Competition law themes to look out for in 2021

A MULTIJURISDICTIONAL OUTLOOK – JANUARY 2021

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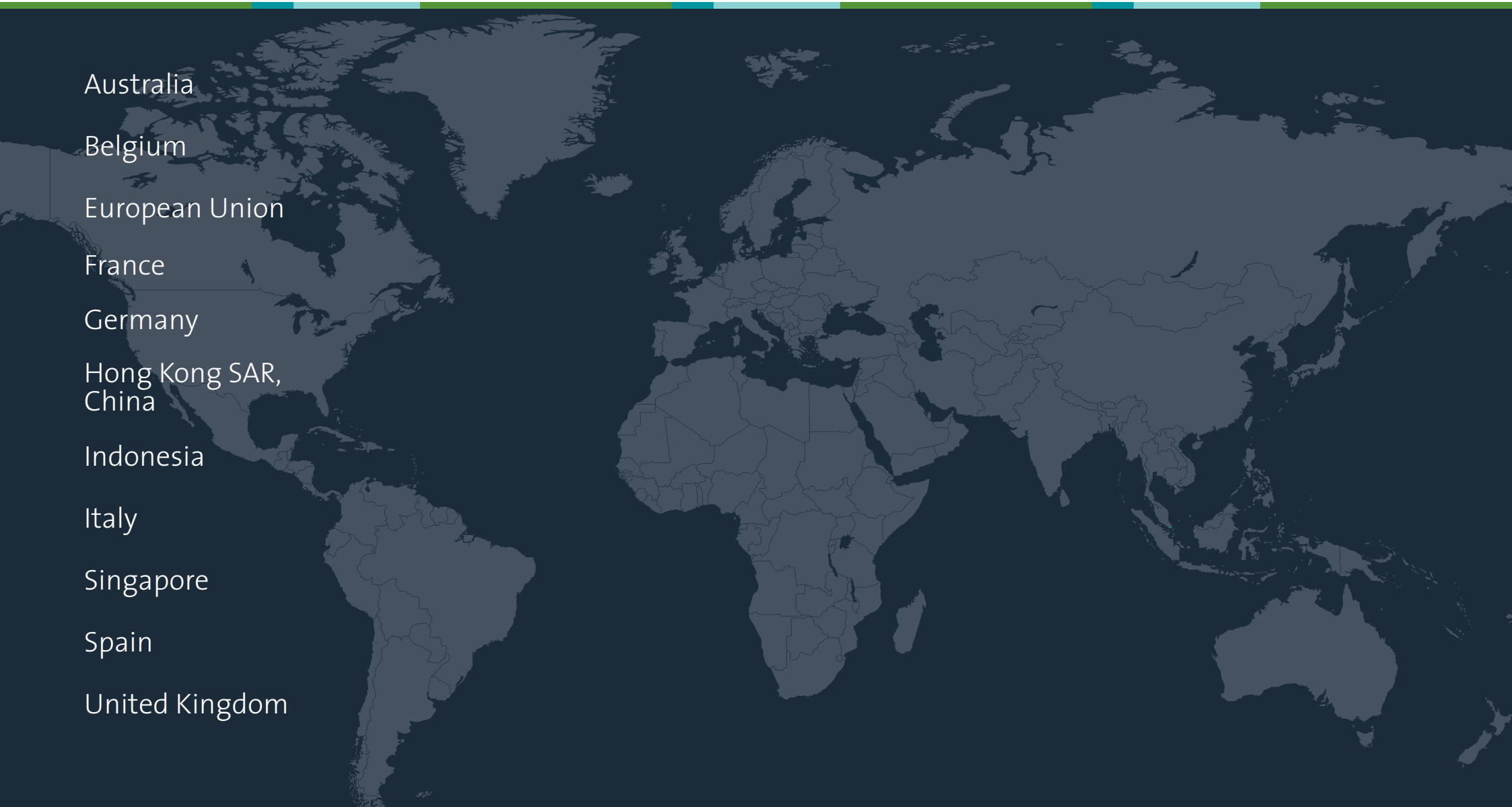

From the Editors

In this edition of the Ashurst competition law newsletter we set out what we consider to be some of the key themes to look out for in 2021 (you can find our 2020 outlook here) across a number of jurisdictions. Will your business be impacted by any of these developments?

Whilst there are some common themes across many of these regions, such as a focus on Big Tech and the digital economy, the continued impact of the COVID-19 pandemic on cooperation between competitors, the implementation of the ECN+ Directive (EU) No. 2019/1 into national law across EU Member States and developments in cartel damages claims, others are jurisdiction specific and range across a number of topics and sectors.

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^ BACK TO MAP

Australia

Continued focus on data and digital platforms and the wider digital economy

The Australian Competition and Consumer Commission's ("ACCC") Digital Platforms Branch, formed following the completion of the ACCC's landmark inquiry into Digital Platforms ("DPI") in 2019, will continue to monitor and report on, enforce and undertake competition and consumer protection inquiries in relation to digital platforms. The ACCC is due to complete its inquiry into Digital Advertising Services ("ad tech" services) this year, publishing a final report after August 2021. It will also issue its second Interim Report in the 5-year Digital Platform Services monitoring inquiry, focusing on mobile app marketplaces, after March 2021. The ACCC will announce the area of focus for the next interim report in this monitoring inquiry, which spans a broad range of digital services, including digital content aggregation platform services, media referral services, electronic marketplace services and data practices of digital platforms and data brokers. The ACCC will continue with the implementation of the Consumer Data Right ("CDR"), which gives consumers greater access to and control over their data, in the banking sector (where CDR is now live) and rollout in the energy sector, and eventually telecommunications. The ACCC has a significant role in the CDR regime, including enforcement, in line with its CDR compliance and enforcement policy. Several novel proceedings brought by the ACCC alleging consumer law breaches arising from business' privacy and data collection practices are due to be heard this year, and are likely to influence the ACCC's ongoing enforcement action in this area.

Competition and consumer protection in the energy industry

After another year of significant regulatory reform, including the commencement of new competition rules on electricity pricing, offering electricity derivative contracts and trading rules (formerly known as the "Big Stick" provisions), and further refinements to consumer rules on electricity pricing and marketing (including regulated default offers), the energy industry is expected to remain a priority area for the ACCC and the Australian Energy Regulator ("AER") (a constituent part of the ACCC). The ACCC has two ongoing investigations in relation to the Big Stick provisions, and the ongoing retail electricity and gas pricing market inquiries, which have already lead to ACCC investigations and enforcement, will ensure energy remains front of mind. The AER is also expected to continue the more aggressive enforcement approach that it adopted in 2020, including by increased use of infringement notices and a greater willingness to institute court proceedings. Retail pricing, the availability of domestic gas supply, diversity of energy generation and retail competition, and fairness in energy advertising and marketing continue to be hot topics in Australia, as well as how to manage the rapid increase of renewable energy generation in a system that was not designed for it. In addition, the unwinding of collaborative arrangements between energy industry participants that were authorised by the ACCC for a limited time to ensure secure and reliable energy supply and integrity of wholesale markets during the COVID-19 pandemic may also require careful attention.

First misuse of market power case to be heard

The ACCC's first case under the amended misuse of market power prohibition (which, since late 2017, prohibits a corporation with market power from engaging in conduct that has the purpose or likely effect of substantially lessening competition) is due to be heard in 2021. Enforcement of misuse of market power is an enduring priority for the ACCC, and the ACCC's Chairman has been vocal about the importance of tackling market power in the COVID-19 era, as Australia seeks to recover economically from the pandemic and deal with an ever growing digital economy.

Enforcement of criminal cartels

Further cooperation between the Commonwealth Department of Public Prosecutions and the ACCC is expected this year in relation to ongoing criminal cartel matters before the Courts and a number of criminal investigations that are likely to result in further prosecutions. The ACCC will pursue its stated aim of jailing cartelists to improve deterrence. The first contested criminal cartel matter, including against individuals, will be heard this year, as will a major civil cartel case. The criminal prosecution of several large, multinational banks will also continue in 2021. Conduct that does not meet the criminal standard will be pursued civilly, including for breach of the civil prohibitions on cartel conduct and concerted practices. The ACCC has indicated that it is close to commencing at least two 'competition cases' in the finance sector.

Advocacy for consumer and competition law reform

We expect the ACCC will continue to advocate for further reform of competition and consumer law in 2020, including making unfair contract terms illegal and subject to financial penalties, and introducing prohibitions against unfair trading practices and supplying unsafe goods. The ACCC has also called repeatedly for a debate on the strengthening of Australia's merger laws, and it is expected to put forward ideas for changes to the merger laws this year.

^ BACK TO MAP

Belgium

New rules on B2B relationships now in force

New rules on business-to-business ("B2B") relationships entered into force in Belgium in 2020 (see our summaries here and here), including rules on abuses of economic dependence (which have applied from 1 June 2020) and rules on abusive clauses in B2B contracts (which have been prohibited since 1 December 2020). The former rules are intended to tackle abusive practices (e.g. refusal to deal, imposition of unfair terms, abusive tying, etc.) by companies that are indispensable commercial partners for other companies (e.g. franchisers, retailers or major online platforms). These rules have already been applied once by a Belgian court in a case involving the abrupt termination of a distribution relationship without reasonable cause. After establishing the economic dependence of the retailer and the abusive nature of the contract's termination, the court imposed a cease-and-desist order and periodic penalty payments in order to force the supplier to resume supply. More cases may be brought before the Belgian courts in 2021 as companies become more familiar with the new rules. Moreover, the Observatory for Small and Medium Enterprises, within the Federal Ministry for the Economy, is reportedly closely monitoring the market for potential abuses. The new rules on abusive clauses in B2B contracts may also lead to more litigation. In this regard, the Belgian law sets out a 'black list' of clauses that are prohibited in all cases, and a 'grey list' of clauses that are generally presumed to be unlawful unless they can be justified. These new rules will require all companies to screen their existing contracts carefully to make sure they do not contain any problematic clauses, and otherwise to revise them.

More mergers to be dealt with under simplified procedure

In early 2020, the Belgian competition authority ("BCA") adopted new rules allowing its officials to scrutinise and approve more mergers under the simplified procedure (without the need for a decision by the Competition College, the BCA's decision-making body) (see our summary). These new rules may contribute to freeing up some of the BCA's scarce resources, which in recent years have been quite heavily focussed on merger control. This, along with additional recruitment expected in 2021, may mean that the BCA will have more staff to carry out antitrust investigations in future. However, the BCA has not carried out any new inspections during the COVID-19 pandemic, which may impact on its immediate antitrust pipeline.

Continued interest in the digital sector

The digital economy remains amongst the BCA's top priorities. The BCA is actively involved in discussions regarding the digital sector at European, Benelux and national level, and has given a number of formal opinions on the matter over the past year. The BCA also continues to monitor developments in digital markets closely and is likely to play a key role in the implementation of the new EU Digital Strategy, especially the EU Digital Services Act.

Renewal of the BCA's management

The BCA's senior management (including the President and the Prosecutor General) was due to be renewed in 2019. However, due to the political situation in Belgium (which until recently was under a caretaker government) and the subsequent COVID-19 pandemic, these appointments have been delayed and are now expected to be made in the course of 2021. The change in the BCA's senior management may come with a change of priorities, as the President, in particular, traditionally plays a key role defining the BCA's strategic focus.

BCA priority sectors likely to remain unchanged

In addition to digital markets, until the BCA's senior management is refreshed, its priority sectors are expected to remain the same in 2021, i.e. telecoms, retail distribution (and supplier relationships), pharmaceuticals, professional services and logistics.

^ BACK TO MAP

European Union

Changes to merger control enforcement in pursuit of 'killer acquisitions'

Following a September 2020 announcement, the European Commission is expected to adapt its current practice from mid-2021 by accepting Member State merger referrals which do not meet national thresholds. These changes are intended to address the "handful of mergers each year that could seriously affect competition", but evade the Commission's scrutiny due to low company turnover. The alternative solution, using transaction value thresholds, appears to now be off the table. In addition to adapting existing rules, the Commission is also due to publish the results of its public consultation on amendments to the notice on market definition, aimed at adapting the Commission's guidance to an "increasingly digital and interconnected" world. Despite these new tools, the Commission is likely to face greater obstacles to prohibiting transactions in 2021, following the General Court's ruling in CK Telecoms, which raised the burden of proof required to establish a significant impediment of effective competition.

Increased scrutiny of FDI and foreign subsidies

The COVID-19 crisis accelerated the already growing trend toward FDI screening across the EU, prompting Member States to introduce new rules to protect critical assets and technologies. The EU FDI information sharing mechanism went live in October 2020, which allows the Commission and Member States to submit non-binding opinions on FDI that is subject to national regulatory scrutiny. Its impact on deal timetables and the substantive assessment of FDI at a national level should become clear in the course of 2021. In keeping with the global trend toward greater protectionism, it is likely that 2021 will host fresh debates over the impact of foreign subsidies on the single market. The Commission is expected to follow up on its White Paper on foreign subsidies (a consultation concluded in September 2020), which included proposals for measures to detect and address the distortive effects of companies benefitting from foreign subsidies on the single market, and measures requiring beneficiaries of foreign subsidies to submit suspensive pre-closure notifications prior to acquiring EU companies, and to notify these contributions when submitting public tenders.

Greener and more sustainable competition law

Sustainability remains firmly on the agenda in 2021, as consensus has built around the role of competition policy in addressing climate change and environmental harm. The Commission will host a conference on the interaction between competition rules and sustainability goals in February, which will draw on numerous submissions from stakeholders responding to the Commission's call for contributions. Guidance on acceptable forms of cooperation in pursuit of sustainability policy objectives is currently limited, but the Commission is considering amendments to its Guidelines on Horizontal Cooperation in this respect. The Commission's comfort letter to Medicines for Europe in the context of the COVID-19 crisis suggests that it may also be willing to use comfort letters to provide guidance more broadly. With respect to merger control, comments from Chief Competition Economist Pierre Régibeau indicate that the Commission may seek to introduce new tools to analyse "out of market green efficiencies". The Commission is also expected to revise certain State aid instruments, including the Regional aid Guidelines, Environmental and Energy Guidelines and the General Block Exemption Regulation, to better support the objectives of the European Green Deal.

Continued scrutiny of Big Tech via new and traditional tools

The Commission will continue its enforcement activities in the digital sector, including testing some novel theories of harm, through its formal investigations into Amazon (Amazon Marketplace, in which a statement of objections has been issued, and Amazon Buy Box) and Apple (App Store Practices and Apple Pay). It is also investigating how Google and Facebook collect data and use it to generate advertising revenue. The Commission is developing new tools designed to deal with digital platforms. In particular, it has proposed a Digital Markets Act, which, if enacted, will impose unprecedented and far-reaching ex ante obligations on digital "gatekeepers", and will provide the Commission with extensive investigatory powers and the ability to impose fines and structural measures on these gatekeepers. 2021 is also expected to see the first results of the Commission's sector inquiry into the Internet of Things. As with the e-commerce sector inquiry, its findings could lead to further investigations in this area.

Review of the VBER and Vertical Guidelines

The Commission has launched a public consultation (open until 26 March 2021) into the impact of possible amendments to the Vertical Block Exemption Regulations and the Vertical Guidelines. Proposals include clarifications to the rules applicable to restrictions on the use of price comparison websites and online advertising restrictions, as well as the treatment of online platforms. The Commission is also considering possible amendments to the rules on dual distribution, active sales restrictions, indirect measures restricting online sales and parity obligations.

^ BACK TO MAP

France

The expected transposition of the ECN+ Directive

In December 2020, a law was passed authorizing the transposition of the ECN+ Directive by way of a Government ordinance. With the adoption of such text – which should occur in 2021 – the French Competition Authority ("FCA") will benefit from enhanced powers. The expected changes would, in particular, provide the FCA with a discretionary prosecution power, the ability to impose structural injunctions in anticompetitive practices cases and the ability to start interim measures proceedings on an ex officio basis. The maximum fine which can be imposed on trade associations, trade unions and professional bodies under French competition law will also be amended upwards (from the current €3 million limit, to up to 10% of the aggregate turnover of the members active on the affected market). In order to take into account all the upcoming changes, the FCA has already announced that it will revise its guidelines on the method of setting fines.

New merger control referral doctrine

In relation to merger control, the FCA recently stated its willingness to take advantage of the opportunity offered by the European Commission's new reading of Article 22 of Regulation 139/2004, according to which a national competition authority may request that the Commission examines any merger that does not have a European dimension but that would affect trade between Member States and would threaten to significantly affect competition within the territory of the Member State concerned, notwithstanding that it does not meet the national thresholds. This new approach is in line with the FCA's position, having called for such a change on several occasions in 2020, particularly in its new merger control guidelines adopted in July 2020. For 2021, the FCA has stated that it intends to participate actively alongside the Commission in the preparation of guidelines on this matter and to monitor the market in order to detect transactions that could be subject this referral procedure.

Continued focus on the digital sector

The digital economy remains amongst the FCA's top priorities for 2021. First, the study on the "impact of the digital revolution" in the financial sector (which was expected last year) should be published in the coming months. That study, to which the newly established Digital Economy Unit will contribute, will address, among other subjects: fintechs, the entry of internet giants into payment services and dematerialized financial services. The FCA will also seek to deal with digital issues by participating in discussion groups dedicated to sectoral regulation, as well as via its Digital Economy Unit, which will implement new monitoring tools. Finally, the FCA recently announced that two investigations related to intermediation services and massive data collection practices in the online advertising sector, initiated following an opinion issued by the FCA on that sector in 2018, should be completed in 2021.

Competition compliance

In December 2020, the FCA announced its willingness to promote companies' compliance initiatives. In that context, the FCA led a dedicated working group involving various stakeholders (i.e. company managers, professional bodies and experts) in the course of 2020. The conclusions reached from that work should be published in early 2021, and are expected to include recommendations for companies concerning, in particular, actions and tools to be implemented.

Trade associations, trade unions and professional bodies

In early 2021, the FCA will publish a study on the enforcement of competition law against trade associations, trade unions and professional bodies. The purpose of this study will be to identify existing practices and risks which might infringe competition law, and to promote compliance and a better application of competition law among their members. The FCA launched a consultation on this subject in 2019. In this context, it should be noted that the implementation of the ECN+ Directive will lead to an increase in the maximum fines that may be incurred by trade associations, trade unions and professional bodies under French competition law (see above).

^ BACK TO MAP

Germany

The 10th Amendment to the German Act against Restraints of Competition ("ARC")

The 10th Amendment to the ARC entered into force on 19 January 2021. It pursues two major objectives: to create a digital regulatory framework for competition; and to implement the ECN+ Directive into national law. The key changes concern various areas of competition law and include inter alia: codification of the German leniency programme; clarifying the criteria for calculating antitrust fines; introducing a rebuttable presumption in antitrust damages claims that the cartel has actually affected business transactions between a cartelist and third parties; increasing the first domestic merger control threshold from €25m to €50m and the second from €5m to €17.5m; implementing a new mechanism for the Federal Cartel Office ("FCO") to require under certain circumstances the notification of future transactions (even if the notification thresholds are not met) where it conducts a sector inquiry beforehand; introducing a formal procedure for the FCO to decide on the legal conformity of envisaged cooperation between competitors within six months; introducing the possibility to consider precautions to avoid and detect infringements as a mitigating factor in the future assessment of cartel fines; and revising what constitutes an abuse of dominance, in particular, in relation to the digital economy and technology companies (see below).

Digital economy and tech giants remain a top priority

The 10th Amendment to the ARC will give the FCO far-reaching powers to intervene against "companies with overwhelming importance for competition across multiple markets" (so-called "super-dominant companies"), the intended targets being digital giants like Google, Apple, Facebook and Amazon. In particular, the FCO will be able to prohibit the following conduct: granting preference to a company's own offerings over its competitors ("self-preferencing"); hindering third parties in their business activities on procurement or sales markets if the company's activities are important for access to these markets; using competitively sensitive data collected by the company to create or appreciably raise barriers to market entry; and impeding the interoperability of products or services or the portability of data. These tools are underpinned by a new shortened judicial review procedure. The FCO is currently investigating allegations that Amazon restricted the freedom of sellers using its marketplace to set prices, as well as possible harm to sellers due to Amazon's cooperation with brand manufacturers, and has also initiated abuse proceedings against Facebook in relation to the linkage of Oculus virtual reality products with the group's social network. The FCO may also conclude the implementation of its 2019 decision prohibiting Facebook from combining data from different sources, which has since been subject to various court proceedings. Finally, the FCO's President recently announced that it is preparing for further cases with the implementation of the 10th Amendment to the ARC and the new available tools.

Cartel damages litigation

German courts will be busy with damages claims pending in the truck cartel case. In particular, in 2020 the German Federal Court of Justice issued an important decision regarding the burden of proof for establishing damages as a result of the truck cartel, requiring greater assessment and substantiation of the facts of the case. From a procedural perspective, there are signs that the business model whereby litigation vehicles are assigned bundles of claims may face difficulties in Germany, following the Munich District Court's dismissal of a €600m claim brought by a litigation vehicle due to a lack of capacity to sue, because the underlying assignments (reflecting c. 3,200 companies and c. 85,000 trucks) were invalid. More recently, the US investor Transatlantis has filed a truck cartel damages claim of €62 million using a new "class action" model (reflecting c. 450 companies and c. 11,000 trucks). It remains to be seen whether this "class action" model, whereby the companies sell rather than assign their claims to the fund, will be accepted by the German courts.

Cartel prosecution

The FCO has stated that cartel prosecution remains a very important task. As the numbers of leniency applications decrease due to a rise in private damages proceedings, the FCO is exploring innovative investigation methods such as market screening. The FCO will also expand the range of possibilities offered by the anonymous digital whistle-blowing system.

Introduction of a Federal Competition Register

The FCO is launching a Federal Competition Register for Public Procurement, which will enable contracting authorities to verify, via a single electronic query, whether a company has committed relevant violations of law. This blacklisting approach is aimed at helping public authorities decide whether to exclude such companies from tenders for public contracts. It is therefore likely to have significant commercial implications and to prompt many companies to review the robustness of their existing compliance programmes. According to the FCO, the register will be made available in stages in the first quarter of 2021.

^ BACK TO MAP

Hong Kong SAR, China

Continued focus on cartel enforcement

In 2020, cartel enforcement remained the key focus for the Hong Kong Competition Commission ("Commission"). Proceedings were commenced in the Competition Tribunal ("Tribunal") by the Commission against textbook retailers for price fixing and market sharing; and a Tribunal decision was handed down against IT companies for exchanging future price-sensitive information. The Commission also: (i) issued its first infringement notice to an IT company (a summary enforcement mechanism whereby the Commission offers not to bring enforcement proceedings on condition that the recipient makes a commitment to comply with the requirements of the notice); and (ii) accepted voluntary commitments from online travel agent platforms concerning price parity clauses as well as from container terminals (in a separate case) concerning joint venture terms. The first ever pecuniary penalty decision (for cartel conduct amongst construction companies) was also handed down by the Tribunal in 2020. Going forward, we expect cartel enforcement (including the prosecution of individuals) to remain on the top of the Commission's list.

First abuse of substantial market power case

In December 2020, the Commission brought proceedings against a supplier of medical gas (Linde HKO Limited and Linde GmbH, collectively, "Linde") for allegedly abusing its substantial degree of market power in the medical gases supply market in Hong Kong. This is the Commission's first abuse of market power case (prior to this case, it had only enforced against horizontal conduct). Significantly, the Commission lodged proceedings against the General Manager of Linde for allegedly anticompetitive conduct. If the Commission is successful, pecuniary penalties could be imposed not only on Linde but also on the General Manager. The General Manager could also face disqualification orders. This case will be watched closely as the Commission's first abuse of substantial market power case, and will pave the way for more cases of this nature in the near future.

Leniency policies aimed at encouraging applications

In April 2020, the Commission revised its existing Leniency Policy for Undertakings Engaged in Cartel Conduct; and published a new Leniency Policy for Individuals Involved in Cartel Conduct. Major revisions to the existing policy include: (i) creating a distinction between applications for leniency depending on whether they are received before or after the Commission has opened an initial assessment or investigation; (ii) clarifying that the Commission will agree not to commence proceedings before the Tribunal against a successful leniency applicant (including not requiring leniency applicants to declare that they have contravened the Competition Ordinance); and (iii) a confirmation that a single ring-leader of a cartel will be disqualified from obtaining leniency. For the first time, the new policy extends the leniency programme to individuals. These policies are aimed at encouraging businesses and individuals to come forward with leniency applications.

COVID-19 outbreak statement

In March 2020, the Commission released a statement with regards to the application of the Competition Ordinance during the COVID-19 outbreak. In its statement, the Commission recognised the need for additional cooperation between businesses in certain industries on a temporary basis, particularly to maintain the supply of essential goods and services to consumers. Some examples of temporary cooperative measures include joint buying, joint production agreements and certain "sales related" joint ventures. Businesses who are planning to undertake temporary cooperative measures are encouraged to discuss the measures informally with the Commission – who would endeavour to handle such engagements within 5 working days of receiving all necessary information. Businesses who wish to collaborate under the terms of the statement will need to show that the temporary collaborative conduct is "genuinely necessitated" by the COVID-19 outbreak and in the interests of Hong Kong consumers and society. Going forward, collaborations and communications between competitors will continue to be scrutinised closely by the Commission.

^ BACK TO MAP

Indonesia

Sectors in focus

In 2021, the Indonesian Competition Commission ("ICC") will focus its enforcement efforts on the digital economy, health and infrastructure development. The ICC has reported that it intends to study and initiate investigations in the digital economy; and that investigations could involve major e-commerce companies in Indonesia and overseas. In relation to the health sector, the ICC has flagged that it is monitoring the distribution of the Sinovac vaccine in Indonesia. As in previous years, the ICC is likely to focus on horizontal conduct, including bid-rigging. In 2020, approximately 80% of all ICC cases involved bid-rigging.

New ICC Chairperson

In December 2020, the ICC appointed Kodrat Wibowo as its new chairperson. Mr Wibowo's term will end in April 2023. Mr Wibowo has extensive experience in microeconomics, statistics, econometrics, finance, public policy and development planning. He has a PhD from Oklahoma University; and served as the head of Economics and Development at Padjadjaran University (UNPAD). Other positions held include: (i) Chairperson of the Indonesian Bachelor of Economics Association, Bandung Coordinator of West Java Province; (ii) Deputy Chairperson of the Audit Committee of the UNPAD Trustee Council; and (iii) Deputy Director of the Independent Public Policy Institute. Mr Wibowo has indicated that his current priorities include staffing and looking into law enforcement reforms. Given Mr Wibowo's economics background, it is possible that the ICC will increase its focus on economic evidence under his leadership.

Impact of Omnibus Law on competition law

In November 2020, the Omnibus Law was enacted to boost investments and create more jobs in Indonesia. The Omnibus Law amends laws across multiple sectors of the economy, including Indonesia's competition law (Law No. 5 of 1999 on the Prohibition of Monopolistic and Unfair Business Competition Practices). Significant amendments to the competition law include: (i) removal of the cap for administrative fines (previously, fines for anticompetitive conduct were capped at a maximum of IDR 25 billion (c. USD 1.7 million)); (ii) increased criminal penalties for the obstruction of ICC investigations (i.e. imprisonment of up to 1 year, and criminal fines of up to IDR 5 billion (c. USD 350,000) may now be imposed); and (iii) appeals procedures (with regards to ICC decisions) will now be heard by the commercial court as opposed to the district court. We expect to see higher fines and more severe criminal penalties being imposed for anticompetitive conduct as a result of the changes made by the Omnibus Law.

Merger control guidelines

In October 2020, the ICC released the much anticipated Merger Control Guidelines ("Guidelines") for the purposes of clarifying certain thresholds pursuant to the merger control rules. Amongst other things, the Guidelines: (i) introduce a number of exemptions for specific types of asset transfers; (ii) clarify how asset values must be calculated; and (iii) introduce a simplified notification procedure for transactions that have limited impact on competition in Indonesia. Most significantly however, the Guidelines confirm that foreign to foreign transactions would need to be notified in Indonesia only if such transactions exceed the turnover/asset thresholds and "have an impact on the Indonesian market". Transactions are presumed to have an impact if one party directly or indirectly conducts business activities in Indonesia and the sister company of another party directly or indirectly conducts business activities in Indonesia ("double nexus criteria"). Although the Guidelines do not make this clear, the double nexus criteria suggests that at least two parties need to be active in Indonesia for the "impact" criteria to be met. Overall, while the Guidelines provide much needed clarity for specific types of asset transfers, questions remain about the types of foreign to foreign transactions that must be notified in Indonesia. This will continue to make global deal planning tricky in circumstances where parties are active in Indonesia.

^ BACK TO MAP

Italy

Anticompetitive agreements: post COVID-19 cartel enforcement

During 2021, sectors at risk of disruption to their supply chains may continue to take advantage of the favourable approach taken by the Italian Competition Authority ("AGCM") to cooperation between companies. The AGCM, together with other national competition authorities, and in line with the Temporary Framework Communication issued by the European Commission on 8 April 2020, provided guidance allowing the implementation of any necessary, temporary and proportionate measures to ensure the functioning of supply chains of essential goods and services, such as healthcare, pharmaceuticals and agri-food. These forms of temporary cooperation may be used until further notice by the AGCM. However, the AGCM has stressed that it will strictly enforce antitrust rules and that no form of concertation which exploits the crisis as a "cover up" for non-essential restrictions, such as price fixing or the exchange of commercially sensitive information, will be tolerated.

Likely increase in distressed acquisitions without prior notification to the AGCM

The unprecedented harm to the Italian economy caused by the COVID-19 pandemic may increase the opportunities for distressed acquisitions by stronger rivals, whilst the reduction of turnover in 2020 may increase the number of transactions that do not require prior notification to the AGCM. The Italian government has also adopted ad hoc provisions (art. 75 of Law Decree no. 104/2020) for transactions involving companies active in labour-intensive markets or providing services of general economic interest, which have registered three years of losses and are at risk of ceasing to trade due to the COVID-19 pandemic. Where such transactions require prior notification, the AGCM may only seek behavioural measures to prevent onerous prices or other contractual conditions being imposed on consumers as a result of the transaction, as was the case in the recent acquisition of postal operator Nexive by the Italian incumbent Poste Italiane.

Continued growth of foreign investments despite the broadened scope of the FDI regime

In April 2020 a new set of measures was adopted with the aim of broadening the scope of the national FDI regime in order to protect strategic sectors from the impact of COVID-19 and to avoid the risk that Italian companies become cheap takeover targets. The lack of implementing regulations clearly defining the expanded scope of the FDI regime has led to an exponential increase in filings of transactions involving foreign investors (more than 200 notifications between March and November 2020). The measures are planned to be in place until mid-2021, but a further extension cannot be excluded. Therefore, the trend of notifications (even if filed on a precautionary basis) will likely continue throughout the year, so as to avoid last-minute obstacles to closing. So far, buyers do not seem to be deterred from investing in Italy, in particular, given the remedies imposed by the government to date have been mild and the process does not have a significant impact on deal timetables.

Consumer protection: post COVID-19 enforcement

The COVID-19 pandemic has placed e-commerce in the spotlight and, as a result, the AGCM is expected to step up its enforcement of relevant consumer protection rules such as costs transparency, the right to cancel and receive a refund, and the application of surcharges depending on the payment type. The main search engines and browsers have been called upon by the AGCM to support this strict monitoring activity, especially in relation to the unauthorised online sale of COVID-19 drugs. Providers of online services bear civil liability for the content of the websites they host if they do not take immediate action to remove access to illegal content when asked to do so by an administrative authority.

Sectors to watch: telecoms and digital economy

The AGCM will likely remain focused on the telecoms sector and the digital economy. The AGCM is supporting the transition to 5G and broadband technologies through advocacy and advice to the government on how to tackle obstacles to the development of 5G. The AGCM is also carefully monitoring the sector for conduct that might hinder competition, as shown by the recent investigation of agreements for the roll out of broadband networks. The AGCM considers the development of telecoms infrastructure crucial for the growth of the digital economy and is aware of the need to redefine the criteria used to identify relevant markets, especially in light of the value to be attributed to Big Data. In 2021 various investigations concerning alleged abuses of dominance by online platforms will be decided and others may be opened. While the European Commission is considering new enforcement tools, the President of the AGCM has recently stated that the authority has several tools to tackle conduct by players with market power, including Article 102 TFEU, and the rules on abuse of economic dependence, which allow the AGCM to intervene in all business-to-business cases where a weaker party has been forced to accept unfair conditions to use certain online platforms. The AGCM is therefore expected to make an increased use of such tools in the future.

^ BACK TO MAP

Singapore

Focus on e-commerce platforms

In September 2020, the Competition and Consumer Commission of Singapore ("CCCS") issued the findings and recommendations of its market study on e-commerce platforms. The market study focused on e-commerce platforms operating in the region and identified potential competition and consumer issues which may arise from the proliferation of such platforms (especially platforms that compete in multiple market segments in Singapore). The CCCS concluded that while its competition framework was sufficiently robust to address major competition issues that may arise from such platforms; its competition guidelines needed to be updated to provide clarity on how the competition rules would apply in the digital space. For instance clarifications are needed pertaining to: (i) how markets should be defined for multi-sided platforms; (ii) how the control of data and self-preferencing impacts on assessments relating to market power and abuses of dominance; and (iii) in merger reviews, how parties that are important innovators should be assessed. The CCCS is currently conducting a public consultation on the proposed amendments to its guidelines arising from the e-commerce platforms market study. Conduct by e-commerce platforms is likely to remain in the spotlight in 2021.

Guidance note in response to COVID-19 pandemic

In July 2020, the CCCS issued a guidance note which sets out its approach to collaborations between competitors in response to the COVID-19 pandemic. The note states that the CCCS would, for the period February 2020 to July 2021, assume that certain collaborations which sustain or improve the supply of essential goods or services in Singapore would likely generate net economic benefits and are therefore unlikely to infringe the competition law (Competition Act (Cap. 50)) ("Permitted Collaborations"). The CCCS sets out different criteria for Permitted Collaborations which: (i) involve price-fixing, bid-rigging, market sharing or output limitation ("per se conduct"); or (ii) do not involve per se conduct. The term of the guidance note is likely to be extended given the effects of the COVID-19 pandemic are continuing; and the CCCS is likely to continue to apply the criteria for Permitted Collaborations narrowly.

Greater bid-rigging detection

There has been a focus on enforcing and detecting bid-rigging conduct in 2020 and this is likely to continue. In 2020, the CCCS imposed fines on contractors for the rigging of bids in relation to maintenance services for swimming pools and other water features; and in relation to building and maintenance works for park attractions (including the Singapore Zoo). Both of these cases were brought to the CCCS' attention by complainants. The CCCS is expected to take a more pro-active approach to detecting bid-rigging with the assistance of technological tools and data analytics. The CCCS has developed an in-house bid-rigging detection tool which scans tender data and shortlists tenders with a higher probability of bid-rigging. It is also collaborating with the Government Technology Agency to develop a text analytics tool to identify suspicious tender documents which could be indicative of bid-rigging.

Enforcing the consumer protection law

The CCCS took on the role as enforcer of consumer protection law in 2018 (under the Consumer Protection (Fair Trading) Act) and has since been an active enforcer of this law. In 2020, the CCCS took action in four consumer protection law cases involving misleading conduct. The cases involved the following unfair trade practices: (i) subscription traps (where an e-commerce retailer misled consumers into signing up for a recurring subscription); (ii) unsolicited and misleading services (where beauty services companies mislead consumers into purchasing services); (iii) misleading advertisements (where retail outlets misled consumers into believing that there were price benefits for certain products when in fact there were none); and (iv) false claims (where the operator of a travel website misled consumers through false claims contained in electronic direct mail to subscribers). In September 2020, the CCCS published Guidelines on Price Transparency setting out further guidance on how the CCCS interprets and gives effect to the consumer protection law. Enforcement of consumer protection law will likely continue to be a priority in 2021.

^ BACK TO MAP

Spain

Merger control: monitoring of compliance with commitments and focus on gun-jumping

The Spanish competition authority's ("CNMC") 2020 Action Plan (published in February 2020 but with a continuing impact in 2021) set out its intention to closely monitor compliance with commitments in merger decisions, and to investigate potential gun-jumping cases (through the CNMC's Economic Intelligence Unit ("EIU"), created in 2018). The first point is of note as the CNMC has recently approved several mergers subject to commitments (for example, Pigments/Negocio Ferro and Areas/Autogrill at Phase I, and Çimsa/Activos CEMEX at Phase II). The second point is a reminder of the obligation to notify mergers before completion and to comply with the stand-still obligation until clearance, as highlighted by the recent dawn raids of funeral and insurance companies for alleged gun-jumping (the first such dawn raids to be conducted in Spain).

Transposition of the ECN+ Directive and amendment of the Spanish Competition Act

The Spanish government is working on a draft amendment of the Spanish Competition Act ("SCA") to transpose the ECN+ Directive and to update the rules, including: (i) introducing an exemption to the turnover threshold where the parties to the merger do not have a 15% market share in the same relevant market and the notifying party does not have a market share exceeding 50% in any related market; (ii) in simplified merger procedures with prenotification, reducing the time to issue a decision at Phase I from one month to 15 working days; (iii) introducing settlements in antitrust investigations (currently, only commitments are available); (iv) extending the deadline to issue a decision in antitrust investigations from 18 to 24 months; and (iv) increasing the maximum fines for all infringements of articles 1 and 2 SCA (equivalent to Articles 101 and 102 TFEU) to 10% of global turnover (currently that percentage is only applicable to very serious infringements, such as cartels) and increasing the maximum fines on directors involved in antitrust infringements from €60,000 to €400,000.

Follow-on damages actions

The number of follow-on cartel damages claims has substantially increased in Spain since the implementation of the Damages Directive, and the courts are currently dealing with several such claims, many of them related to the European Commission's Trucks cartel decision. This trend is expected to continue in 2021, including potential follow-on cases in relation to the CNMC's milk cartel and envelopes cartel decisions. The Spanish courts typically award damages on the basis of an overcharge of around 5-15%, plus interest and costs. For this reason, the limited cost of claims, the swift procedure (a first-instance decision takes no more than 12 to 18 months), and the increasing experience of the Spanish courts, Spain is becoming an increasingly attractive jurisdiction for damages actions.

Focus on financial and energy sectors

Low profitability among Spanish banks is leading to an integration process, which is expected to increase merger control filings in 2021. In recent months, important mergers have been announced between large and medium banks (Bankia/Caixabank and Unicaja/Liberbank respectively), with more expected to come this year. The insurance market will also be affected by this new trend as insurance companies will be forced to renegotiate the terms of their "bancassurance" contracts (arrangements which allow insurance companies to sell their products to a bank's client base). In the energy sector, the CNMC will continue to closely monitor the behaviour of electricity and gas companies along the whole value chain in order to protect effective competition, as recently announced.

Keeping tabs on bid-rigging

Combatting bid-rigging will remain a top priority for the CNMC, as well as for the regional competition authorities, which often bring such infringements to the attention of the CNMC. This occurred in two recent decisions, Transporte Escolar de Viajeros Navarra and Radares Meteorológicos (see our summary). In both cases, the CNMC banned the infringing companies from participating in future public tenders, a particularly strong sanction that is increasingly commonly imposed by Spanish competition authorities. The CNMC also has ongoing investigations in several cases, including Conservación Carreteras, in which major operators are accused of coordinating their bids in tenders issued by the Ministry of Development regarding the National Highway Network, and Consultoras, an investigation into the provision of consulting services involving major firms such as KPMG, Deloitte and PwC. In addition, the CNMC is also focusing its efforts on detecting these anti-competitive practices on its own initiative through the EIU.

^ BACK TO MAP

United Kingdom

Reform of the UK competition rules?

The UK left the EU on 31 January 2020, and on 24 December 2020, shortly before the expiry of the Transition Agreement, the EU and UK reached a Trade and Cooperation Agreement ("TCA"), which has been provisionally applied as of 1 January 2021. Our Quickguide provides a summary of the TCA's provisions on anticompetitive conduct, mergers, subsidy control and public procurement and the key implications for businesses. There have been no substantive changes to either the UK merger control or anti-trust enforcement regimes from 1 January 2021 as a result of Brexit. However, new EU case law is not binding on the UK courts and competition authorities, and they may also depart from pre-2021 EU case law where it is considered appropriate to do so in light of relevant circumstances (for example, differences in UK and EU law prior to Brexit, differences between EU and UK markets, developments in the form of economic activity, generally accepted principles of competition analysis, and developments in EU case law). The application of the UK's competition rules (set out in Chapters 1 and 2 of the Competition Act 1998) may therefore begin to diverge from Articles 101 and 102 TFEU over time. Legislative reforms to the UK rules may also be introduced in due course: the UK Competition and Markets Authority ("CMA") is advocating legislative reform to bring about stronger, swifter and more flexible competition and consumer protection regimes, and a review of UK competition policy by John Penrose MP is due to be published shortly.

Digital markets: new regime to regulate tech giants

Following the findings of the Furman Review, and the CMA's market study into online platforms and digital advertising, in December 2020 the CMA's Digital Markets Taskforce published proposals for new regulation of technology firms designated as having "strategic market status", including imposing a legally binding code of conduct, pro-competitive interventions and enhanced merger control rules. A dedicated Digital Markets Unit ("DMU") will be set up within the CMA to oversee the regime. The Government has committed to consulting on the form and function of the DMU in early 2021 and to legislate as soon as parliamentary time allows. Under the new regime, the DMU could be given ex ante powers to suspend, block and reverse decisions by platforms like Google and Facebook, to order them to take certain actions to achieve compliance with the code, and to impose financial penalties for non-compliance. See our previous summary.

New National Security and Investment regime

The National Security and Investment Bill was introduced to Parliament in November 2020 and is expected to become law in the first half of 2021. It will significantly strengthen the UK Government's powers to investigate and potentially prohibit transactions on national security grounds. The Bill contains a mandatory notification regime, backed up by criminal sanctions, for transactions in sectors thought most likely to raise national security concerns, and a voluntary notification process (underpinned by a "call-in" power) for other transactions that may affect UK national security interests. 17 sectors have been identified as potentially raising national security concerns, but the precise scope of the activities within these sectors that will be covered by the Bill are still to be clarified following a consultation process. The Government envisages around 1,000-1,830 mandatory notifications being made each year, with 70-95 detailed national security assessments undertaken under both the compulsory and voluntary regimes. This is a very significant increase on the number (typically 1-2 per year) of national security reviews that take place under the existing regime. See our previous summary.

New post-Brexit subsidy control regime

The TCA requires the UK to establish a new UK subsidy control regime, which will need to be closely modelled on the EU State aid regime. It is not yet clear how that regime will operate or who will be responsible for overseeing it. In particular, the UK will need to develop new rules governing how the subsidy control obligations will be implemented and enforced in practice, including in respect of seeking approval for subsidy measures. The Government is considering whether to bring forward secondary legislation in early 2021 to give legal certainty regarding compliance with the UK's commitments in relation to the granting of subsidies. The Government also intends to launch a consultation on the UK's approach to subsidy control, which may result in further primary legislation.

Private enforcement: new precedent for collective actions

This year could see certification of the UK's first opt-out class actions. The Supreme Court's December 2020 judgment in Merricks v Mastercard clarified the approach that the UK Competition Appeal Tribunal ("CAT") must take in deciding whether claims are suitable for collective proceedings. The CAT is due to reconsider Merricks' request to certify a proposed £14 billion collective competition damages claim against Mastercard in March 2021, and certification hearings will also take place in a number of other cases that had been stayed pending the Supreme Court judgment, including two claims in respect of the European Forex cartels, two claims in respect of the European Trucks cartel, and the UK's first standalone collective actions against railway operators for alleged abuse of dominance.

^ BACK TO MAP

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