Competition law themes to look out for in 2020

A MULTIJURISDICTIONAL OUTLOOK – JANUARY 2020

Australia
Belgium
European Union
France
Germany
Hong Kong SAR, China
Italy
Singapore
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United Kingdom
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 2020 (you can find our 2019 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 the continued challenges of digitalisation for competition policy (and increased enforcement in this area), developments in merger control regimes and the growth in consumer protection law enforcement, others are jurisdiction specific and range across a number of topics and sectors.

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Australia

ACCC to continue to advocate for larger penalties
The Australian Competition & Consumer Commission ("ACCC") will continue its push for Australian Courts to impose larger penalties for contraventions of competition and consumer laws, to promote deterrence among the Australian business community. In late 2019, the Federal Court of Australia ordered Volkswagen AG ("VW") to pay AUD 125 million for breaches of the Australian Consumer Law ("ACL") relating to VW's failure to disclose the true nature of its car emission outputs – the highest-ever penalty for breach of the ACL. Importantly, the Court imposed a penalty amount AUD 50 million higher than had been agreed between the parties, bucking the recent trend of the Court reducing penalties proposed by the ACCC. This is likely to embolden the ACCC to seek higher penalties and negotiated settlements in 2020.

Continued focus on data and digital platforms and the wider digital economy
Following the completion of the ACCC’s landmark inquiry into Digital Platforms ("DPI") in 2019, the ACCC has received increased funding to support the implementation of certain recommendations from its final report including the establishment of a permanent Digital Platforms Branch. The new branch will be a specialist unit within the ACCC empowered to monitor and biannually report on, enforce and undertake competition and consumer protection inquiries in relation to digital platforms. The first inquiry will focus on the supply of online advertising and advertising technology ("ad-tech") services. The ACCC has also announced an update on the timeline for the implementation and launch of the Consumer Data Right, which gives consumers greater access to and control over their data, deferring the launch of certain aspects from February to July 2020. The ACCC will have a significant role in the new regime, which is expected to commence initially within the banking industry, followed by the energy and telecommunications sectors.

Focus on and reform of the energy industry
The energy industry remains a priority area for the ACCC, with its ongoing inquiries into retail electricity and gas pricing continuing, and the Australian Energy Regulator ("AER") (a constituent part of the ACCC) taking a more aggressive enforcement approach than it has in the past, instituting three new court proceedings. Before 2019, the AER had only ever instituted court proceedings twice: in 2015 and 2009. The ACCC's and AER's roles have been expanded through new legislative reforms that have re-introduced price regulation by requiring electricity retailers to include a "default offer" tariff that is subject to a regulated price cap, and the passing of changes to competition law that the Government has referred to as the "Big Stick", including new obligations on energy retailers to pass on reductions in wholesale energy costs to customers and new bidding behaviour rules for generators, retailers and traders who buy and sell electricity from the national electricity spot market. Those reforms carry significant penalties, including giving the ACCC the right to apply for divestiture orders to remedy illegal bidding behaviour and giving the Treasurer the right to set terms for wholesale electricity contracts on the ACCC's recommendation.

Enforcement of criminal cartels
Further cooperation between the Commonwealth Department of Public Prosecutions ("CDPP") and the ACCC is expected in 2020 in relation to ongoing criminal cartel matters before the Courts and in a number of criminal investigations which are likely to result in further prosecutions. The ACCC’s stated aim of having cartelists jailed to improve deterrence will be further pursued in 2020. The first contested criminal cartel matter will go to trial, including against individuals, and the prosecution of several large, multinational banks will continue in 2020. The CDPP has also launched unprecedented criminal proceedings against an individual for obstructing the course of an ACCC criminal cartel investigation.

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, advocating for the inclusion of a rebuttable presumption that a merger that causes a significant increase in concentration is likely to cause a substantial lessening of competition, putting the onus on the merger parties to prove otherwise.

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Belgium

New rules on B2B relationships enter into force
In March 2019, Belgium adopted a new law prohibiting three types of conduct in B2B relationships: unfair market practices, abuses of economic dependence and abusive clauses, which will require companies to carefully assess their contractual practice and market position (see our summary). Unfair market practices refer to both misleading and aggressive market practices (e.g. misleading contractual offers, forced contracting, etc.). These provisions have been in force in Belgium since 1 September 2019. Abuses of a company’s economic dependence will be prohibited from 1 June 2020 and cover all types of abusive conduct by companies that are deemed indispensable commercial partners for other companies, even if they do not hold a dominant market position. As a result, these provisions are likely to be relevant to a large number of companies (e.g. online platforms, supermarket chains, franchisers, etc.). Abusive clauses will be prohibited in B2B contracts as from 1 December 2020. The new law contains a ‘black list’ of clauses that are prohibited in all cases and a ‘grey list’ of clauses that are generally presumed unlawful, unless they can be justified.

Higher competition law fines
A new competition law entered into force in Belgium on 3 June 2019 that intends to improve the efficiency of the Belgian competition authority (“BCA”), codifies its existing practice and further aligns Belgian competition rules with EU law (see our summary). The most notable change brought about by the new law is the increase in the cap on competition fines, which is now set at 10% of a company’s worldwide (rather than domestic) turnover. Other notable changes include a new obligation for companies applying for leniency to adduce evidence of the anticompetitive conduct (instead of simply acknowledging the infringement), the express power given to BCA prosecutors (in addition to the Competition College) to close investigations on the basis of commitments and the fact that individuals can more easily be held liable for violations of competition law.

Competition policy in digital markets
On 2 October 2019, the Belgian, Dutch and Luxemburgish competition authorities published a joint memorandum addressing the “Challenges faced by competition authorities in a digital world” (see our summary). The joint memorandum, which builds on the EU Commission study into digital competition policy published on 4 April 2019 (see our summary of the EU study), contains three key proposals to protect competition in digital markets: further evaluation of the need to revise existing merger control rules in technology markets (in order to capture and allow scrutiny of ‘killer acquisitions’) through a comprehensive study of large platform acquisitions in the past decade and their effects on competition; increased use of ex ante guidance, both in the form of general guidance papers and individual guidance letters to companies, possibly in conjunction with a fast-track commitment procedure to address concerns in digital markets at the earliest possible stage; and the development of an ex ante intervention mechanism, allowing competition authorities to impose behavioural remedies on dominant digital companies even in the absence of any finding of an abuse (a particularly controversial proposal).

Renewal of the BCA’s management
The BCA’s top management (including the BCA’s President and the BCA’s top prosecutor and chief economist) was due to be renewed by September 2019. However, due to the current political situation in Belgium (being still under a caretaker government), it is uncertain when the appointments will eventually be made, as those officials need to be appointed by a decision of the Ministers’ cabinet.

BCA priority sectors likely to remain unchanged
The BCA’s priority sectors are expected to continue to be telecoms, retail distribution (and supplier relationships), pharmaceuticals, professional services and logistics.
Vestager re-appointed

Commissioner Margrethe Vestager has been re-appointed as Commissioner for competition, combining her role with a new industrial policy mandate as Executive Vice-President for “a Europe fit for the Digital Age”, so expect some continuity on the policy themes dominating her previous mandate, such as a continued focus on energy, financial services, industrial policy and the fight against tax evasion, as well as an increased focus the digital single market (including platforms and the role of artificial intelligence). Recent and ongoing probes into use of data by Google and Amazon, along with the Commissioner’s recent statement of intent to “tame the dark side” of the technology industry, indicate that the trend of vigorous Article 102 TFEU enforcement in this area is unlikely to abate. The appointment of former Director-General of FISMA, Olivier Guersent, to the head of DG Competition also suggests continued focus on financial services. Whilst 2019 was the year when theoretical considerations of how competition policy should react to the digital economy kicked-off in earnest (reflected in the “Competition Policy for the digital era” report of 4 April 2019, see our summary), 2020 is likely to be the year where the European Commission (“Commission”) ramps up enforcement action in this space. Some of these themes are covered in our Multijurisdictional comparative guide to competition policy in the digital era of 20 June 2019.

Revisiting substantive assessment in merger control

2019 was marked by numerous calls for reform of the substantive assessment of transactions under the EU merger control regime. The Commission’s 2019 report on “Competition policy for the digital era” identified a number of proposals to address the issue of ‘killer acquisitions’ in the technology sector (see our summary). Member States such as France and Germany have also expressed frustration over Commissioner Vestager’s stance on so called ‘European champions’. In this context, Commissioner Vestager recently announced the imminent review of the notice on the definition of relevant markets in light of the changes brought about by digitalisation and increased globalisation. 2020 is likely to be marked by further discussion on the implementation of the findings of the Commission’s report, as well as discussion on changes to the substantive review of transactions more broadly.

Reviving cartel investigations

The Commission issued four cartel decisions in 2019, similar to 2018, although the amounts imposed in fines significantly increased to over EUR 1.07 billion, up from approximately EUR 800 million in the previous year. This increase is almost entirely accounted for by the considerable fine imposed in the FOREX decision, one of three financial services cases recently opened by the Commission. 2019, as 2018, was also characterised by the continued decline of the leniency program. In response, the Commission has stated its intention to increase the number of investigations generated by its own leads in 2020, relying to a greater extent on analysis of market trends and its anonymous whistleblowing tool.

Interim measures

In October 2019, the Commission made use of its power to impose interim measures for the first time in 18 years in the Broadcom case (see our summary). Statements from Commissioner Vestager indicate that the Commission considers interim measures to be the appropriate tool to address prima facie competition concerns in fast-moving markets which are prone to tipping in favour of dominant undertakings, such as in digital markets. Given the Commissioner’s sustained focus on the technology sector in her new mandate, the use of interim measures may be also be a feature of 2020 and 2021.

State aid and sustainability

President von der Leyen has made the environment one of her top policy priorities over the 2019–2024 mandate, advocating a “European Green Deal”. Vestager has made it clear that competition policy should contribute to the objectives of this project, specifically identifying State aid as a tool to further sustainable environment goals. The Commission’s ongoing fitness check of its State aid regulations and guidance, due in 2020, will provide the institution with an opportunity to further increase the prominence of environmental objectives in this area. Considerations relating to sustainability and the environment are also likely spill over into other areas of competition enforcement, notably with respect to merger control (e.g. the Commission cited environmental concerns as grounds for further enquiry in two recent transactions (Aleris/Novelis and Arubis/Metallo).
New merger control guidelines and ex post merger control
New merger control guidelines are expected to be adopted by the French Competition Authority ("FCA") in early 2020, after a public consultation on the FCA's draft guidelines was completed in the course of November 2019. The new guidelines will in particular incorporate developments stemming from the evolution of the FCA decision-making practice since the adoption of the last version of its guidelines in July 2013. The FCA is also still considering the introduction of an ex-post-merger control regime.

Continued focus on data and digital platforms and the wider digital economy
The digital economy remains amongst the FCA's top priorities for 2020 and it intends to strengthen its resources in this field. In January 2020, it announced the setting up of a Digital Economy Unit. That unit will support the FCA's investigation services, developing new digital investigation tools based on algorithmic technologies, big data and artificial intelligence (and follows its joint studies with the German Federal Cartel Office into "Competition Law and Data" (2016) and into "Algorithms and Competition" (2019) (see our summary). The FCA also announced in early January that it would issue a study on the "impact of the digital revolution" in the financial sector. That study, to which its new Digital Economy Unit will contribute, will address among other subjects the blockchain technology, fintechs, the entry of Internet giants on payment services and the dematerialized financial services.

Sustainability
The FCA announced its desire to place sustainable development at the heart of its action, both in terms of merger control and anti-competitive practices, by focusing in particular on "identifying the practices that restrict competition between companies and which harm the environmental protection". In this context, the FCA takes part in the collective discussions between several French regulation authorities regarding the incorporation of climate objectives defined by the Paris Agreement into their own strategic priorities and operational activities.

Joint purchasing agreements in the retail sector
The FCA is currently investigating two joint purchasing agreements involving: (a) Auchan Retail, Casino Group, Metro and Schiever Group, and (b) Carrefour and Système U, following notification of those agreements in May and June 2018. The FCA is examining the competitive impact of these purchasing agreements on both the upstream and downstream markets concerned, and recently announced that it would adopt an opinion in the course of 2020. These decisions are expected to provide significant insights into how to help ensure joint purchasing agreements are competition law compliant.

Trade associations/unions and professional bodies
In 2020, 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 which might infringe competition law, promote compliance, and anticipate the transposition of the ECN+-Directive (EU) No. 2019/1 which will modify the maximum fines which can be imposed on trade associations, trade unions and professional bodies under French competition law (from the current EUR 3 million limit, to up to 10% of the aggregate turnover of the members active on the affected market once the Directive has been transposed). The FCA launched a consultation on this subject in 2019.
Germany

The 10th Amendment to the German Act against Restraints of Competition

The 10th Amendment to the German Act against Restraints of Competition ("ARC") is expected to be passed in 2020. The Amendment pursues two major objectives: to create a digital regulatory framework for competition; and to implement the ECN+-Directive (EU) No. 2019/ into national law. The planned 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 of third parties with a cartelist; increasing the second domestic merger control turnover threshold from EUR 5 million to EUR 10 million; implementing a mechanism for the Federal Cartel Office ("FCO") to require the notification of potential so-called “killer acquisitions” (please see below); revising what might constitute an abuse of dominance, in particular in relation to technology companies who might be considered dominant intermediaries. In addition, the FCO has recently announced that compliance efforts (e.g., the implementation of compliance programs) might be considered as a relevant mitigating factor when calculating fines going forward (however, the extent to which this will be reflected in the 10th Amendment to the ARC remains to be seen – under the current draft Amendment, discounts may only be granted for improvements to compliance systems implemented subsequent to an infringement).

Tech giants remain in focus of the FCO and legislation

The President of the FCO, Andreas Mundt, recently stated that certain technology giants have obtained an ”almost unreachable market position for potential competitors”. The planned 10th Amendment to the ARC attempts to address this concern and foresees far-reaching powers of intervention being granted to the FCO regarding “companies with overwhelming importance for competition across multiple markets” (the “super-dominant companies”), the intended targets being digital giants like Google, Facebook and Amazon. In particular, the FCO will, inter alia, be able to: prohibit a company from granting preference to its own offerings vis-à-vis those of competitors (also known as “self-preferencing”); and step in early in order to prevent new markets being dominated by incumbent tech giants through “killer acquisitions”.

Cartel damages litigation

Reportedly several hundred damages claims relating to the EU trucks cartel and the German sugar cartel are still pending before German courts. It is expected that further decisions will be reached in many of these cases during 2020, which might (further) clarify important aspects of private enforcement in Germany. In particular, the District Court of Munich is expected to decide, in early 2020, on the validity and requirements of the assignment of damage claims to a litigation vehicles (in the case at stake Financialrights Claim GmbH is seeking damages of around EUR 600 million, plus interest, on behalf of approximately 3,200 potentially injured parties from around 20 EU member states, representing more than 84,000 individual truck acquisitions). Amongst others, the court is expected to decide on fundamental questions concerning the validity of the statement of claim, i.e. whether Financialrights had a legitimate right to bring the claims to court and whether the ultimate claimants had validly assigned their claims to the vehicle.

Consumer protection

In May 2019, the FCO launched its third sector inquiry which will take a closer look at the collection, examination and presentation of online user reviews. This sector inquiry is, according to the FCO, expected to be concluded in 2020, along with the ongoing sector inquiry into Smart TVs and reflects the regulator’s increasing focus on enforcement of consumer protection law. It will be interesting to see which role the FCO will assume in the German consumer protection landscape alongside other regulators and administrative bodies.

Introduction of a Federal Competition Register

The FCO intends to establish, by the end of 2020, a nationwide Federal Competition Register enabling public authorities to verify, via a single electronic query, whether a company has committed certain offences. This blacklisting approach is aimed at helping public authorities decide whether to exclude such companies in tenders for public contracts and so is likely to have significant commercial implications and lead to many companies reviewing the robustness of their existing compliance programs.

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Focus on cartel prosecutions

Drawing from its successes in the previous year, the Hong Kong Competition Commission ("Competition Commission") is likely to continue focusing on cartel enforcement in 2020. In 2019, the Competition Commission successfully prosecuted two cartel conduct cases before the Hong Kong Competition Tribunal ("Tribunal") (see our summary). The first case (a bid-rigging case involving IT companies) is currently under appeal, while the second case (a price-fixing/market sharing case involving renovation contractors) is currently in the penalties hearing stage. The maximum financial penalties imposed could be up to 10% of Hong Kong turnover for each of the undertakings concerned for each year of a contravention. The Competition Commission is expected to advocate for high fines to deter businesses from breaching the competition law. There is also likely to be further progress on the Competition Commission's second and third enforcement cases before the Tribunal, concerning alleged cartels between renovation companies — those cases involve the prosecution of not only companies but also individuals. Also of note is the fact that the Competition Commission has recently been provided with dedicated litigation funding from the government of HKD 238 million.

Private enforcement

Despite the fact that the Hong Kong Competition Ordinance does not provide for stand-alone rights of action (only follow-on rights of action are permitted), there are currently two related private cases under review before the Tribunal. The cases involves a party who used competition law grounds as a defence to a non-competition law action. It is likely that we will see similar cases arise in Hong Kong, depending on, inter alia, the progress and outcome of these cases. In 2018, the Hong Kong High Court referred suits filed by each of Taching Petroleum Company Limited and Shell Hong Kong Limited, against Meyer Aluminium Limited, over non-payment of dues for the supply of diesel oil by each of Taching and Shell to Meyer. Meyer contends, as a defence, that Shell and Taching had colluded to fix diesel prices and, as a result, the diesel oil supply contracts were tainted by illegality and were unenforceable. Meyer is seeking damages from each of Shell and Taching.

Container ports investigation

The much-awaited decision in respect of the container ports investigation will likely be published during the first quarter of 2020. In 2019, the Competition Commission announced a probe into an alliance between four out of five container terminal operators ("Hong Kong Seaport Alliance") who planned to jointly operate and manage 23 berths across eight terminals at Kwai Tsing port. The four operators are COSCO-HIT Terminals (Hong Kong), Asia Container Terminals, Hong Kong International Terminals and Modern Terminals. According to the operators, the objective of the alliance is to improve efficiency and to increase the competitiveness of the Hong Kong container ports industry, which has been in decline. The Competition Commission is looking into the extent to which the alliance prevents, restricts or distorts competition in Hong Kong and its decision is likely to provide insights into how it views such cooperation agreements more widely.

Reform of the taxi services industry

The Competition Commission has called for wider reform of the taxi services industry to increase competitiveness and it is likely that this will continue to be a point of focus in 2020. For years, the highly regulated Hong Kong taxi services industry has been heavily criticized for poor quality of service, high levels of driver misconduct (e.g., refusal to hire, not using the most direct practicable route and overcharging) and lagging behind on technological advancements (e.g., preference for cash payments). The Competition Commission has repeatedly called for the Hong Kong Government to liberalise the taxi services industry to include and legalise ride-hailing services. Recently, the Competition Commission has been critical about the Government’s efforts to introduce a premium taxi service scheme (pursuant to a Franchised Taxi Services Bill) to increase competitiveness in the industry. The Competition Commission’s view is that the implementation of the scheme is unlikely to achieve its objectives. Under the scheme, 600 premium taxis with enhanced services (such as wifi, phone charging stations, wheelchair services) will be introduced into the taxi industry.
Italy

New AGCM President - a shift in enforcement priorities?
The appointment of former judge Roberto Rustichelli as the new president of the Italian competition authority ("AGCM") took place in May 2019. In his speech accompanying the AGCM 2019 Annual Report, he stressed the importance of strengthening the cooperation between EU Member States in order to protect the European Single Market and to avoid the distortion of competition. As also illustrated in the recent guidelines published by the AGCM, and by the Telecoms/Media Regulator and the Data Protection Authority, this will likely entail strengthening international cooperation on policy design for the governance of Big Data. President Rustichelli also hinted at the increased focus on conduct by large technology companies, in particular in relation to the creation of barriers to entry, and the possibility of imposing larger (more deterrent) fines.

Higher fines may lead to an increase in leniency applications
Since the adoption of the leniency program in 2006, the use of the AGCM’s leniency program by companies has been low compared to the rest of the EU. However, in recent years, the AGCM has imposed increasingly higher fines, notably also because it has extended penalty liability to parent companies originally involved in the proceedings. Recent cases show a change in this trend which may be even more significant in the coming years. In addition to the granting of full immunity to the first leniency applicant, there have also various instances of subsequent leniency applicants being granted 40%-50% reductions – a trend which is likely to continue into 2020.

Growing attention to Big Data
In July 2019, the AGCM published guidelines on the joint inquiry carried out with the Italian Privacy Authority and the Telecoms/Media Regulator, setting out guidelines and policy recommendations for big data (the final report will be published soon). In line with other national competition regulators, the AGCM has sharpened its focus on the digital, which will likely require changes in its enforcement tool-box. For example, the AGCM foresees a review of its merger control rules in order to assess digital transactions which currently do not satisfy the national notification thresholds but which may restrict potential competition as a result of the acquisition of data. Furthermore, enforcement of the consumer protection powers will likely increase in relation to the use and the transfer of data and the AGCM may also seek to raise the level of fines it can impose in consumer protection cases.

Longer (formal) proceedings?
The AGCM’s investigations have traditionally been known for their expediency, with proceedings generally lasting less than two years. However, several recent cases indicate that the AGCM may have to take more time to conclude its investigations, as it takes on more complex cases but with the same resources. The administrative high court has recently ruled, by upholding the first instance court’s assessment, that the AGCM should not unreasonably extend the length of the initial review of a case, i.e. before the formal proceedings are opened. Similar points are also currently under appeal in other cases, the result of which it likely to impact on the length of the AGCM’s complex investigations, potentially by shortening of the duration of pre-investigative phases but extending the length of the formal stage.

New merger control tools to address complex cases
The AGCM is considering a review of its merger control rules to fill a potential gap (in particular, acquisitions of small dynamic companies that do not meet the current thresholds) and to introduce the SIEC test in line with EU law (currently the test is still strictly speaking a “dominance” test). This may, in turn, lead to increasingly complex merger proceedings. This trend has started to develop in the last two years, during which the AGCM has assessed very complicated mergers and imposed significant behavioural commitments. Since the Luxottica/Barberini merger and the more recent Sky Italia/R2 case (see our summary), the AGCM has taken a tougher approach to merger cases, which may be further strengthened after the wider review referred to above. It is hoped that the above changes, if enacted, will be also accompanied by changes in the procedural rules, extending the AGCM’s already tight merger review timeline.

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New Chief Executive – continued tough stance
A new Chief Executive of the Competition and Consumer Commission of Singapore ("CCCS"), Ms Sia Aik Kor, was appointed on 1 October 2019. Ms Sia will serve as Chief Executive for a period of three years (extendable by two more years). Like the previous Chief Executive, Mr Toh Han Li, Ms Sia is a lawyer by training and from the Singapore Legal Service (a body of lawyers serving courts, the Attorney General's Chambers ("AGC") and legal departments within government ministries and statutory boards). She was most recently deputy chief counsel of the civil division at the AGC. Ms Sia is no stranger to the CCCS, having been previously seconded to the then-Competition Commission of Singapore during its formative years (from 2015 to 2010) as its first Director for Legal & Enforcement. During the secondment, she oversaw the issue of the first infringement decision against a pesticides company cartel and played an instrumental role in the release of guidelines on how the competition law would be implemented. Ms Sia’s CCS experience combined with her strong legal credentials puts her in good stead to continue Mr Toh’s tough stance towards enforcement against cartel and other forms of anticompetitive conduct.

Appeal decisions expected on chicken distributors cartel and Uber/Grab cases
The much-awaited appeal decisions on two landmark cases (the chicken distributors cartel case and the Uber/Grab merger case) are likely to be finalised in 2020. The chicken distributors cartel case saw the CCCS impose its highest fine to date (SGD 26.9 million), and the Uber/Grab case is the first appeal relating to a CCCS merger decision. The appeals were lodged in 2018 and are being heard by the Competition Appeal Board, an independent body comprising members appointed by the Minister for Trade and Industry.

Enforcing the consumer protection law
Consumer protection law came under the ambit of Singapore’s competition authority in 2018. Since then, the CCCS has been an active enforcer of consumer protection law, notwithstanding that the only remedy currently available is injunctive relief. The CCCS has undertaken three consumer protection law enforcement actions recently namely actions against: a car retailer for misrepresenting terms and conditions of sale; a Thai restaurant for misrepresenting discount periods (see our summary); and a footwear e-commerce website for engaging in “subscription traps”. The CCCS has also conducted two market studies: a market study on the online travel booking sector; and a joint study with the Personal Data Protection Commission ("PDPC") to examine the consumer, competition and data protection issues regarding the potential data portability requirements in Singapore (the PDPC’s published its response to feedback on the consultation on 20 January 2020). The CCCS has indicated that it will continue to take consumer protection law breaches seriously and is closely monitoring the beauty, e-commerce and food and beverage industries in particular.

Impact of digital platforms
As was the case in 2019, the CCCS is expected to continue with a number of initiatives (including market studies and investigations) to study the impact of digital platforms on competition and consumer protection. The CCCS has indicated that it is interested in how tools and mechanisms, such as big data, machine learning and artificial intelligence, are used in pricing and how they affect business models. In 2019, the CCCS published draft guidelines on price transparency for both online and offline transactions across all consumer-facing industries. Some press reports have indicated that the CCCS is looking into the virtual kitchen and online food delivery sectors.

Focus on exchange of competitively sensitive information
In 2019, the CCCS issued its first infringement decision against competitors exchanging competitively sensitive information. The CCCS imposed fines of over SGD 1.5 million on the owners and operators of four hotels for this conduct. The information sharing concerned corporate client accounts. Sales personnel from each of Capri (by Fraser Changi City), Village Hotel Changi, Village Hotel Katong and Crowne Plaza Changi Airport Hotel shared information on non-public bid prices in response to corporate client requests, commonly known in the hospitality sector as “call arounds”. This case is significant as it is the first case to consider liability issues in principal-agent relationships. It is likely that the CCCS will continue undertake a tough stance towards competitors sharing competitively sensitive information.
Spain

Digital economy investigations
The Spanish competition authority (the “CNMC”) is expected to focus in particular on competition law issues raised by the digital economy in coming months. In this regard, the authority will publish its Report on Online Advertising in 2020, which was subject to a public consultation in 2019. In addition, it is anticipated that the CNMC will pay closer attention to potential antitrust issues regarding the digitalization of the financial sector, following its report Market study on the impact on competition of technological innovation in the financial sector.

Focus on vertical agreements
The CNMC is showing an increasing interest in the investigation of vertical agreements, as shown by its recent decisions in cases Asistencia Técnica Vaillant and Atresmedia/Mediaset (see our summary). It is also expected that the authority will soon publish its decision in the Adidas case, relating to an alleged infringement of Articles 1 SCA and 101 TFEU regarding restrictions concerning online distribution and cross-sales between its franchisees, e-commerce restrictions, the imposition of non-compete obligations, and resale price maintenance. This case will offer important insights for companies into how the CNMC will analyse traditional and more recent (such as online) forms of vertical restrictions.

Closely monitoring of bid-rigging
As was the case in 2019 (see our 2019 outlook), it is anticipated that big-rigging will remain a key focus for the CNMC in 2020 and that the it will continue to use new legal tools to deter anticompetitive practices, including fining directors of infringing companies, and imposing bans on bidding for public tenders (an option that has been used in recent decisions such as Montaje y Mantenimiento Industrial and Electrificación y Electromecánica Ferroviarias - see our summary). In addition, the CNMC will continue its investigations in several cases, such as Gestión de archivos (regarding the provision of library and file and document management services) and Consultoras (an investigation into the provision of consulting services, and which included major firms such as KPMG, Deloitte and PwC). Lastly, the CNMC is expected to publish an updated version of its 2011 Guide on public procurement and competition, aimed at providing public authorities with further guidance on how to configure bids and detect collusion in tender responses.

Damages actions
After the implementation of the Damages Directive (EU) No. 2014/104, the number of follow-on cartel damages claims has substantially increased, and Spain is becoming an increasingly more attractive jurisdiction for these actions for several reasons such as, the limited cost of actions, the limited economic risk in case of losing the claim, the swift procedure (a first-instance decision will take no more than 12 or 18 months), and the increasing experience of courts in these matters. In this context, the courts are currently dealing with a hundreds of follow-on damages claims, many of them related to the European Commission’s trucks decision, and this trend is expected to continue in 2020.

Railway sector liberalization
An increase in competition law issues related to this market is expected as the liberalization process, promoted by the European Union, will be completed in Spain by December 2020. The CNMC, which also regulates the rail sector (amongst other sectors), is likely to closely monitor the incumbent monopolist, Renfe, in particular complaints in relation to its dominant position and it potentially creating artificial barriers to new competitors entering the sector. Access conditions from the railway infrastructure manager, Adif, are also expected to be under the spotlight of the CNMC, in order to help facilitate the entry of new operators and avoid unnecessary requirements that undermine effective liberalization of the sector.
Numerous developments are expected in 2020 including, of course, relating to Brexit. During the Brexit transition period, proposed to last from the UK’s exit from the EU (31 January 2020) until 31 December 2020, the future UK-EU relationship will be negotiated: we will issue updates as matters develop. In the meantime, see the Competition and Markets Authority’s (“CMA”) Guidance on the functions of the CMA under the Withdrawal Agreement. It could also be a big year for competition appeals including Supreme Court hearings in *Merricks v Mastercard* and *Sainsbury’s v Mastercard*, Court of Appeal hearings in *Achilles v Network Rail*, and the anticipated *Pfizer/Flynn* judgment. Set out below are some more specific predictions for the UK in 2020.

**Private enforcement: new precedents for collective actions**
Collective actions are set to take centre stage this year when the Supreme Court hears MasterCard's appeal challenging the legal approach to whether the claim brought by Walter Merricks on behalf of 46 million UK consumers is eligible to be certified for collective proceedings. The Supreme Court’s judgment is expected to clarify important and novel issues for the UK’s developing class action regime, and to kick-start a number of other cases which have been stayed pending its outcome, including two opt-out class actions against the European FOREX cartel and two collective claims against the European Trucks cartel. In these cases, the Competition Appeal Tribunal will be required to resolve the question of what happens when more than one person seeks to act as class representative in respect of the same claims: can only one prevail? In addition, we await the UK’s first standalone collective action against railway operators for alleged abuse of dominance.

**Digital markets: a brand new set of rules?**
The CMA will publish its market study into online platforms and the digital advertising market final report in July 2020. The CMA's Interim Report (2 January 2020) states that the CMA is not minded to propose a market investigation reference at this stage. The final report is therefore likely to recommend that the Government develops a new regulatory regime, including a code of conduct for online platforms with 'strategic market status' and greater control over individuals’ own data. In relation to merger control in digital markets, whilst the CMA considers the existing UK rules remain appropriate (see our summary) it has begun adapting its approach to their substantive assessment, with updates to its Merger Assessment Guidelines expected.

**Open Banking and Open Finance - expansion of the fintech revolution?**
2020 will see further roll out of the UK's ground-breaking Open Banking initiative (a remedy flowing from the CMA's *Retail Banking Market Investigation* which provides a secure way of granting service providers access to consumer's financial information so that they can more easily compare and switch providers of current accounts and SME loans – see our summary). 2020 will also see the Financial Conduct Authority Advisory Group further explore the expansion of the Open Banking model into other retail products (such as savings, loans, investments, insurance and pensions) – Open Finance. The sector will be closely following, and engaging with, the work of the FCA to help shape the future of this project and ensure that lessons from Open Banking are folded into any future plans. As a global leader in this field, the eyes of other jurisdictions also engaged in Open Data projects will be fixed firmly on the UK in 2020.

**National security: new Government powers to review transactions**
The Government is expected to introduce new legislation to upgrade its powers to scrutinise and intervene in transactions that may give rise to national security risks. The new powers would apply across all sectors of the economy to businesses of any size as well as to the acquisition of assets. Currently, the Secretary of State for Business, Energy and Industrial Strategy (or Digital, Culture, Media and Sport in the case of media mergers) can intervene in mergers which have the potential to impact the UK public interest as part of both the UK and EU merger control regimes. For example, in the recent *Advent/Cobham* case, the Secretary of State intervened and accepted undertakings to remedy national security concerns. The proposed new regime would be separate from the CMA's remit.

**Consumer protection: new CMA powers expected**
The CMA's powers to enforce consumer law could soon be brought into line with its competition law powers. The Government is expected to issue a Consumer White Paper this year to consult on new CMA powers to decide whether consumer law has been broken and to impose fines directly, without having to go through the courts as is currently the case. The CMA has already investigated a number of sectors under its existing consumer protection powers, including online gambling, care homes, leasehold housing and secondary ticketing websites. See our previous overview of the current regime.