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Outpacing change

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Introduction

Welcome to the first edition of the Ashurst Competition Law Quarterly (CLQ) which focuses on key developments and enforcement cases across the Asia Pacific region.

The publication comprises key developments in competition law enforcement for the quarter ending 31 December 2023.

- In Australia, talks of merger reform are at the fore following the release of a consultation paper by the Australian Treasury. Amongst the reform measures, one of the options floated is to have a mandatory merger control regime;
- In China, cooperation between China's state, provincial and city market regulators coupled with a strengthened investigatory toolkit promulgated by earlier reforms to the Anti-Monopoly Law have seen an unprecedent number of investigations and enforcement actions for abuse of dominance conduct in the last quarter;
- Meanwhile, the Indonesian authority is looking to neighbouring regimes as they follow the trend of shifting focus and a push for law reform to address the imbalance of power and risks of anti-competitive conduct in digital markets;
- With a cost of living crises being felt in jurisdictions across the world, regulators are also increasing scrutiny across key consumer industries. In December 2023, the Malaysia authority imposed significant penalties on 5 companies for forming a price fixing cartel in the chicken feed market.

These reform and enforcement trends look set to continue in 2024.

The CLQ will continue to provide snapshots of the key developments as the year progresses.

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Australia

Australian government consults on potential reforms to Australia's merger control regime

On 20 November 2023, the Australian Treasury's Competition Taskforce released its consultation paper setting out potential options for reforms to Australia's merger regime (**Consultation Paper**).

The Consultation Paper seeks feedback on whether Australia's merger control regime is effective. Its focus is on reform options suggests changes to the current regime are likely.

Reform options

The reform options focus on changes to the

1. merger control process; and
2. merger test.

In relation to the merger control process, three options have been canvassed:

1. a voluntary suspensory clearance regime;
2. a mandatory suspensory regime; and
3. a mandatory formal clearance regime.

In relation to the merger test, three options have been canvassed:

1. modernising the factors that decision makers must consider when deciding whether mergers substantially lessen competition (**SLC**);
2. prohibiting mergers that entrench, materially increase or materially extend substantial market power; and
3. allowing consideration of related agreements.

Key implications of the ACCC's preferred model, if adopted

The Australian Competition and Consumer Commission's (**ACCC**) preferred reforms are reflected in option three of the merger control process and each of the merger control test options which are being considered by Treasury. If these reforms are enacted:

- More transactions are likely to need to be notified to the ACCC.
- More transactions are likely to be blocked by the ACCC as a result of the substantive test being enlarged to prohibit mergers that entrench, materially increase or materially extend market power.
- Merger parties will confront a more substantial upfront information burden when engaging with the ACCC (with implications for deal planning and timelines).
- The option to close a deal pending an ACCC review will be removed for those transactions which exceed the merger notification thresholds.
- The onus of proof will be changed under the ACCC clearance regime, requiring merging parties to demonstrate, on the balance of probabilities that a merger is unlikely to SLC. In contrast, under the current informal clearance regime, the ACCC needs to make a decision about whether to challenge or intervene to stop a merger, applying to the Federal Court to do so. In the Federal Court, the ACCC must prove that a transaction would be likely to SLC, to obtain an injunction to prevent the merger.
- Mergers that do not reach notification thresholds could still be "called in" by the ACCC, potentially undermining the desired certainty that comes with a mandatory suspensory regime and creating residual risk of regulatory intervention.

ACCC clears transaction on ESG grounds

On 10 October 2023, the Australian Competition and Consumer Commission (**ACCC**) authorised the proposed acquisition of Origin Energy Limited (**Origin**) by Brookfield LP and MidOcean (**Authorisation**).

Under Australian law, specifically the formal merger authorisation regime under sections 88 and 90 of the Competition and Consumer Act 2010 (Cth) (the CCA), the ACCC may authorise a transaction if "public benefits" outweigh any actual or likely detriment that would result from the transaction.

The ACCC found that the public benefits and public detriments arising from the transaction were "finely balanced". The ACCC's main concern was whether likely detriments resulting from the vertical integration of Brookfield's Victorian transmission network and Origin Energy Markets' generation interests (for example, if Brookfield, post-merger, would have the ability and incentive to operate its transmission network to benefit Origin Energy Markets' generation business), were outweighed by likely benefits to Australia's renewable energy transition.

Ultimately, the ACCC found that the public benefits outweighed the likely detriments – noting that the acquisition will likely result in an accelerated roll-out of renewable energy generation, leading to a more rapid reduction in Australia's greenhouse gas emissions.

In reaching this decision, the ACCC took into account behavioural undertakings offered by the parties (historically the ACCC has been reluctant to accept behavioural undertakings) focusing on separation and ring-fencing, as well as undertakings to increase the likelihood of the public benefits actually occurring.

The ACCC's clearance citing environmental and sustainability benefits is the first time in Australia (and likely globally) a merger has been cleared / authorised on ESG grounds. As industries transition away from fossil fuels towards greener alternatives, it is increasingly likely that merger parties will look to ESG arguments in future merger reviews.

China

China's anti-trust enforcers target abuse of administrative dominance with new investigatory powers

In December 2023, China's State Administration for Market Regulation (**SAMR**) announced that authorities at the city, provincial and national levels investigated 39 cases of abuse of administrative dominance. Article 39 of China's Anti-Monopoly Law (**AML**) prohibits administrative bodies or organisations empowered by a law or administrative regulation to administer public affairs from abusing their administrative power. Notably:

- the cases were focused on the following sectors: city management; health; construction and public utilities sectors;
- over a third concerned administrative bodies creating rules and regulations which prevented or restricted competition;
- the remaining investigations concerned administrative bodies engaging in bid rigging, entering into agreements that prevented new market entrants, and placing restrictions on the circulation of goods.
- These investigations follow amendments made to the AML throughout 2022 and 2023. The amendments, amongst other wider changes:
- redefined the definitions and circumstances in which abuse of administrative dominance occurs; and
- conferred upon authorities the power to conduct interviews with responsible individuals or their legal representatives if they suspect administrative bodies are abusing their power to restrict competition.

In 2023, a total of 17 enforcement interviews were undertaken. In addition, in October 2023, SAMR published its interview guidelines, which prescribes the specific steps and processes which must be followed in any exercise of the investigatory interview tool.

We can expect SAMR to continue to focus on the conduct of administrative bodies and their impact on competition in China in 2024.

Four pharmaceutical companies fined USD 171 million for abuse of dominance

In December 2023, Shanghai's Administration for Market Regulation (**AMR**) fined four pharmaceutical companies a total of CNY 1,219,341,948 (c. USD 171.8 million) for selling an injectable drug (Polymyxin B sulphate – an antibiotic used to treat infections) at unfairly high prices, in breach of the prohibition against an abuse of dominance.

According to the decision, Shanghai No.1 Biochemical & Pharmaceutical (**Shanghai B&P**) colluded with three other entities, Wuhan Huihai Pharmaceutical, Wuhan Kede Pharmaceutical and Hubei Minkang Pharmaceutical (together, the **Huihai Entities**) to set unfairly high prices with respect to the drug. The Huihai Entities controlled the supply of the active pharmaceutical ingredients required to produce the antibiotic drug in China and entered into agreements with Shanghai B&P for the production of the drug. Shanghai B&P was the sole producer of Polymyxin B sulphate in China.

The companies used their dominant market positions in the supply and production of market for injectable Polymyxin B sulphate to set unfairly high prices for the sale of Polymyxin B sulphate and shared profits in this regard. The Huihai Entities in particular, imported the active pharmaceutical ingredients required to produce the drug at just CNY 73 to 94 per gram but sold the ingredients to Shanghai B&P at inflated prices of between CNY 8,000 to CNY 35,000 per gram.

This case demonstrates the high-degree of communications and cooperation between China's state, provincial and city market regulators to achieve enforcement outcomes under China's AML. In addition, it highlights the severe financial penalties possible as a consequence of engaging in anti-competitive abuses of dominance.

Hong Kong

HKCC sues Hong Kong real estate agency Midland for price-fixing

The Hong Kong Competition Commission (**HKCC**) commenced proceedings on 14 November 2023 before the Hong Kong Competition Tribunal in relation to an alleged real estate cartel.

Proceedings were commenced against three related bodies corporate (together, **Midland**) and four individual directors of those entities. The HKCC is seeking pecuniary penalties for all defendants and disqualification orders against the individuals involved.

According to the HKCC, Midland allegedly engaged in price fixing by agreeing with a competing corporate group (**Centaline**) to fix a minimum net commission rate for the sale of new residential properties in Hong Kong, limiting the value of rebates that real estate agents could offer to potential purchasers. The net commission rate affects the commission paid by property developers to real estate agencies for the sale of new properties to buyers.

The alleged conduct came to the attention of the HKCC after it was reported in the media that the competing real estate agencies had, within a short time of each other, issued internal memoranda directing agents to observe the minimum net commission rate. During the course of the HKCC's investigation, Centaline applied for leniency under the HKCC's leniency policy, in exchange for substantially assisting the investigation.

Indonesia

ICC commences formal cartel investigation into lending firms

On 25 October 2023, the Indonesian Competition Commission (**ICC**) progressed a cartel conduct inquiry alleging price fixing by online lenders. The inquiry commenced after the ICC had conducted a market study of the sector and found that members of the Indonesian Joint Funding Fintech Association (**AFPI**) appeared to be colluding on fixing interest rates on consumer loans.

The ICC alleges that the AFPI, whose membership includes 89 fintech lenders and peer-to-peer (**P2P**) lending companies, agreed with members to set interest rates provided to consumers.

The AFPI has denied the allegations stating that it provided members with guidance on maximum interest rates to benefit consumers rather than as an attempt to undermine market competition. The AFPI noted that it had discussed the rates issue with the Financial Services Authority before providing guidance on rates to members.

The investigation continues on a closed door basis. The Investigation Task Force has sent written requests for data and documents to all P2P lending companies that have been licenced by the Financial Services Authority and has received responses from 48 P2P companies. In addition, ICC has requested information from the Chairman of AFPI, four lenders, and 17 P2P organizers.

This investigation demonstrates the risks inherent in participation in trade associations and the importance of competing parties which are members to such associations to remain vigilant of their obligations under competition laws.

ICC expresses support for increased regulation in digital markets

On 5 October 2023, the ICC Chairman (**Chairman**), Prof. M. Afif Hasbullah, met with the Minister of Cooperatives and SMEs (**Minister**), Teten Masduki, to discuss the need for a law regulating digital markets with the objective of levelling the playing field for Indonesian micro, small and medium businesses.

During the meeting, the Chairman expressed the view that there is an imbalance between firms' ability to compete in digital markets which has led to digital platforms holding stronger bargaining positions and the emergence of potentially unfair behaviour, such as abuse of dominant positions and monopolistic practices.

The Chairman considered that at least two factors contributed to the imbalance described as the "platform factor" and "international trade factor":

- "platform factor": digital platforms have the ability to use big data and artificial intelligence to develop targeted consumer advertising and large ecosystems merging several services in one platform or application;
- "international trade factor": the platform industry is highly concentrated which may enable platforms to engage in anticompetitive behaviours such as predatory pricing, tying, bundling, and self-preferencing.

The Chairman and Minister considered that current regulations were insufficient to address competition concerns in digital markets. The Minister invited the ICC to collaborate on reviewing a policy regulating the use of big data in digital markets, particularly with respect to the use of technology and algorithms, and the flow of goods.

Similar emphasis has been placed on competition in digital markets across APAC, and globally. For instance, the EU Digital Markets Act implemented ex ante regulation of digital platforms, with the regulations becoming effective in May 2023. Following suit in the APAC region, China introduced new provisions dealing specifically with abuse of dominant market positions in the digital sector. In late 2022 the Korean Fair Trade Commission established a new division focused on policy issues related to online platforms, along with a joint nine-step plan for improving competition in digital markets, together with other government regulators, which contemplates the introduction of a digital bill of rights. It has also updated its abuse of dominance guidelines to make specific reference to issues arising in digital markets. These shifts towards enhanced regulation of competition matters in digital markets have also been seen in Taiwan, India, Japan, Hong Kong, and Australia.

Malaysia

MyCC impose record penalty on chicken feed cartel

On 22 December 2023, the Malaysia Competition Commission (**MyCC**) issued its final decision against five companies for forming a price fixing "chicken feed cartel" in violation of section 4 of the Competition Act 2010 (**Act**).

The MyCC imposed MYR 415 million (c. USD 89.6 million) in cumulative penalties against the five poultry feed companies. This is the highest penalty imposed by the MyCC to date.

The decision followed an extensive investigation by the MyCC between November 2021 and June 2022. The MyCC carried out dawn raids, issued requests for information, and conducted in-depth analysis of data obtained during the course of the investigation. Notably, this case marked the first time the MyCC conducted simultaneous raids in five locations, illustrating the importance the regulator is currently placing on the investigative techniques involving a surprise element.

The investigation revealed that the five companies had engaged in anti-competitive agreements and collectively increased the price of certain chicken feed, causing distortions to the competitive process in the poultry feed market. Key evidence in support of the MyCC's case included suspicious price announcements, pricing patterns, and communications among the enterprises. There was also evidence that the companies had falsely represented that the increase in price of chicken feed was a result of increases in the price of raw materials.

In addition to the financial penalties, the MyCC issued directives requiring the parties to cease and desist the conduct, submit monthly reporting on poultry feed prices, review and enhance compliance training programs, and implement compliance programmes.

Following its decision, the MyCC has reaffirmed its commitment to the active monitoring of chicken industry activities in response to government subsidies and price controls effective from 1 November 2023. The MyCC investigation is significant for the poultry sector and serves as an important reminder to all market participants that cartel conduct will remain an enforcement priority for the competition regulator.

Federal Court dismisses MyCC's appeal to reinstate penalty against airlines

On 1 November 2023, the Federal Court of Malaysia dismissed the Malaysia Competition Commission's (**MyCC**) application to review an earlier decision by the Federal Court to refuse the competition regulator leave to pursue its appeal to reinstate fines imposed on the Malaysian Airlines (**MAS**) and AirAsia Bhd (**AirAsia**) for engaging in a prohibited market-sharing agreement.

This long-running litigation began in April 2014 when the MyCC found that AirAsia and MAS had entered into an anti-competitive market-sharing agreement. The MyCC imposed a fine of MYR 10 million (c. USD 2.1 million) on each airline.

In February 2016, the Competition Appeals Tribunal (**CAT**) set aside the MyCC's decision on the basis that the prohibition against market sharing had not been contravened. The MyCC appealed this decision to the High Court, which held that a collaboration agreement between the parties, in combination with evidence from board meetings, showed that the market-sharing agreement had "the object or effect of significantly preventing, restricting or distorting competition" in the air transport industry.

In April 2021, the Court of Appeal overturned the High Court's decision to uphold the fine on the basis that the MyCC did not have standing to apply for judicial review.
The Court of Appeal quashed the fine and re-instated the CAT's decision.

In setting aside MyCC's infringement decision, the Court of Appeal noted that the MyCC is a quasi-judicial body, and is not "a person who is adversely affected by the decision" within the meaning of Order 53 rule 2(4) of Rules of Court 2012 and hence, has no legal standing to apply for a review.

The MyCC unsuccessfully sought leave from the Federal Court to challenge the Court of Appeal's decision. In a final effort, the MyCC applied for review of the Federal Court's decision to refuse leave which, as mentioned above, the Federal Court dismissed on the basis that there was "not an iota of evidence" that its previous decision was tainted by a denial of natural justice.

The MyCC was ordered to pay costs of MYR 50,000 (c. USD 10,000) to each of MAS and AirAsia. The outcome is likely to have come as a disappointment for the MyCC. While further proceedings appear unlikely, however, MyCC chair, Iskandar Ismail, has been reported to say the competition regulator would seek law reform with a view to strengthen its appeal rights.

Competition Appeals Tribunal dismisses monopolist's appeal against abuse of dominance decision

In a recent decision the Malaysian Competition Appeals Tribunal (**CAT**) dismissed an appeal by Dagang Net to set aside an infringement decision by the MyCC finding that the Malaysian Government appointed service provider abused its dominant position.

In 2009, the Malaysian Government appointed Dagang Net, a privately owned company engaged in the development and provision of business-to-government transaction facilitating services, to be the sole-service provider to design, develop, operate and maintain the National Single Window (**NSW**) service in Malaysia.

The NSW services is an electronic based ecosystem that enables trade documentation to be transferred electronically between trading communities (also known as 'end-users, including manufacturers, importers, exporters, freight forwarders and shipping agents) and regulatory authorities.

In 2015, the Royal Malaysian Custom issued an RFP for the appointment of a new service provider to manage a new 'uCustoms' system, which would replace the NSW.

Following this announcement, Dagang Net imposed exclusivity clauses on a number of software providers that stipulated the vendor would not engage with the service provider appointed under the uCustoms system RFP to provide similar services to end-users.

In February 2021, the MyCC found that the exclusivity clauses were anti-competitive and constituted an abuse of dominant position in breach of section 10(1) of the Competition Act (the **Act**). Dagang Net was fined MYR 10,302,475.98 (c. USD 2,244,902.56) by the MyCC.

Dagang Net subsequently appealed the MyCC's infringement decision, raising several grounds of appeal including that the MyCC had erred in its definition of the relevant market and that it had failed to demonstrate that Dagang Net held a "dominant position" in the relevant market.

The CAT dismissed the appeal, noting that the effect of the exclusivity clause was to "kill competition". Notably, the CAT found that Dagang Net held a dominant position by virtue of its monopoly position, at the time, as the sole service-supplier to the Malaysian Government. The CAT also found that Dagang Net's conduct could not be exempted under section 10(3) of the Act because it failed to prove the introduction of the exclusivity clause was commercially justifiable.

Singapore

Regulator raids multiple businesses in the construction sector

On 30 November 2023, the Competition and Consumer Commission of Singapore (**CCCS**) reported that it had carried out unannounced inspections at the premises of a number of businesses operating in the market for the provision of construction services in Singapore. The inspections are a part of the CCCS's investigation into possible infringements of section 34 of the Competition Act (**Act**) which prohibits anti-competitive arrangements, including anti-competitive agreements or concerted practices.

The number of businesses subject to these inspections, and their identity, is not known. The CCCS issued a media release noting that the inspections do not indicate that the businesses being investigated have in fact infringed the Act. At the time of writing, the CCCS's investigation is ongoing.

The CCCS is well-versed in the use of its dawn raid powers. It recently conducted unannounced inspections at the premises of businesses in cases regarding: bid-rigging in tenders for maintenance services of swimming pools and other water features in 2020, exchange of commercially sensitive information between competing hotels in 2019, and price-fixing in the market for the supply of fresh chicken products in Singapore in 2018.

It is important that businesses appreciate the very real possibility of an unannounced inspection at their premises and have appropriate dawn raid protocols on hand to ensure staff are prepared should the CCCS come knocking.

CU Water's appeal against bid rigging penalty is dismissed

In December 2020, the Competition and Consumer Commission of Singapore (**CCCS**) issued an infringement decision against three water feature maintenance companies for infringing section 34 of the Act. The three businesses were found to have engaged in bid-rigging conduct relating to tenders called for the provision of maintenance services for swimming pools, spas, fountains and water features. Affected developments included condominiums and hotels in Singapore, including the Shangri-La.

The infringing conduct took place on multiple occasions between August 2008 and June 2017, with no less than 521 instances of bid-rigging which affected at least 220 privately-owned property developments in Singapore.

The CCCS imposed the maximum allowable financial penalty (ie, 10% of relevant turnover in the preceding year) on CU Water of SGD 308,680 (c. USD 233,924) while lower penalties were imposed on the other two businesses (as a result of their reliance on the CCCS Leniency Programme and Fast Track Procedure).

CU Water appealed against the quantum of its financial penalty. CU Water did not appeal against the CCCS's findings on liability.

On 15 November 2023, the Competition Appeal Board (**CAB**) published its decision to dismiss the appeal by CU Water.

The CAB noted that the maximum financial penalty imposed by CCCS was just and proportionate taking into account a range of factors including the number of infringements and the seriousness of the conduct.

Notably, the CAB affirmed the CCCS's penalty calculation framework and warned future appellants against simply asserting that the financial penalty imposed by the CCCS was excessive, instead they must show how the framework was flawed or applied erroneously.

Taiwan

Two medical oxygen suppliers fined for jointly raising prices

On 22 November 2023 the Taiwan Fair Trade Commission (**TFTC**) imposed administration fines totalling NT $1.1 million (c. USD 35,815) on two suppliers for jointly raising the prices of bottled gaseous medical oxygen in contravention of the prohibition against price-fixing. The TFTC opened an investigation into the matter after receiving reports from the public. After conducting an investigation into medical equipment shops, dealers and suppliers the TFTC found that two upstream suppliers, Taipei Oxygen and Gas Co. and Tai Da Gas Corp, jointly increased prices of bottled gaseous medical oxygen between August to October 2011. The similarity in prices could not be reasonably explained and the prices of the two operators had significantly exceeded the price increases of other suppliers.

This enforcement action is a reminder of how coordinated behaviour amongst competing firms (which can be observed by relevant stakeholders including consumers) can prompt complaints to regulators and ultimately reveal underlying anti-competitive conduct.

Manufacturer of blood glucose meters fined for resale price maintenance

On 11 October 2023 the Taiwan Fair Trade Commission (**TFTC**) imposed an administrative fine of NT $300,000 (c. USD 9,768) on Abbott Laboratories Services LLC Taiwan Branch (USA) (**Abbott Laboratories**) for restricting the resale prices of trading counterparts when marketing its Freestyles Freedom Lite blood glucose meters in violation of Article 19 of the Fair Trade Act (**FTA**) which prohibits resale price maintenance.

Abbott Laboratories' distribution contract stipulated a price list for blood glucose machines, blood glucose test strips, blood collection needles and other products used by diabetes patients. If the dealer failed to comply with the price list, Abbott Laboratories could terminate or cancel the contract. Abbott Laboratories also directly intervened where it received reports from other dealers about price disruptions in the blood glucose machine market.

In many jurisdictions resale price maintenance is strictly prohibited. However, pursuant to Article 19 of the FTA, while firms are prohibited from imposing restrictions on resale prices of goods to a third party an exception applies if there are justifiable reasons for doing so. Under Article 25 of the Enforcement Rules of the FTA "justifiable reasons" are assessed by taking into account factors such as the encouragement of downstream enterprises to enhance efficiency or pre-sale service quality, prevention of free-riding effects, promotion of entries of new businesses or brands and stimulation of competition between brands.

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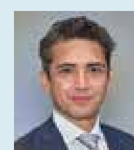

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