is one of the most highly concentrated sectors in the country and outlined its views in relation to four key issues:

- **Slot allocation:** slot management at Sydney airport has become increasingly important for competition as improving access to Australia's busiest and key international gateway for new and expanding airlines will translate to better outcomes for consumers.
- **Airport market power:** as many airports in Australia are regional monopolies with significant market power, the ACCC view is that the Australian Federal Government should adjust the regulatory framework to address significant power imbalance between airports and airlines to provide greater protections against airport market power in negotiations.
- **Consumer protection:** to improve outcomes for consumers in terms of airfares, service reliability and customer service, the ACCC supports reforms to the consumer protection framework, notably the introduction of a targeted and fit-for-purpose compensation scheme in relation to delayed or cancelled flights (similar to the EU 261 Flight Compensation Regulation).



Australia ●

- **Net zero transition and greenwashing:** since greenwashing by airlines can undermine Australia's transition to net zero, the ACCC supports the development of robust frameworks that provide certainty to industry on investment decisions to reduce emissions in the sector and clarify responsibilities to support the transition to net zero.

The Green Paper marks an important step for the long-term policy direction for the aviation sector in Australia. A White Paper addressing that policy is expected to be released in mid-2024.

Digital platform regulation in Australia in the spotlight

Digital platform regulation in Australia is under review, with the possibility of significant reforms. Papers released in November 2023 by the Treasury, the Senate Committee and the ACCC highlight concerns about the anti-competitive effects of acquisitions by large firms, tech mergers, the business practices of major digital platforms and the challenges posed by digital platform providers.

The Australian Federal Government supports, in principle, recommendations made by the ACCC in its fifth interim report ("**Report**") as part of the ongoing Digital Platform Services Inquiry. In the Report, the ACCC made recommendations to address what it sees as the competition and consumer harms resulting from the continued expansion of digital platforms. Notably, the ACCC expressed concerns about invasive data collection methods and strategies leading to "consumer lock-in", where users might unwittingly agree to unfavourable terms and data collection practices.

With the Australian Federal Government welcoming the ACCC's recommendations, digital platforms are expected to be subject to dedicated legislation in Australia which will likely align with similar legislation in other jurisdictions, such as the Digital Markets Act and Digital Services Act in the European Union.

ACCC's merger review

Woolworths Group Limited proposed acquisition of PETstock Pty Ltd (pet products and services)

On 15 December 2022, Woolworths, Australia's largest retailer, announced it would acquire a 55% interest in Petstock for AUD 586 million. Petstock is Australia's second largest speciality pet retailer, with a broad range of pet products, rural supplies and pet services in-store and online. It operates under various retail banners, including PETstock, Best Friends, My Pet Warehouse, Pet City and PETstock Country. Woolworths and Petstock both supply pet food, pet accessories and pet health products in Australia. Woolworths stocks pet products at Woolworths supermarkets and in BIG W stores.

Shortly after the ACCC commenced its review of Woolworths' proposed acquisition of a majority interest in Petstock, it emerged that Petstock had completed a large number of acquisitions in the pet industry in recent years that had not been notified to the ACCC. In March 2023, the ACCC opened an enforcement investigation in relation to some of those previous acquisitions.

Australia ●



On 19 October 2023, Woolworths and Petstock each provided a court-enforceable undertaking to resolve the ACCC's concerns with the past acquisitions and to enable Woolworths to complete its proposed acquisition of a controlling interest in Petstock. As part of its undertaking, Petstock agreed to divest 41 speciality pet retail stores, 25 co-located veterinary hospitals, four brands and two online retail stores.

On 14 December 2023, the ACCC accepted court-enforceable undertakings offered by the merger parties and announced it would not oppose Woolworths' acquisition of a 55% controlling interest in Petstock. The ACCC noted that its market feedback indicated that speciality pet retail and grocery are distinct channels in the pet industry, and speciality pet retail stores have a very different product and service offering to supermarkets and discount department stores. The ACCC also concluded it was unlikely that Woolworths could leverage its retail position into the speciality pet industry in an anticompetitive way.

Under the current informal merger regime in Australia, there is no law requiring merger parties to notify the ACCC of proposed mergers and acquisitions or to wait for clearance before they can proceed. However, this transaction and the steps taken by the ACCC to address completed transactions highlights the increased importance of obtaining specialised competition law advice for mergers and acquisitions which may have an anticompetitive effect on a market in Australia.

Australian Clinical Labs Limited proposed acquisition of Healius Limited (pathology services)

As noted in our Q3 2023 briefing, on 20 July 2023, the ACCC published an SOI outlining significant preliminary competition concerns with ACL's unsolicited all-scrip reverse takeover offer for Healius. By combining ACL and Healius, ACL would have become the largest provider of community pathology services in every state and territory in which they both operate, with more than 50% of Approved Collection Centres ("**ACC**") across Australia.

On 3 October 2023, ACL offered a court-enforceable undertaking to the ACCC to address the preliminary competition concerns outlined in the ACCC's SOI. The proposed undertaking would have required ACL to divest 99 ACCs across Western Australia, Victoria and the Northern Territory. Notably, the proposed undertaking did not contain any divestments relating to other areas of concern identified by the ACCC in its SOI, namely:

- community pathology in New South Wales, Queensland and South Australia;
- public pathology in Victoria;
- private in-patient services; and
- veterinary pathology.

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

Australia ●

On 15 December 2023, the ACCC opposed the proposed transaction. The ACCC noted that a combined ACL and Healius may be able to raise prices and reduce services for private hospital services and large commercial pathology customers, due to the limited competition it would face. The ACCC considered the level of competition provided by other pathology providers, and considered that due to a range of barriers to entry and expansion (e.g. economies of scale in lab testing, courier networks and relationships with healthcare practitioners), it was unlikely that a new or existing provider could enter or expand in a timely way, or to scale sufficiently to address the loss of competition resulting from the proposed transaction.

Following the ACCC's opposition, the ACCC stated to ACL that it would be open to considering a revised remedy (divestment) package with respect to the proposed transaction. However, ACL has publicly stated that, due to Healius' declining trading performance since the merger was announced in April 2023, it has decided to withdraw its takeover offer for Healius.

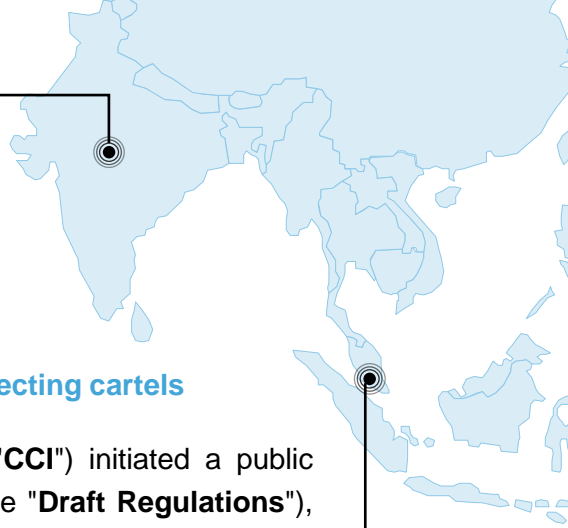
New Zealand ●

New Zealand Commerce Commission becomes the latest enforcer to publish guidelines for sustainability cooperation

In November 2023, the New Zealand Commerce Commission ("**NZCC**") issued guidelines to help businesses working together to pursue sustainability goals. The guidelines will assist businesses to understand how they can work collaboratively to address climate change without breaching New Zealand competition laws. The guidelines set out the factors the NZCC will consider when assessing collaboration between businesses for sustainability purposes, and provide practical examples to help organisations understand whether their initiatives are compatible with competition law.

The NZCC is the latest enforcer to follow what appears to be an emerging global regulatory trend. Notably, in 2023:

- Japan's Fair Trade Commission and the UK's Competition and Markets Authority issued sustainability-related guidelines;
- the European Commission adopted antitrust guidelines for sustainability agreements in agriculture; and
- the Competition and Consumer Commission of Singapore revealed plans to issue guidelines about how it will assess sustainability collaborations between competitors.



India

CCI proposes draft regulations on a new leniency system for detecting cartels

On 16 October 2023, the Competition Commission of India (the "**CCI**") initiated a public consultation on the Draft CCI (Lesser Penalty) Regulations 2023 (the "**Draft Regulations**"), the consultation period of which ended on 6 November 2023. The Draft Regulations, once enacted, will replace the incumbent regime which has been in place since 2009. The Draft Regulations introduce the conditions and procedures to implement the "lesser penalty" and "lesser penalty plus" mechanisms. Under the "lesser penalty" mechanism, a full reduction of penalty is provided to the first party to provide material evidence of a cartel, a reduction of up to 50% to the second party and a reduction of up to 30% to subsequent parties. The "lesser penalty plus" mechanism aims to incentivise leniency applicants involved in a cartel to disclose information on another unknown cartels by offering further penalty reductions. Under the "lesser penalty plus" mechanism, a previous leniency applicant who discloses vital information about another cartel may receive an up to 30% reduction of the penalty imposed on the first cartel and a full waiver of the fine levied against the newly disclosed cartel.

Malaysia

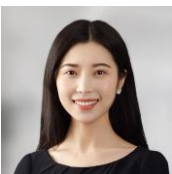
MyCC penalises five poultry feed companies for price fixing

On 22 December 2023, the Malaysia Competition Commission ("**MyCC**") imposed a total fine of MYR 415 million (USD 89.6 million) on five poultry feed companies for price fixing. Upon investigation, the MyCC found that from January 2020 to March 2022, these companies had engaged in price fixing and/or concerted practices to jointly raise the price of poultry feed in Malaysia through various meetings and communications, thereby distorting competition in the poultry feed market. The MyCC concluded that the five companies violated section 4 of the Competition Act 2010 (Act 712). In addition to the monetary fines, the MyCC also issued directives to these companies to (1) cease participation in the poultry feed cartel; (2) monthly report on poultry feed prices; (3) review and enhance compliance training programs; (4) implement compliance programs; and (5) include a provision in their respective Code of Conduct recognising Competition Law infringements as misconduct.

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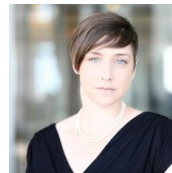
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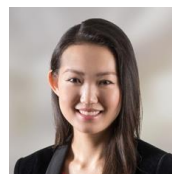
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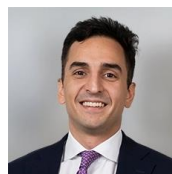
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