



ASIA-PACIFIC ANTITRUST REVIEW 2023

GCR's *Asia-Pacific Antitrust Review 2023* delivers specialist intelligence to help readers – in-house counsel, government agencies and private practitioners – navigate increasingly complex competition regimes across the Asia-Pacific region.

Evolving legislation and enforcement tactics continue to transform the landscape, as highlighted by recent amendments to China's Anti-monopoly Law and an uptick in private antitrust cases in Japan; meanwhile, the Korea Fair Trade Commission has updated its Guidelines on Merger Filing to expedite the review process.

Visit [globalcompetitionreview.com](https://www.globalcompetitionreview.com)
Follow [@GCR_alerts](https://twitter.com/GCR_alerts) on Twitter
Find us on [LinkedIn](https://www.linkedin.com/company/global-competition-review)



Asia-Pacific: Evolving legislation and enforcement tactics help competition authorities fight cartels and abusive conduct

[Adelaide Luke](#), [Patrick Gay](#) and [Joel Rheuben](#)

Herbert Smith Freehills

In summary

This year's article once again provides a snapshot of broad trends in competition law enforcement across the Asia-Pacific region. As in earlier years, Asia-Pacific competition authorities have actively pursued cases against domestic and foreign market players alike, while continuing to build capacity and skills.

Discussion points

- Legislative and institutional highlights across the Asia-Pacific region
- Emergence of environmental, social and governance issues as areas of focus
- Continued focus on the digital sector
- Evolving enforcement trends in the Asia-Pacific region
- Growing emphasis on the consumer goods sector

Referenced in this article

- Australian Competition and Consumer Commission
- Competition and Consumer Commission of Singapore
- Competition Commission of India
- Hong Kong's Competition Commission
- Indonesian Competition Commission
- Japan Fair Trade Commission
- Korea Fair Trade Commission
- Malaysia Competition Commission
- Philippine Competition Commission
- State Administration for Market Regulation of China
- Taiwan Fair Trade Commission



Introduction

This year's article once again provides a snapshot of broad trends in competition law enforcement across the Asia-Pacific region. As in earlier years, Asia-Pacific competition authorities have actively pursued cases against domestic and foreign market players alike, while continuing to build capacity and skills.

Some of the most significant changes in the region have been in China, where the Anti-monopoly Law (AML) was amended for the first time in almost 15 years and further changes are mooted. Already one of the leading jurisdictions for competition law enforcement globally, the prominence of China's State Administration for Market Regulation (SAMR) and the costs of infringing the AML for foreign companies are likely to rise.

Asia-Pacific competition authorities have shown themselves to be aligned with authorities in Europe and North America in terms of enforcement priorities. Digital markets continue to be an area of focus for newer as well as more established competition authorities, while the relationship between competition law and environmental, social and governance (ESG) concerns has become topical in Japan, Australia and elsewhere. As Asia-Pacific countries face global inflationary pressures, abusive conduct relating to everyday consumer products is likely to become an increasingly significant area of focus.

Legislative and institutional developments

Legislative developments in the competition law space are rarely subtle and 2022 saw substantial changes, including in China, Australia and Thailand, with important amendments also planned for India and Malaysia. While proposed amendments in Malaysia and India relate primarily to merger control, they also have implications for cartel leniency.

China

After having elevated and expanded SAMR in 2021, as noted in last year's article, in June 2022 the 35th session of the 13th National People's Congress Standing Committee passed a raft of amendments to the AML.¹ This marks the first major revision of China's competition law since it first came into force in 2008.

The updated AML restated the goals of the legislation and clarified that antitrust regulation is to be carried out under the leadership of the Chinese Communist Party. This amendment significantly elevates the legal and political status of

¹ Herbert Smith Freehills, '[A New Chapter for China's Anti-Monopoly Law: Highlights from the Legislative Amendments](#)', 24 June 2022.



China's competition policy, which expresses the importance attached by the Communist Party and the state towards competition policy. To this end, with amendments to article 11 of the AML – which now call for 'strengthening anti-monopoly regulatory powers, improving regulatory capabilities and modernising supervisory systems' – we anticipate a further expansion of SAMR, the principal competition authority. A further key impact of the amendment is that the penalties for antitrust infringements have increased significantly; for example, the maximum fine can be multiplied by up to five times in serious cases.

Only days after amending the AML, SAMR launched a public consultation on draft amendments to six substantive regulations.² Headline proposals in the draft amending regulations include the introduction of a safe harbour for monopolistic agreements, the introduction of the concept of 'potential competitors' into the prohibition on monopolistic agreements and fresh proposals dealing specifically with abuse of dominant market position in the digital sector.

These developments clearly show that China sees modernisation of its competition landscape as a priority for economic development.

Association of Southeast Asian Nations

Thailand updated its (still relatively new) unfair trade practices guidelines in 2022. The updated guidelines increase the types of conduct deemed to be prohibited and refine the criteria for assessing whether a company has superior bargaining power (a concept considered further below). In particular, the guidelines introduced a de minimis threshold, meaning a business operator is presumed to have superior bargaining power if the counterparty relies on its goods or services for 10 per cent or more of its turnover.³

Nearby Cambodia, which has the region's newest competition law, issued a decree establishing its national competition regulator, the Competition Commission of Cambodia.⁴ All Association of Southeast Asian Nations member states accordingly now have competition authorities, albeit in varying states of operational readiness. Other, newer competition authorities – such as those in Brunei, Laos and Myanmar – have continued to focus on capacity building and educational campaigns.

² Herbert Smith Freehills, '[More changes to come: China consults on amendments to six antitrust guidelines](#)', 28 June 2022.

³ Trade Competition Commission of Thailand, '[The Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertakings](#)', 29 December 2021.

⁴ More information on the [Competition Commission of Cambodia](#) can be found on its official website.



A new buzzword: ESG

The relationship between competition law and ESG initiatives has been highly topical in Europe over the past two years. European competition authorities have both provided guidance on the acceptable limits of ESG-focused cooperation between competitors and pursued cases in which the development of environmental standards has been used to limit innovation or engage in other forms of anticompetitive coordination.

Increasingly, Asia-Pacific competition authorities are also identifying this as an important area of competition regulation, with authorities in Australia and Malaysia in particular declaring sustainability to be a key enforcement priority for 2023.⁵ The Australian Competition and Consumer Commission (ACCC), which has consumer protection in addition to competition powers, has plans to focus on online greenwashing (claims that products or manufacturing processes are more environmentally sustainable than they actually are) across a range of sectors.⁶

So far, only the Japan Fair Trade Commission (JFTC) has moved in the direction of the European Commission and other European authorities by drafting detailed guidelines on the interplay between competition law and ESG issues, notwithstanding that the guidelines are very much focused on the environmental element of ESG. The JFTC's study group on guidelines for business initiatives towards a green society published draft guidelines for public comment in January 2023.⁷ The draft guidelines cover a range of collaboration activities including joint production and logistics, as well as data sharing and standardisation, and state that they are aimed at 'preventing anticompetitive conduct that obstructs innovation such as the creation of new technologies, and of encouraging the activities of enterprises . . . toward the realisation of a green society'.⁸

Officials from the Competition and Consumer Commission of Singapore (CCCS) and Hong Kong's Competition Commission (HKCC) have also indicated their openness to updating existing guidelines on horizontal cooperation to provide greater certainty in relation to ESG-related cooperation.

In some jurisdictions that currently do not have guidelines that allow self-assessment by competitors, it may be possible to apply for a declaration of compliance or individual exemption from the application of cartel prohibitions on sustainability grounds. The ACCC, for example, recently granted a conditional interim authorisation to allow supermarket operators Coles, Woolworths and

5 ACCC, '[Compliance and enforcement priorities for 2022/23](#)', 3 March 2022; Malaysia Competition Commission, '[Strategic Plan 2021–2025](#)', 14 December 2021.

6 ACCC, '[ACCC internet sweeps target "greenwashing", fake online reviews](#)', 4 October 2022.

7 JFTC, '[Request for Public Comments on the Draft of "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act"](#)', 13 January 2023.

8 JFTC, '[Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act](#)', lines 38–40, 13 January 2023.



ALDI to cooperate with each other over the storage, transport, processing and recycling of soft plastics after Australia's sole return-to-store plastics programme was suspended.⁹ Under the authorisation, the retailers are permitted to minimise landfill waste by meeting to develop and implement short-term solutions for storing, transporting, processing, recycling and managing soft plastics.

The Philippine Competition Commission (PCC) is in the process of setting up a system to allow undertakings to apply for binding rulings on the compatibility of agreements and conduct with the country's competition law, which it has indicated has sustainable development objectives in mind.¹⁰

An official at the Indonesian Competition Commission has suggested that the authority could have a role to play in supporting environmental goals by providing exemptions or relaxations from the operation of competition law for certain sectors.¹¹

Competition law and digital markets

Although regulatory enforcement priorities have, to a certain extent, ebbed away from abuse of dominance investigations into the Google, Apple, Facebook and Amazon digital platforms, digital markets remain an important focus for regional competition authorities.

A focus on digital markets

Authorities are continuing to strengthen their internal capabilities. The Korea Fair Trade Commission (KFTC) reorganised its technology task force into a more comprehensive digital market response team to deal with multifaceted digital platform markets and technological developments.¹² In December 2022, it established a new division focused on policy issues related to online platforms.¹³ This body sits within the KFTC's anti-monopoly bureau and is tasked with devising new rules to deal with platform-related antitrust issues. More recently, the KFTC announced a joint nine-step plan for improving competition in digital markets, together with other government regulators, which would include the

9 Francesca McClimont, '[Australia allows supermarket recycling cooperation in rare sustainability-focused authorisation](#)', *GCR*, 25 November 2022.

10 PCC, '[Philippine Competition Bulletin Issue 31](#)', October–December 2022, page 7.

11 Charles McConnell, '[Indonesian official: first movers on sustainability goals could entrench market power](#)', *GCR*, 29 September 2022.

12 McConnell, '[KFTC revamps technology task force to increase digital enforcement](#)', *GCR*, 27 January 2022.

13 KFTC, '[Fair Trade Commission, Online Platform Policy Department New Establishment and Manpower Reinforcement](#)', 1 December 2022.



introduction of a digital bill of rights.¹⁴ It has also updated its abuse of dominance guidelines to make specific reference to issues arising in digital markets.¹⁵ Under the KFTC's regulatory agenda for 2023, the KFTC plans to pursue active enforcement against abuse of dominance by tech companies.¹⁶

Capacity building can also be expected in Hong Kong. The HKCC stated, in its Report on the Work of the Competition Commission, that it anticipates more cases concerning digital markets in the coming years in light of the covid-19 pandemic accelerating the trend of businesses going digital.¹⁷

Long-running investigations against Google in relation to its Android mobile operating system wound down in India and South Korea. In October 2022, the Competition Commission of India (CCI) imposed a provisional penalty of 13.37 billion rupees for conduct deemed to abuse Google's dominance in the operating system market, including pre-installing Google apps and preventing users from removing them from Android phones.¹⁸ Just days later, the CCI imposed a separate provisional penalty of 9.36 billion rupees for requiring app developers to use Google's own payment processing system for apps downloaded via the Google Play app store. The latter decision imposed behavioural remedies on Google, including allowing third-party billing services for in-app purchases and preventing Google from restricting developers from promoting their apps via alternative channels.¹⁹ In South Korea, the Seoul High Court upheld the KFTC's decision to fine Google 224.9 billion won for similar conduct.²⁰

The KFTC also searched Apple's headquarters in response to an allegation that it had unlawfully charged game developers excessive commission on in-app purchases by imposing an additional 10 per cent tax on top of its existing 30 per cent commission rate.²¹

Ride hailing apps have instead increasingly become a target of enforcement. The Federal Court of Malaysia allowed Grab's abuse of dominance case (whereby it had allegedly restricted drivers from promoting competitors' platforms) to be heard on its merits in the Malaysian High Court, where it will decide whether the Malaysia Competition Commission's proposed penalty of 86.77 million ringgit is suitable.²² Upon the controversial acquisition of Grab's acquisition of motorcycle and taxi hailing app Move It, the Philippines' former antitrust commissioner

14 GCR, '[Korea to tighten scrutiny of digital economy](#)', 5 January 2023.

15 McConnell, '[Korea publishes abuse of dominance guidelines for digital markets](#)', GCR, 13 January 2023.

16 KFTC, '[2023 Fair Trade Commission's Key Tasks Promotion Plan](#)', 26 January 2023.

17 HKCC, '[Report on the Work of the Competition Commission](#)', 27 June 2022.

18 McConnell, '[Indian tribunal rejects Google's request to stay Android decision](#)', GCR, 4 January 2023.

19 McConnell, '[CCI fines Google €114 million and orders it to open up app store payments](#)', GCR, 26 October 2022.

20 Julie Masson, '[Korean court grants Google's injunction request to postpone corrective order](#)', GCR, 3 March 2022.

21 Masson, '[Korea raids Apple over excessive pricing allegations](#)', GCR, 28 September 2022.

22 Bernama, '[MyCC fails to get leave to appeal in Grab Holdings case](#)', *New Straits Times*, 5 December 2022.



Stella Quimbo has asked the PCC to look into potential abuse of dominance that may have resulted from the merger, such as overcharging.²³

SAMR also explicitly referenced and introduced the digital sector in the AML through the 2022 amendments, stating that business operators shall not use data and algorithms or technology and platform rules to engage in any prohibited monopolistic conduct.²⁴ The proposed revisions in the draft regulations also include various provisions specifically directed towards operators in platform economies. In particular, platform operators are prevented from self-preferencing practices.

Digital platform regulation

On the whole, regulators appear to be following the lead of the EU Digital Markets Act in implementing ex ante regulation of digital platforms. Japan's Ministry of Economy, Trade and Industry (METI) published its first transparency evaluation in December 2022 after its first year of monitoring the small number of designated platform operators regulated under Japan's Digital Platform Transparency Law.²⁵ The report called for more transparency in the platform operators' reports to the monitoring panel, including over app store fees and self-preferencing concerns, among other issues. While the Digital Platform Transparency Law is overseen by METI rather than the JFTC, the JFTC also retains an interest in ensuring competition in digital markets. In June 2022, the JFTC introduced a new set of rules to broaden its investigatory powers to be able to disclose the names of big technology companies under investigation at an earlier stage.

In the fifth report of the ACCC's Digital Platform Services Inquiry, the Australian authority recommended the introduction of separate codes of conduct to apply to different types of digital platform services.²⁶ The ACCC recommends that three principles will be applied to the codes. First, the codes will seek to prohibit anticompetitive conduct that hinders the ability of rival firms to compete, including that third-party services are treated at least as favourably as similar first-party services. Second, consumers should be able to switch between alternative digital platforms with improved transparency over prices and quality. Finally, the codes seek to address unfair and unreasonable terms faced by business users in their dealings with digital platforms.²⁷ The codes will only apply to designated digital platforms.

²³ Dennis Gutierrez, '[Grab could face possible investigation for abuse of dominance — Rep. Quimbo](#)', *Inquirer.net*, 27 November 2022.

²⁴ See footnote 1.

²⁵ The [Digital Platform Transparency Law](#) can be accessed via METI's official website.

²⁶ ACCC, '[Digital platform services inquiry interim report No. 5](#)', September 2022.

²⁷ ACCC, '[ACCC calls for new competition and consumer laws for digital platforms](#)', 11 November 2022.



The Indian Parliamentary Standing Committee on Finance also made a recommendation that the CCI should establish a dedicated digital markets unit with skilled experts to deal with the emerging competition issues in the digital realm, including self-preferencing, predatory pricing and exclusivity clauses.²⁸ Specifically, the committee recommended that the CCI address the issues through ex ante regulations instead of only through ex post enforcement. However, critics have suggested that the effects of two recently proposed bills focused on digital markets (the Digital Personal Data Protection Bill and the Competition (Amendment) Bill 2022, both of which seek to protect consumers, preserve competition and promote tech innovation, with a special focus on digital markets)²⁹ should be seen before compounding further regulation that could unintentionally restrict innovation.³⁰

Taiwan's Fair Trade Commission (TFTC), on the other hand, appears to be moving in the opposite direction. Its White Paper on Competition Policy in the Digital Economy, released in December 2022, set out the TFTC's first comprehensive overview of competition issues specific to the digital economy.³¹ Unlike other regional authorities, the TFTC emphasised that its policy is to avoid ex ante regulation and to instead rely on traditional abuse of dominance enforcement to target conduct such as tying in and predatory pricing.³²

Cartel penalties continue to mount

In last year's article, we noted that the costs of infringing competition law in the Asia-Pacific region are higher than ever. That trend continued into 2022.

As noted above, amendments to the Chinese AML in 2022 increased maximum possible fines for infringements that have 'particularly serious circumstances, particularly negative impact, and particularly serious consequences' by up to five times the possible relevant fine amount.³³ This will mean that fines will potentially exceed the previous cap of 10 per cent of turnover for the first time. The amended AML also introduces a credit record system, under which administrative penalties imposed on infringing business operators will be recorded and publicised.

As of 10 November 2022, infringements of Australia's Competition and Consumer Act also carry substantially higher penalties. Infringements by companies will now be subject to fines up to the greater of:

²⁸ McConnell, '[Big Tech pushes back on suggested Indian digital competition bill](#)', *GCR*, 10 January 2023.

²⁹ IANS, '[India's new competition law may dampen digital innovation: Big Tech](#)', *Business Standard*, 9 January 2023.

³⁰ McConnell, '[Big Tech pushes back on suggested Indian digital competition bill](#)', *GCR*, 10 January 2023.

³¹ TFTC, '[The TFTC released the "White Paper on Competition Policy in the Digital Economy"](#)', 29 December 2022.

³² *id.*

³³ See footnote 1.



- A\$50 million;
- three times the value of the benefit obtained; or
- 30 per cent of the company's turnover during the relevant period of the offence.³⁴

Elsewhere in the region, fines are mounting. At the end of 2022, the JFTC was poised to impose record fines, potentially of more than ¥100 billion, against regional power utilities for market sharing following the liberalisation of Japan's electricity market in 2016.³⁵ The investigation also led to a wider market survey. The HKCC also imposed its highest-ever fine of HK\$150 million for a settled cartel investigation into the country's air conditioning servicing market (subject to Competition Tribunal approval),³⁶ while the KFTC fined domestic steelmakers more than 256.5 billion Korean won.³⁷ A record cartel fine against brewers in India levied in 2021 was upheld by the National Company Law Appellate Tribunal.³⁸

The costs for individuals also remain high. Under China's amended AML, individuals will now face the prospect of personal liability for infringements for the first time. Legal representatives, management and other individuals personally involved in infringing conduct can face fines of up to 1 million yuan, which can be further multiplied by up to five times in serious cases. This may pave the way for criminal liability for infringements in the future and will undoubtedly elevate the importance of antitrust compliance in the Chinese corporate agenda.

The amendments to Australian law have increased potential penalties for individuals to A\$2.5 million. At the same time, 2022 saw the first custodial sentences imposed on individuals under Australia's criminal cartel offence, with sentences against money transfer operators ranging from nine months to two years and six months (suspended).³⁹ Later, in November 2022, the Federal Court handed down a custodial sentence relating to another matter (two years and eight months), which was to be served as an intensive corrections order.⁴⁰

In South Korea, procedural protections in criminal cases have been tightened, but prosecutions remain common. The KFTC's investigation into domestic steelmakers also resulted in criminal indictments of 22 executives by the Seoul Central District Prosecutors' Office.⁴¹

³⁴ ACCC, '[ACCC welcomes new penalties and expansion of the unfair contract terms laws](#)', 1 November 2022.

³⁵ Masson, '[Japan expected to impose record cartel fines on electricity utilities](#)', *GCR*, 28 November 2022.

³⁶ Masson, '[Hong Kong nets record €19.5 million settlement for air conditioning cartel](#)', *GCR*, 4 November 2022.

³⁷ Masson, '[KFTC again fines steel cartel in show of 'zero-tolerance' approach to collusion](#)', *GCR*, 11 August 2022.

³⁸ Bhavini Mishra, '[NCLAT upholds CCI's Rs 870 cr fine on Kingfisher, Carlsberg manufacturers](#)', *Business Standard*, 23 December 2022.

³⁹ *Commonwealth Director of Public Prosecutions v Vina Money Transfer Pty Ltd* [2022] FCA 665.

⁴⁰ ACCC, '[Alkaloids of Australia and its former export manager sentenced in criminal price fixing cartel](#)', 29 November 2022.

⁴¹ See footnote 37.



Although the HKCC does not itself have criminal enforcement powers, in 2022, it carried out two investigations together with the Hong Kong Police Force.⁴² In Japan, the Tokyo District Public Prosecutors' Office similarly took part in a raid together with the JFTC on the offices of companies suspected of having engaged in bid rigging around the awarding of contracts for the 2020 Tokyo Olympics.⁴³

On the detection side, leniency applications across the region have dropped,⁴⁴ but competition authorities continue to encourage leniency as a tool for cartel detection and investigation. Slow-moving amendments to Malaysia's competition law would implement an expanded leniency application system, including greater discretion in setting fines for applicants, among various other investigatory tools. The proposed amendments to the Indian Competition Act 2002 similarly include the introduction of a US-style leniency plus system. The HKCC has also updated its Leniency Policy for Individuals Involved in Cartel Conduct.⁴⁵

Abusive conduct under review

An eye on consumer goods providers

Against a backdrop of global inflation, regulators are paying closer attention to markets involving price-sensitive consumer goods. The HKCC stated in June 2022 that it will accord priority to investigating anticompetitive conduct affecting citizens' livelihoods.⁴⁶

In November 2022, New Zealand's Grocery Industry Competition Bill was prepared for its first reading in Parliament.⁴⁷ This bill aims to improve competition and efficiency in the grocery industry for the long-term benefit of consumers.⁴⁸

Pharmaceutical and healthcare products are a particular focus. In November 2022, Jinyao Pharmaceutical Co, Ltd (Jinyao) announced that China's Tianjin Administration for Market Regulation imposed a fine of 27,721,311.36 yuan on Tianjin Jinyao Pharmaceuticals, its subsidiary, for abuse of market dominance in the sale of carmustine injections.⁴⁹ This is not the first time Jinyao has been fined for violating the AML. In April 2021, the same authority imposed

⁴² See HKCC, '[Competition Commission and Hong Kong Police conduct joint operation on maintenance project of an industrial building in Tuen Mun](#)', 18 January 2022; and HKCC, '[Competition Commission and Government departments conduct joint operation at Aberdeen Wholesale Fish Market](#)', 27 November 2022.

⁴³ Olivia Rafferty, '[JFTC probes advertisers for Tokyo Olympics bid-rigging](#)', *GCR*, 21 November 2022.

⁴⁴ GCR, '[Enforcement data tables](#)', *GCR Rating Enforcement 2022*, 7 September 2022.

⁴⁵ HKCC, '[Competition Commission revises leniency programme for cartel conduct](#)', 8 September 2022.

⁴⁶ HKCC, '[Report on the Work of the Competition Commission](#)', 27 June 2022.

⁴⁷ David Clark, '[Another step towards improved supermarket competition](#)', *The official website of the New Zealand government*, 21 November 2022.

⁴⁸ The [Grocery Industry Competition Bill](#) can be accessed via the official website of the New Zealand Parliament.

⁴⁹ Jinyao board of directors, '[Jinyao Pharmaceutical Co, Ltd Announcement on Subsidiary Received Notice of Administrative Penalty](#)', 18 November 2022.



fining of 35,124,711.2 yuan on Tianjin Tianyao Pharmaceuticals and confiscated its illegal gains of 8,897,850 yuan for reaching and implementing monopoly agreements to divide the market and fix the price of the fluocinolone acetonide active pharmaceutical ingredient (API).⁵⁰ In December 2022, China's regional competition authority announced that it would impose fines of 133 million yuan on Northeast Pharmaceutical Group for selling levocarnitine APIs at unfairly high prices.

China is also one of the few jurisdictions to pursue excessive pricing cases in recent years. SAMR fined China National Knowledge Infrastructure 87.6 million yuan for imposing excessively high subscription fees and forcing users to exclusively use its online academic literature database.⁵¹ SAMR noted that the average annual price increase of 10 per cent between 2014 and 2021 resulted in the company gaining ultra-high profits, as industry peers' annual price increase averaged 4 per cent. The approach in this case contrasts with that in prior cases of excessive pricing, where SAMR's focus was on one-time increases or increases over a short period of time.

In India, the CCI found 12 super-specialty centres of hospitals operating in the National Capital Region charging unfair and excessive prices for products including medicines, medical devices and tests. In the Philippines, the PCC has stated that it will further strengthen enforcement in the pharmaceutical industry, which has been designated as a priority sector for enforcement.⁵²

While not a provider of services directly to end consumers, the ACCC continues to pursue proceedings against Mastercard in relation to alleged anticompetitive exclusive dealing and misuse of market power. The proceedings concern Mastercard's arrangements with retailers that provided them with discounted rates for processing Mastercard credit transactions on the condition that the relevant retailer processed all or most Mastercard electronic funds transfer at point of sale (EFTPOS) debit transactions through the Mastercard network (in circumstances where EFTPOS provided an alternative for debit transactions but not for credit transactions).⁵³

Abuse of superior bargaining power

While abuse of superior bargaining power (roughly corresponding to 'abuse of economic dependency' in certain European countries) is less prominent as an enforcement tool elsewhere,⁵⁴ it is commonly used in some parts of the Asia-

⁵⁰ [SAMR's decision on this case](#) can be accessed via SAMR's official website.

⁵¹ McConnell, '[SAMR fines academic database for excessive pricing](#)', *GCR*, 9 January 2023.

⁵² PCC, '[Press Statement Re: PCC's resolve to strengthen enforcement in the pharmaceutical sector](#)', 26 July 2022.

⁵³ ACCC, '[Mastercard in court for alleged misuse of market power over card payments](#)', 30 May 2022.

⁵⁴ Atsushi Yamada, '[Abuse of Superior Bargaining Position in Japan – Its Development and Current Position](#)', *Competition Policy International*, 4 December 2022.



Pacific region to capture unilateral abusive conduct by market players that may not meet the threshold of being in a dominant position. Although in principle it applies to business-to-business relationships, in recent years it has started to creep into business-to-consumer relationships also.

As in previous years, the JFTC has stated that combatting abuse of superior bargaining position will be one of its enforcement priorities in 2023.⁵⁵ In light of inflationary pressures, the JFTC has clarified that abuse of superior bargaining position can occur if parties maintain current levels of payments (eg, raw material prices and minimum wages) without proper negotiations with counterparties or through ignoring requests from suppliers to raise the amounts of payments.

While usually a favourite enforcement tool of the JFTC, 2022 also saw a successful private damages claim brought on the basis of abuse of superior bargaining in Japan. In June 2022, the Tokyo District Court ordered the popular comparison shopping site Kakaku.com to pay damages of ¥38.4 million to a Korean barbeque chain, Hanryu-mura. Hanryu-mura claimed that Kakaku.com had secretly altered the algorithm of its restaurant review and search platform, Tabelog, to lower ratings of chain restaurants. This was done with the aim to incentivise companies to pay higher fees so that they would be displayed at a higher position in the search results. The case was unusual not only for relying on abuse of superior bargaining position as a cause of action, but also because Kakaku.com was required to disclose its algorithm. The case may set a precedent in Japan and elsewhere for other digital companies to be ordered to disclose their algorithms, which are generally considered to be highly confidential and commercially sensitive.

In South Korea, the KFTC opened a public consultation to end the investigation against US chipmaker Broadcom for alleged abusive conduct against Samsung Electronics.⁵⁶ Conduct alleged to have amounted to abuse of superior bargaining position included threatening Samsung Electronics that Broadcom would stop approving purchase orders or providing technical assistance unless Samsung Electronics entered into a long-term supply contract. For the KFTC to agree to end the investigation, Broadcom offered to grant Samsung Electronics three-year warranties on certain mobile phone components and to refrain from coercing any smartphone manufacturers into entering unfair deals.

⁵⁵ JFTC, '[Message from Chair Furuya Kazuyuki: New Year's Greetings from Chair](#)', January 2023.

⁵⁶ McConnell, '[Broadcom offers commitments in Korea to settle antitrust probe](#)', 9 January 2023.

**Adelaide Luke**

Herbert Smith Freehills

Adelaide Luke is the head of competition, Asia at Herbert Smith Freehills. She has considerable experience in all areas of Hong Kong, EU and UK competition law, as well as of many of the competition regimes in Asia (particularly China). Her practice encompasses merger control, joint venture arrangements, regulatory investigations (concerning both horizontal and vertical pricing issues, as well as issues regarding the abuse of market power) and competition litigation.

Adelaide worked in the firm's London and Brussels offices prior to relocating to Hong Kong in 2015. She is qualified as a solicitor in Australia, Hong Kong, England and Wales, and Ireland.

**Patrick Gay**

Herbert Smith Freehills

Patrick Gay is a partner at Herbert Smith Freehills. He has extensive experience across all aspects of Australian competition law and advises clients in relation to cartels, authorisation applications, market investigations and the structuring of commercial agreements and joint ventures. He has significant experience in contentious merger matters before the Australian Competition and Consumer Commission and the Australian Competition Tribunal, as well as acting for clients with matters before the Federal Court. Patrick also advises on issues under the Australian Consumer Law.

**Joel Rheuben**

Herbert Smith Freehills

Joel Rheuben is a senior associate within Herbert Smith Freehills' competition, regulatory and trade practice in Tokyo. Joel has previously worked in the Brussels office of Herbert Smith Freehills and has spent close to five years in



Europe working on EU competition law matters. Joel has broad experience in various areas of EU and cross-border competition and regulatory law.

Joel has supported a number of global and Japanese clients in relation to the merger control aspects of their transactions, as well as antitrust investigations by the European Commission and other regulators, in particular in the chemicals, resources, consumer goods and media sectors.



Herbert Smith Freehills is one of the world's leading professional services businesses, bringing together the best people across our 27 offices to meet all your legal services needs globally. Our clients trust us with their most important transactions, disputes and projects because of our ability to cut through complexity and mitigate risk. Because technical ability alone is not enough, we seek to build exceptional working relationships with our clients, which enables us to develop a deeper understanding of their businesses, provide commercially astute, innovative advice and create better business outcomes for each client.

Ranked among the Global Elite by GCR in 2020, our competition, regulation and trade practice is widely recognised by peers and legal directories as one of the leading teams in the field. We advise many of the world's blue-chip organisations in a wide range of industries across the full spectrum of competition work – including merger control, investigations, litigation and state aid – and provide advice on regulated sectors. Many of our lawyers have spent time working for regulatory authorities and for clients, enabling us to provide a unique insight. Our global network of offices allows us to provide a comprehensive and integrated cross-border service to our clients.

Exchange House
Primrose Street
London EC2A 2EG
United Kingdom
Tel: +44 20 7374 0888

[Adelaide Luke](#)
adelaide.luke@hsf.com

[Patrick Gay](#)
patrick.gay@hsf.com

www.herbertsmithfreehills.com

[Joel Rheuben](#)
joel.rheuben@hsf.com
