

# Competition law themes to look out for in 2019

## A MULTIJURISDICTIONAL OUTLOOK

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# Australia

## ACCC's Digital Platforms Inquiry

The effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets is currently under investigation by the Australian Competition and Consumer Commission's ("ACCC"), with the final report due by 3 June 2019. The inquiry is also examining the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.

## "Big stick" electricity industry intervention

The government has been under significant pressure to reduce energy prices for consumers and 2019 will see the introduction of new laws which will prohibit energy market misconduct and provide a series of remedies. Notably, proposed remedies for misconduct include a power for the Treasurer to apply to the Federal Court for a divestiture order where a corporation's conduct is fraudulent, dishonest or in bad faith, for the purpose of distorting or manipulating prices.

## New Consumer Data Right

The government has announced the introduction of a consumer data right in Australia, allowing customers to direct that their data be shared with other providers, to encourage competition. The ACCC will have a significant role in the new regime, which is expected to commence in phases from mid-2019 onwards (initially within the banking industry, followed by energy and telecommunications). This development follows the launch of Open Banking (a similar initiative) in the UK, following the UK Competition and Markets Authority's market investigation into retail banking.

## Misuse of market power test case anticipated

The ACCC has indicated that it expects to commence enforcement litigation in the first half of 2019 in relation to misuse of market power. The relevant competition law provisions were substantively amended in late 2017 to prohibit corporations that have a substantial degree of power in a market from engaging in conduct that has the purpose or has or is likely to have the effect of substantially lessening competition.

## Progress in financial services cartel case

Further developments are expected in 2019 in the first criminal cartel case against a listed company in Australia, following criminal charges being brought in June 2018 against several banks and individuals after investigation by the ACCC. The charges relate to trading in one of the bank's shares following an institutional share placement in 2015.

# Belgium

## **Adoption of amended competition law?**

A new Belgian competition law is due to be adopted in 2019, dealing mainly with procedural points such as the formal introduction of the possibility to adopt a commitment decision (similar to Article 9 of Regulation 1/2003) but also increasing the fine cap to 10% of worldwide turnover. However, following the split of the coalition government in December 2018, the current caretaking government is only authorised to deal with urgent matters. As a result, it is unclear when the amended law will be adopted.

## **Appointment of a new competition authority president**

A new president of the Belgian competition authority (“BCA”) is due to be appointed before the end of August 2019, such as the formal introduction of the possibility to adopt a commitment decision (similar to Article 9 of Regulation 1/2003) but also increasing the fine cap to 10% of worldwide turnover was the end November 2018, but there remains a degree of uncertainty around the timing of the new appointment (and indeed whether it will be achieved before the current president’s mandate expires) due to the current political situation in Belgium.

## **New guidance on the application of competition law to information exchange**

The BCA is expected to issue new guidance on the application of competition law to information exchange during 2019. Based on the draft revised guidance which was published in September 2017, it is anticipated that the new guidance will focus on the (indirect) exchange of information, inter alia via trade associations, rather than the direct exchange of information between competitors.

## **BCA priority sectors likely to remain unchanged**

The BCA’s priority sectors are expected to continue to be telecoms, the retail distribution sector (and supplier relationships), pharmaceuticals, professional services and logistics.



# European Union

## New Commissioner for Competition

Competition Commissioner Margrethe Vestager will end her five-year term of office at the end of October 2019, and a new Commissioner is likely to be appointed. Whilst Commissioner Vestager has focused on areas such as the digital single market, energy policy, financial services, industrial policy and the fight against tax evasion in support of President Juncker's priorities, it remains to be seen whether a new Commissioner could alter the direction of DG Competition.

## The challenges of digitalisation for competition policy

Like many other competition authorities around the world, the European Commission is focusing on the challenges of digitalisation for competition policy. Special advisers appointed in 2018 are due to submit a report by 31 March 2019 considering the effects of digitalisation on markets and consumers and their implications for competition policy. On 17 January 2019 the European Commission also hosted an interesting one-day conference entitled "Shaping competition policy in the era of digitisation" (see further the Ashurst briefing on this conference [\[insert hyperlink\]](#)).

## Increase in abuse of dominance investigations?

During 2018 we saw less cartel enforcement activity at European Commission level, with just four new cartel decisions and total fines of just €800 million, possibly due to the decline in leniency applications. Whilst the investigation of cartels remains an important part of the Commission's enforcement work, this trend seems likely to continue in 2019, freeing up resources to focus on potential abuse of dominance cases, in particular those involving FAANG (Facebook, Apple, Amazon, Netflix and Google).

## Strict enforcement of merger control procedural rules

The European Commission is expected to continue its increasingly strict approach to ensuring compliance with EU merger control procedural rules in 2019, against the background of a record-breaking 414 merger notifications in 2018. It recently fined Altice €124.5 million for "gun-jumping" (i.e. implementing a transaction which fell within the scope of the EU merger control regime without first obtaining clearance), and at the time of writing there are at least three further ongoing investigations involving suspected procedural breaches (Merck and Sigma-Aldrich, General Electric and Canon).

## State aid and taxation

The Commission will continue to use EU State aid law in its work against certain types of national tax rulings granted to multinationals. So far, the Commission has adopted negative decisions against Luxembourg (Fiat, Amazon and Engie), Ireland (Apple), the Netherlands (Starbucks), Belgium (35 multinationals) and Gibraltar (5 multinationals). There are other ongoing State aid probes into tax rulings or tax schemes in the Netherlands (IKEA and Nike) and in the UK (CFC regime). Whilst the Commission has in the past been keen on identifying novel issues, the probe into Nike opened beginning of January flags that it is now applying established theories of harm.

# France

## New merger control guidelines

New merger control guidelines are expected to be adopted by the French Competition Authority (“FCA”) in Spring 2019, following the launch of a public consultation on draft revised guidelines at the beginning of 2019. The FCA is also considering the introduction of an ex-post merger control regime.

## New settlement procedure

An updated settlement procedure (covering both anticompetitive agreement and abuse of dominance cases) has recently been adopted by the FCA and is expected to be applied for the first time during 2019. The settlement procedure no longer specifies the reduction a party may be likely to receive (it used to specify a maximum discount of 50%). Discounts will instead be determined on a case-by-case basis in negotiations between the FCA and the parties. Where relevant, the FCA will also take into account the existence of any leniency application and/or any commitments offered by the undertaking. However, there is no longer any specific reward for the adoption of a compliance programme. It remains to be seen how this updated procedure will be used by the FCA and companies subject to investigation.

## Final opinion in FCA healthcare sector inquiry

The FCA is due to adopt a final opinion in its sector inquiry into the markets for the distribution of medicines and laboratory testing in the healthcare sector in early 2019, following a wide-ranging public consultation in October 2018. A further FCA opinion on price setting of medicinal products is anticipated in Summer 2019.

## Developments in the digital economy sector

The FCA is expected to continue with its ongoing investigation into the online advertising market, focussing on how data is collected and used, as well as regarding restrictions on data access. This investigation may lead to the imposition of fines or commitments during 2019. The FCA is also expected to conclude its joint project with the German competition authority on the implications of algorithms for competition. This project was launched in June 2018, with a joint working paper due to be published at the end of the project.

## FCA investigation into supermarket joint purchasing agreements

The FCA is currently investigating two joint purchasing agreements involving (i) Auchan Retail, Casino Group, Métro and Schiever Group, and (ii) 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 may adopt an opinion during the course of 2019.

# Germany

## Private enforcement – further decisions and more litigation expected

More than 100 damage claims relating to the EU trucks cartel and the German sugar cartel are currently pending before German courts, and further claims are expected to be filed. It is expected that decisions will be reached in many of these cases during 2019, which will hopefully (further) clarify important aspects of private enforcement in Germany, such as the scope of disclosure, the existence of a presumption of damage, and the calculation of damages.

## Decision expected in Facebook abuse of dominance case

The German Federal Cartel Office (the “FCO”) is expected to take a decision in early 2019 in relation to allegations that Facebook is abusing its dominant position by making the use of its social network conditional on its being allowed to amass data generated by using third-party websites and merge it with the user’s Facebook account.

## Digital business models to come under scrutiny

The FCO has made various statements to the effect that it intends to investigate computer-based price-setting mechanisms (algorithms) and examine certain sectors of the digital economy in 2019. The FCA has already launched sector inquiries into comparison websites, the online advertising sector and Smart TVs. It is anticipated that further investigations will focus in particular on algorithms, access to data, and concerns regarding data and associated market power.

## “Competition Law 4.0” – preparations for reform of German competition law

A high-level panel of experts dubbed “the Competition Law Commission 4.0” has been tasked by the government to develop proposals to modernise German competition law to meet the demands of the data economy, the dissemination of platform markets and so-called ‘Industry 4.0’. The Commission’s proposals are due to be published in autumn of 2019, and are expected to cover issues including: conglomerate and vertical strategies of digital platforms; potential amendment of merger control rules in relation to the acquisition of small potential future rivals; and control over and access to data.

## Investigation into alleged abuse of dominance by Amazon

Developments in the ongoing FCO investigation into Amazon’s terms of business and practices towards sellers on its German marketplace amazon.de will be carefully watched by many other online retailers in 2019. The issues being investigated by the FCO include: liability provisions to the disadvantage of sellers in combination with choice of law and jurisdiction clauses; rules on product reviews; the non-transparent termination and blocking of sellers’ accounts; withholding or delaying payment; clauses assigning rights to use information which a seller has to provide with regard to the products being offered; and terms of business on pan-European despatch. The outcome of these proceedings is expected to have an enormous impact on online selling via marketplaces across Europe.

# Hong Kong

## **Hong Kong Competition Tribunal expected to conclude its first case**

The Hong Kong Competition Tribunal is expected to reach a decision in its first case in 2019. The case concerns alleged bid rigging by five technology companies in relation to a tender issued by a social service organisation. The Hong Kong Competition Commission (the “HKCC”) Chairperson Anna Wu has emphasised that the HKCC will continue to focus on hard-core cartels (involving for example bid-rigging, price fixing or market/customer sharing), which have been the primary focus of its enforcement efforts over the last year.

## **Collaboration with other competition authorities**

The HKCC is expected to seek to collaborate closely with other competition authorities when handling large antitrust cases involving leniency applications across multiple jurisdictions.

## **Potential new framework for rewarding cooperation in investigations**

During 2018 several officials from the HKCC indicated that it may revise its leniency policy. It is unclear at the time of writing whether this will go ahead, but if so then it is hoped that the revisions will address the uncertainties and limitations of the current policy, such as the lack of certainty regarding how leniency is applied to applicants who are not the first to report a potential infringement.

## **Increased focus on pursuing individuals**

The HKCC enforced competition law against individuals involved in alleged cartel conduct for the first time in 2018. It is expected that this trend of pursuing individual liability (e.g. through imposition of individual fines and/or disqualification of directors) will continue in 2019, particularly in hard-core competition law infringement cases.

## **More market studies expected**

It is anticipated that the HKCC will initiate market studies in a number of sectors in 2019, including digital platform markets.



# Italy

## Possible new direction for the Italian Competition Authority under a new president?

The appointment of former judge Roberto Rustichelli as the new president of the Italian competition authority (the “AGCM”) will formally take place in 2019. Historically the president of the AGCM has always imposed his/her mark on enforcement policy. For example, the departing president has shown a strong willingness to enforce both antitrust and consumer protection laws, whilst often clearing potentially concerning mergers through the use of structural commitments and monitoring trustees. It remains to be seen what direction enforcement policy will move in under the new president.

## Increased use of interim measures

The AGCM has recently been using interim measures in order to oblige companies to cease allegedly unlawful behaviour pending the conclusion of an investigation. To date this approach has been used particularly in cases involving enforcement of consumer law. Looking ahead in 2019, also in light of the ECN+ Directive, it is likely that interim measures may also be increasingly used by the AGCM in cases involving enforcement of competition law.

## Higher fines in antitrust proceedings...?

The involvement of parent companies in antitrust proceedings has led to the imposition of higher fines in a number of recent Italian cases, due to the way in which the maximum cap of 10% of global turnover is then calculated. Whilst the current case law on this topic still leaves a lot of questions unanswered, final decisions closing some currently pending proceedings might provide clarifications on this regard in 2019.

## ... or lower fines because of the adoption of compliance programmes?

It is expected that 2019 will see the application in practice of new guidelines issued by the AGCM in October 2018 on the recognition of compliance programmes as a potential mitigating factor when calculating fines. It will be interesting to see how this will affect overall fine levels in practice.

## Stronger merger enforcement

In recent merger cases the AGCM has increasingly shown a willingness to impose significant behavioural commitments on merging parties when granting a conditional clearance decision. This trend is expected to continue, and may be a precursor to a wider review of the Italian merger control system more generally in 2019.

# Netherlands

## Focus on issues raised by the digital economy

It is expected that the Dutch Competition Authority (the “ACM”), like many other authorities around the world, will focus in particular on competition law issues raised by the digital economy, in particular competition risks relating to digitalization. Key areas of interest are likely to be: (i) the risk of market power; and (ii) the relationship between regulation and enforcement.

## Tackling (excessive) drug prices through competition law

Keeping the costs of prescription drugs under control is the subject of a broader debate in Dutch society at present. It is anticipated that the ACM may take steps to tackle (excessive) drug prices by, for example: (i) investigating possible anti-competitive conduct; (ii) emphasizing its role in tackling market problems in the pharmaceutical sector to drug manufacturers; and/or (iii) providing training regarding the discretion market participants may have when procuring prescription drugs collectively.

## Competition in the ports

Companies in the Dutch ports often cooperate. However, not all of these businesses appear to be aware of the basic rules on fair competition. Over the next few years, which could include 2019, it is anticipated that the ACM may focus on investigating violations of competition rules in this sector, whilst also seeking to increase awareness and compliance with competition law by port operators.

## Continued interest in mergers in the healthcare sector

It is anticipated that mergers in the healthcare sector will continue to attract the attention of the ACM in 2019, following second phase investigations into two healthcare mergers in 2017 and 2018. Any such investigations are likely to be accompanied by fervent debate in Dutch politics and the press, as this has proved to be a controversial area.

## Promoting competition in the energy sector

It is anticipated that the ACM may take steps in 2019 to ensure that energy markets are functioning as well as possible, against the background of new options and opportunities for existing energy companies, new market entrants and consumers in light of the increased focus on sustainable energy and reducing CO<sub>2</sub> emissions. The ACM is likely to seek to promote competition where possible, but may also look at regulating tariffs and other requirements if competition is not fully possible.

# Singapore

## Issues in the digital economy

The Competition and Consumer Commission of Singapore (“CCCS”) is expected to continue its collaboration with other regulators to keep pace with and adapt to the dynamic nature of the digital economy so that the regulatory environment in Singapore facilitates innovation while protecting consumers. The CCCS is likely to focus on the use of Fair, Reasonable and Non-Discriminatory (“FRAND”) terms for competition and intellectual property related cases to strike the balance between enabling innovation and safeguarding competition and consumers’ interest.

## Personalised pricing and the use of pricing algorithms

The CCCS is expected to focus on the increasing use of personalised pricing and pricing algorithms in the flight industry, the quasi-taxi service industry, the online grocery industry and the retail industry. The CCCS is participating in a research study on the market impacts of pricing algorithms from a consumer perspective and is concerned that companies using pricing algorithms are engaging in price discrimination and pricing bias. The research will assist policymakers and regulators in Singapore to create new laws to better regulate digital markets.

## Market studies into the online travel sector and personal data protection

The CCCS has launched a market study into the online travel booking sector in relation to the provision of flight tickets and hotel accommodation in Singapore. The CCCS will particularly be focusing on the types of commercial arrangements entered into between online booking platforms and the service providers, and how booking platforms and service providers compete with each other. Simultaneously, the CCCS has launched a study into personal data protection to examine the possible implications of introducing a right to data portability in Singapore.

## Driving regional cooperative projects and global partnerships with other competition regulators

The ASEAN Expert Group on Competition has established the Competition Enforcers’ Network to facilitate cooperation in the region and serve as a platform to handle cross-border competition cases, which are becoming increasingly common. This network will allow for the easier transfer of information to allow each region to better deal with cross-border cases. The network also aims to facilitate meetings where regions learn to better understand each other’s competition enforcement objectives to encourage the sharing of information.

## Increasing regulatory oversight of peer-to-peer business models, blockchain technology and the sharing economy

The CCCS is focusing on anti-competitive conduct in innovative business models that is detrimental to consumer welfare, particularly regulating the unique power balance between peers as opposed to the traditional business to consumer relationship. The CCCS is also looking into the use of blockchain technology and considering whether the current tools used to assess competitive conduct are sufficient to meet these new technological challenges.

# Spain

## **Bid-rigging to remain in the spotlight**

It is anticipated that enforcement action against bid-rigging will remain a key focus for the Spanish competition authority (the “CNMC”) in 2019, following on from the creation of specialised new economic intelligence unit which conducts market screening activities and targets in particular potential bid rigging in public procurement activities.

## **Competition law issues raised by the digital economy**

The CNMC is expected to focus in particular on competition law issues raised by the digital economy in coming months. It recently submitted an opinion on this topic to the European Commission, in advance of the one-day conference on these issues held by the European Commission on 17 January 2019, where Nobel laureate Professor Jean Tirole gave a keynote speech on “Shaping competition policy in the era of digitization” (see further the Ashurst briefing on this conference [\[insert hyperlink\]](#)).

## **Continued focus on the financial services sector**

In February 2018, four financial institutions were fined by the CNMC in relation to agreeing to charge above-market prices for interest-rate derivatives in the context of syndicated lending. It is likely that the CNMC will continue to focus on the financial services sector in 2019.

## **New requirements for submission of economic reports to the CNMC**

Companies seeking to submit economic reports to the CNMC in the context of proceedings relating to the imposition of fines for infringement of competition law will need to ensure that they have regard to new guidance published by the CNMC in November 2018, which sets out various conditions which must now be complied with.



# United Kingdom

## The impact of Brexit

At the time of writing, it remains unclear whether some form of the Withdrawal Agreement will be ratified or Brexit will take the form of a “no deal” scenario. Whilst the basic principles of the UK merger and antitrust regimes should remain largely familiar in 2019 in both a “deal” and “no deal” scenario, there are a number of important practical implications of a “no-deal” scenario. In particular: (i) the UK Competition and Markets Authority (“CMA”) would face a significant immediate increase in its workload in respect of both merger and antitrust cases, as well as becoming the new UK state aid authority - impacting its ability to take on new discretionary work (particularly new market studies/investigations); and (ii) businesses that are part way through a European Commission merger control or antitrust investigation on Brexit Day in a “no-deal” scenario will be faced with a scenario where the CMA will take jurisdiction over the UK aspects of the case, and UK rules will apply (see further our detailed briefing of 26 November 2018).

## Focus on protecting vulnerable customers, improving trust in markets, online markets and supporting economic growth

The CMA's draft Annual Plan for 2019/20 states that it intends to maintain the same themes it selected in its 2018/19 Annual Plan to carry particular strategic importance as it selects and carries out its casework in 2019, namely: (i) cases where consumers may be losing out from illegal, anti-competitive or unfair trading practices because they are in a vulnerable position; (ii) cases in markets for everyday goods and services that matter to “typical consumers”, and educating people to better understand the importance of competitive markets to overall societal and economic benefit; (iii) promoting better competition in online markets (see further below); and (iv) cases in markets which underpin and enable economic growth, building on its work in markets of central significance to the economy, such as audit services.

## Competition in the digital economy

The UK government has appointed an expert panel to look at competition in the digital economy, as part of a wider ongoing review of the UK competition regime which is due to be completed by April 2019. In particular, the panel is considering the impact of the emergence of a small number of big players in digital markets such as social media, e-commerce, search and online advertising, and how best to assess consumer impacts in ad-funded products and services that are “free” to consumers. The focus on competition in the digital economy is also likely to influence the CMA's competition enforcement work, with the actions of companies operating online remaining in the spotlight in 2019.

## Increase in market studies and market investigations?

The CMA has stated that it intends to give greater priority to potential market studies and market investigations in 2019. However, this is subject to the outcome of Brexit negotiations, as its ability to allocate resources to such discretionary work may be limited in the event of a “no-deal” scenario.

## Pharmaceutical and construction industries to remain in the spotlight

It is anticipated that the pharmaceutical/healthcare and construction industries will continue to be the target of CMA competition enforcement work in 2019, with a significant number of ongoing investigations being taken forward. These include four investigations into drug pricing in which a statement of objections has already been issued, and investigations into the roofing materials and design, construction and fit-out services sector.

See [here](#) for key competition law contacts across Ashurst's global network.

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